



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





21.1048

COPY No. 1

Pet. L. Eng. A. 75 d. 47 <sup>1859-1861</sup>

OW. U. K.

120

C110









# R E P O R T S

OF

All the Cases decided by all the Superior Courts

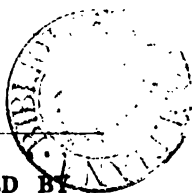
RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)



EDITED BY

EDWARD WILLIAM COX, ESQ.,

*Barrister-at-Law, Recorder of Falmouth and Helston.*

---

VOL. I.

LONDON :

LAW TIMES OFFICE, 10, WELLINGTON STREET, STRAND. W.C.

---

1862.



# INDEX

TO

## THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A.			
Ackland v. Lewis.....	252, 254	Cole v. Terry .....	474
Alexander v. Worman.....	254	Collumpton v. Brighthelmston, <i>ex parte</i> Howse... 221	
Allen, Lieutenant, <i>ex parte</i> .....	244	Cook and others v. Wright.....	412
Amazon, The .....	104	Corporation of the Sons of the Clergy v. Sutton... 55	
Anderson, <i>ex parte</i> .....	264	Crawsbay, <i>ex parte</i> .....	222
Appleton v. Morray and another.....	159	Cowley and another v. The Mayor and Corporation of Sunderland .....	332
Archer v. James .....	2	Cureton v. The Queen.....	345
Ashmore v. Horton.....	20	Curtis v. Blight and others.....	483
Attenborough v. Page.....	237		
Attenborough v. Kemp .....	431	D.	
Attorney-General v. The Corporation of Thetford	121	Davies v. Lord Berwick .....	283
Attorney-General v. Floyer and another, <i>re</i> Bankers .....	404	Dawes v. Hawkins .....	346
Attorney-General v. Jesus College, Oxford.....	414	Day v. Hemings .....	378
Attorney-General v. Mayor, &c. of Southampton	30	Deputy Coroner of Middlesex, <i>ex parte</i> .....	300
Attorney-General v. Pascall .....	382	Dixon v. Doubleday .....	272
B.		Dobbin v. Aikin .....	103
Backhouse v. The Churchwardens of Bishopwearmouth .....	268	Doick v. Phelps .....	205
Bannatyne v. MacLulich and another .....	98	Donington Church Estate, <i>re</i> , and <i>re</i> The Charitable Trusts Act .....	84
Barford, <i>ex parte</i> .....	251	Draper v. Sperring .....	368
Barlow, Rev. J. M., <i>re</i> .....	453	Dudley and West Bromwich Banking Company v. Spittle.....	84
Batting and others v. The Bristol and Exeter Railway Company .....	295		
Bennett v. The London and North Western Railway Company .....	119	E.	
Bickley v. Tucker .....	64	Easton v. Alce.....	465
Bignold v. Clarke .....	97	Ecclesiastical Commissioners for England and Courtenay v. The Vestry of the Parish of St. James and St. John Clerkenwell.....	398
Birrel v. Jones.....	98	Eddleston v. Francis .....	193
Bishop of Down, &c. v. Miller .....	424	Edmonds v. Plews .....	182
Bishop of Down v. Potter .....	424	Ellis, H. E., <i>ex parte</i> .....	114
Bosanquet v. Heath.....	200	Ellis v. Kelly .....	226
Bradshaw v. Vaughton .....	243	Ellis v. The Corporation of Bridgnorth .....	331
Bristol Free Grammar School, <i>re</i> .....	81	Ellis v. Woodbridge.....	114
Brock v. Kellock.....	341	Empson v. The Metropolitan Board of Works.....	266
Brumfitt v. Brenner .....	215	Evans v. The Portreeve, &c. of Avon and others	209
Bulmer v. Norris.....	252	Evans v. McLoughlan.....	316
Burder v. Heath.....	445	Everett v. Grapes .....	275
C.			
Candlish and another v. Simpson and another ... 376		F.	
Cardinal v. Molyneux.....	321, 399	Farmer and others v. Giles.....	128
Cates v. South .....	43	Fernandez, <i>re</i> .....	352
Chartered Gas Company v. Clerkenwell Poor-rate	332	Fitzgerald v. Champneys .....	459
Chelsea Waterworks Company v. The Parish of Putney .....	164	Follit v. Koetzow .....	94
Chilcote v. Youldon .....	122	Fox v. Williams .....	197
Churchwardens, &c. of Llanllechid v. Parish Officers of Pistyll .....	41	French and others v. Tucker .....	64
Churchwardens and Overseers of Fletton, <i>ex parte</i> Clark v. Hagne .....	86	Freud v. Dennett.....	434
Clements v. Smith .....	204		
Clerk v. The Queen.....	147, 436	G.	
Clerk of the Peace for Middlesex v. All Saints, Poplar.....	108	Gough v. Hardman.....	49
Coates v. The Nottingham Waterworks Company	402	Governor, &c. of the New River v. Johnson, S. H.	61
Cobbett v. Wheeler and another.....	262	Green v. Macnamara and others .....	7
Cole v. Coulton .....	109	Green, <i>ex parte</i> , <i>re</i> Rand and another v. Green and another .....	202
		Grubb v. The Inclosure Commissioners .....	323
		Guardians of the Portsea Island Union v. Whillier	105
		Guardians of the Poor of the Cambridge Union v. Parr .....	370



H.	N.
Hailes v. Marks ..... 422	North Wingfield Charity, re ..... 219
Hamill v. Henry ..... 468	
Hardwick v. Moss and others ..... 423	O.
Harris v. Jenuis ..... 245	Onley v. Gee ..... 361
Hayes v. Stevenson ..... 205	Oram v. Gait ..... 60
Healing v. Cattrell ..... 1	Overseers, &c. of Clapham v. Overseers of St. Pancras ..... 105
Health v. Bosanquet ..... 200	Overseers of East Dean v. Everett ..... 284
Hildreth v. Adamson ..... 127	Overseers of Everton v. Overseers of South Stoneham ..... 110
Hodges v. Bennett ..... 96	Overseers of St. Botolph without, Aldgate v. The Board of Works of Whitechapel ..... 151
Hodgson and others v. Hooper and others ..... 184	Overseers of Spotland ..... 107
Holden v. Weekes ..... 256	Overton v. Hunter ..... 44
Holiday v. The Vestry of St. Leonards, Shoreditch ..... 371	
Horley v. Rogers ..... 88	P.
Hornsey and another, v. The Vestry of St. Luke, Chelsea ..... 92	Padwick v. King ..... 15
Horwood v. Powell ..... 372	Pare v. Clegg ..... 418
Housell v. Smith and others ..... 66	Parish v. Sleeman ..... 75
Howell v. The London Dock Company ..... 176	Patten v. Rhymer ..... 134
Hughes v. The Metropolitan Board of Works ..... 367	Pearham, <i>ex parte</i> ..... 23
Hunt v. Hibbs ..... 50	Pease and others v. Clayton and another ..... 454
Hunt and others v. Allgood and others ..... 335	Pedgrift v. Chevalier ..... 135
	Pedley v. Davis and another ..... 450
I.	Pinckney v. Ewens ..... 421
Illingworth v. Montgomery ..... 163	Pollon and another v. Brewer ..... 7
Inhabitants of Kimbolton, <i>ex parte</i> ..... 474	Poole v. Bishop of London ..... 336
	Price v. Taylor ..... 116
J.	Proctor v. Annison ..... 26
Johnson v. Simpson ..... 22	Purnell v. The Wolverhampton Waterworks Company ..... 395
Jones v. Howell ..... 67	
Justices of Kent v. The Maidstone Commissioners ..... 124	Q.
	Quick v. The Churchwardens, &c. of St. Ives ... 107
K.	
Kerr v. Wilkie ..... 173	R.
Knowles v. Dickinson ..... 91	Ramsay's Settlement, re ..... 438
Knox and another v. Shepherd ..... 122	Rand and another, re v. Green and another ..... 206
	Read F. Freeman ..... 213
L.	Read v. Storey ..... 270
Ladd v. Gould ..... 41	Reg. v. Adams, C. .... 19
Leary v. Lloyd ..... 196	Reg. v. Armitage and others ..... 154
Leech v. The North Staffordshire Railway Company ..... 46	Reg. v. Aulton ..... 293
Legg v. Pardoe ..... 241	Reg. v. Bell, E. G. .... 169
Lewis v. Roberts ..... 476	Reg. v. Bester ..... 274
Liverpool Library v. The Mayor, &c. of Liverpool ..... 128	Reg. on the prosecution of the Town Council of Birmingham v. Birmingham Waterworks Company ..... 339
Llandaff and Canton District Markets Company v. Lyndon ..... 167	Reg. v. Boyes ..... 439
Loom v. Bailey ..... 247	Reg. v. Bradford and others ..... 136
Luckett v. Voller ..... 464	Reg. v. Bradley ..... 304
Luckett v. Gollop ..... 464	Reg. v. Bramley, J. .... 364
Luckett v. Gilder ..... 464	Reg. v. Brown, J. .... 3
Luton Board of Health v. Davis ..... 89	Reg. v. Brummitt, G. .... 296
	Reg. v. Burial Board for the Parishes of St. John, Westgate, and Elswick, Newcastle ..... 473
M.	Reg. v. Burnside, J. .... 208
Mackay v. Ford ... 96	Reg. on the prosecution of Ringland v. Burslem Local Board of Health ..... 161
McLeod, <i>ex parte</i> ..... 284	Reg. v. Butler ..... 174
Manchester, &c. Railway Company v. Wood ..... 6	Reg. v. Charles Ann ..... 3
Mansegh, <i>ex parte</i> ..... 387	Reg. on the prosecution of the Eastern Counties Railway Company v. Churchwardens of Fletton ..... 279
Mason v. The Birkenhead Improvement Commissioners ..... 168	Reg. on the prosecution of the Guardians of the Strand Union v. Churchwardens, &c. of St. Giles-in-the-fields ..... 201
Mayor, &c. of Stockport v. Cheetham ..... 62	Reg. v. Churchwardens, &c. of Tiverton ..... 290
Mayor, &c. of Stockport v. Davenport ..... 62	Reg. v. Crawshaw, J. .... 260
Mayor of Birmingham, <i>ex parte</i> ..... 199	Reg. v. Davies, D. .... 391
Melbourne v. Greenfield ..... 13	Reg. v. Elrington, R. J. and H. H. .... 458
Merrett, <i>ex parte</i> , re The Portsmouth Railway Company ..... 149	Reg. v. Fitch ..... 42
Mersey Docks and Harbour Board v. Jones and others ..... 189, 452	Reg. v. Fox ..... 33, 114
Meyers and another v. Rawson ..... 68	Reg. v. Glamorganshire Canal Company ..... 165
Minton v. Minton ..... 410	Reg. v. Goose and another ..... 240
Mirehouse re ..... 6	Reg. v. Goss, T. .... 58
Morden v. Porter ..... 53	
Morton v. Brammer ..... 158	
Mytton v. The Overseers of Thornbury ..... 76	

# INDEX TO NAMES OF CASES.

v

Reg. v. Governor, &c. of the Licensed Victuallers' Society .....	339
Reg. v. Guardians of the Cambridge Union .....	338
Reg. v. Guelder .....	246
Reg. v. Halliday, C. ....	121
Reg. v. Hassall .....	392
Reg. v. Herford .....	155
Reg. v. Hind, J. D. ....	120
Reg. v. Holt, T. N. ....	207
Reg. v. Hoole and another .....	149
Reg. v. Hudson and others .....	132
Reg. v. Hughes, W. ....	70
Reg. v. Huntley, C. ....	52
Reg. v. Incumbent and Churchwardens of the Parish of Goole .....	375
Reg. v. Inhabitants of Aughton .....	385
Reg. v. Inhabitants of Aylesford .....	43
Reg. v. Inhabitants of Birmingham .....	463
Reg. v. Inhabitants of Brailsford .....	158
Reg. v. Inhabitants of Brighton .....	421
Reg. v. Inhabitants of Elswick .....	223
Reg. v. Inhabitants of Liverpool .....	90
Reg. v. Inhabitants of Selborne .....	2
Reg. on the prosecution of the Inhabitants of Heckmondwick v. Inhabitants of Thornton ..	107
Reg. v. Johnson .....	64
Reg. v. Jones .....	333
Reg. v. Justices of Durham, <i>ex parte</i> , The Justices of Sunderland .....	125
Reg. v. Justices of Gloucestershire .....	33
Reg. v. Justices of Leicestershire .....	25
Reg. v. Justices of Leicestershire, <i>ex parte</i> , Compton .....	138
Reg. v. Justices of Macclesfield .....	133
Reg. v. Justices of Monmouthshire .....	25
Reg. v. Justices of Richmond, Surrey .....	126
Reg. v. Justices of Somersetshire .....	220
Reg. v. Justices of Surrey .....	301
Reg. v. Justices of Sussex, <i>re</i> an Appeal between the parish officers of Colemore and the parish officers of Funtington .....	235
Reg. on the prosecution of Porter v. Justices of Tyrone .....	170
Reg. v. Justices of Warwickshire .....	112
Reg. v. Kirby .....	454
Reg. v. Leatham .....	257, 324
Reg. v. Lloyd and others .....	112
Reg. v. Longton & Co. ....	78
Reg. v. Loose, F. ....	131
Reg. v. McDonald, D. ....	480
Reg. v. May, P. W. ....	257
Reg. v. Mayor, &c. of Manchester .....	113
Reg. on the prosecution of Hunter v. Mayor of Sligo .....	182
Reg. v. Moore .....	299
Reg. v. Mosely .....	467
Reg. v. Mourilyan and another .....	275
Reg. v. Oliver, G. ....	208
Reg. on the prosecution of Wrightson v. Overseers of Hemsworth .....	224
Reg. v. Overseers of Lackmanstone .....	109
Reg. v. Overseers of Toxteth-Park .....	344
Reg. on the prosecution of the Parish Officers of Rushton .....	276
Reg. v. Parker, J. & J. ....	387
Reg. v. Pearham .....	23
Reg. v. Perry .....	306
Reg. v. Pickford .....	384
Reg. v. Pritchard .....	363
Reg. v. Proud, W. ....	470
Reg. v. Ragg, J. ....	58
Reg. v. Recorder of Leeds .....	295
Reg. v. Recorder of Liverpool .....	469
Reg. v. Registrar of the Medical Council of England .....	282
Reg. v. Riall, S. & W., <i>re</i> Fetherston .....	99
Reg. v. Robson, J. ....	471

Reg. on the prosecution of Dimsdale v. Saddlers' Company .....	310
Reg. on the prosecution of the Guardians of Birmingham v. St. Anne's Westminster .....	45
Reg. v. Sayers and another .....	225
Reg. v. Shaw .....	138
Reg. v. Sleep .....	388
Reg. v. Smith .....	139
Reg. v. Sparrow .....	284
Reg. on the prosecution of the Overseers of Bishopwearmouth v. The Earl of Durham .....	5
Reg. v. Timmins, J. ....	236
Reg. v. Tite, J. ....	334
Reg. v. Tongue, J. ....	237
Reg. v. Tott .....	362
Reg. v. Tottenham Board of Health, <i>ex parte</i> Perry .....	80
Reg. v. Wardroper, R. ....	72
Reg. v. Worrell .....	449
Reg. v. Webster .....	466
Reg. v. Weeks, U. ....	366
Reg. on the prosecution of Churchwardens of Brimington v. Wheeler .....	478
Reg. v. White and another .....	157
Reg. v. Wilkins, H. ....	470
Reg. v. Wilmot .....	326
Reg. v. Wright and another .....	472
Reg. v. Yeadon and Birch .....	479
Reg. v. Yeomans .....	46
Reg. on the prosecution of Mappin and others v. Youle .....	355
Rider v. Wood and others .....	4
Rogers v. Lewis .....	12
Routledge v. Hialop .....	86

## S.

Scannell v. French .....	98
Sewell v. Taylor .....	11
Shackell v. West .....	2
Sherlock v. Steward .....	18
Shipton v. Gale .....	449
Short v. Hudson .....	117
Sibbet v. Ainsley .....	263
Sindon and others v. Banks .....	291
Smerdon v. Tucker .....	64
Smith and the District of Todmorden, <i>re</i> Local Government Act, 1858 .....	394
Smith v. Churchwardens and Overseers of St. Michael, Cambridge .....	278
Smith v. Huggett .....	487
Smith v. James .....	481
Somerville v. Mirehouse .....	203
Spencer v. North Staffordshire Railway Company ..	276
Steele v. Hamilton .....	224
Stephenson v. Taylor .....	340
Stevens v. Gourley .....	8
Storie's University Gift, &c., <i>re</i> .....	150
Sulley v. Attorney-General .....	140
Sutcliffe v. Surveyors of Highways of Sowerby ...	1

## T.

Taylor v. Carr and another .....	373
Taylor v. Humphreys .....	396
Taylor v. Vergette .....	409
Thompson, W., <i>ex parte</i> .....	203, 220
Thorne v. Colson .....	293
Townsend v. Read .....	380, 442
Trustees of the Mersey Docks v. Cameron .....	324
Turnidge v. Shaw .....	302

## V.

Vaughan v. South Metropolitan Cemetery Company .....	286
Victory Steam-tug, The .....	131

W.			
Walker v. Evans.....	21	White v. Leeson .....	28
Wallington v. White .....	349	Whitehouse v. Fellowes and others.....	329
Walsby v. Auley .....	289	Willett v. Boote and another .....	195
Ward, re.....	381	Williams v. The Churchwardens of Llangeinwen	462
Ward and another v. Lowndes .....	36	Wiltshire v. Baker .....	474
Waterford and Limerick Railway Company v.		Wiltshire v. Willett.....	475
Kearney .....	178	Woodard v. The Eastern Counties Railway	
Wheeler v. The Churchwardens of Brimington ...	88	Company.....	359
		Woodhouse v. Wood and another .....	21
		Wyatt v. White .....	68

# INDEX TO SUBJECTS OF CASES.

<b>ABDUCTION.</b>	
Taking unmarried girl from father.....	236
<b>ACTION.</b>	
Against servant of local commissioners—Notice of	168
<b>ADMINISTERING.</b>	
Cantharides—A noxious drug within the Act.....	470
<b>ALEHOUSE.</b>	
Innkeeper cannot entertain his guests with spirits after the hours.....	44
Police Clauses Act applies to—Clerk to commissioners may lay information against, for harbouring prostitutes.....	109
An innkeeper cannot allow his friends to play at cards for money .....	134
Sale on Sunday— <i>Bona fide</i> traveller, what is ...	245
Refusing to admit a police officer .....	362
Borough justices cannot licence .....	376
Who is a <i>bona fide</i> traveller .....	396
<b>AMENDMENT.</b>	
Of order of maintenance at sessions .....	90
<b>APPEAL FROM JUSTICES.</b>	
Notice and transmission of case .....	21
Entitling of the affidavits .....	22
Cannot be granted on summary proceedings to enforce payment of rate .....	33
What is a matter of fact and not of law under ...	41
Refusal of justices to state case .....	46
Does not lie on a poor rate .....	88
When court will interfere to order justices to state case .....	133
<i>Certiorari</i> obtained after case stated .....	154
Statement of case—Delivering on Sunday .....	512
<b>APPEAL TO QUARTER SESSIONS.</b>	
Notice and grounds of appeal—Entering and registering .....	235
Part heard—Adjournment of .....	338
Notice of—Respondents having community of interest, service on one only.....	469
<b>APPRENTICE.</b>	
Continuance of service after death of master.....	509
<b>ARREST.</b>	
Statutory power to, and take before justice .....	316
<b>ASSAULT.</b>	
Conviction for on charge of rape .....	203
Counts for bodily harm—Conviction .....	208
Aggravated—Charge of rape—Jurisdiction of justices .....	229
Certificate of dismissal bars action.....	243
Verdict of aggravated assault—Entering same ...	285
A County Court bailiffs warrant evidence of authority.....	391
Certificate of dismissal bars indictment for aggravated assault .....	458
Verdict of common assault on count for grievous bodily harm.....	479
<b>ATTORNEY.</b>	
Slandering by, when acting as advocate in a police court .....	96
Bound not to practise on acceptance of office of clerk to board of guardians.....	182
<b>BAILEE.</b>	
<i>(See Larceny.)</i>	
<b>BANKRUPT.</b>	
Indictment for an offence committed before the expiration of repealed statute.....	517
<b>BASTARDY.</b>	
Service of summons—Jurisdiction .....	3
Contract by mother to accept a sum of money no bar to subsequent application .....	94
Mother's evidence of payment of money needs not to be corroborated .....	96
Death of justice granting summons—Application	384
<b>BEERHOUSE.</b>	
Evidence of house being open after hours .....	43
Licence necessary, whatever price of beer .....	270
<i>(See Alehouse.)</i>	
<b>BETTING HOUSE.</b>	
Conviction for keeping—Continuous offence .....	361
<b>BRIBERY.</b>	
Action for penalties—Staying proceedings .....	409
<i>(See Election Law.)</i>	
<b>BRIDGE.</b>	
<i>Mandamus</i> to justices to widen .....	25
Over public road—Liability of railway companies to repair .....	46
Liability to regulate rate of toll.....	485
<b>BROTHEL.</b>	
Jurisdiction of borough magistrates in prosecution of.....	467
<b>BUILDING.</b>	
<i>(See Metropolitan Building Act.)</i>	
<b>BUILDING SOCIETY.</b>	
Personal responsibility of trustees signing promissory note as such .....	116
Liability of administrator of deceased member for fines .....	122
Liability on a covenant on the subject not a question in dispute to be referred .....	129
Liability to pay out of, for a surveyor.....	254
<b>BURIAL BOARD.</b>	
Right of incumbent to burial fees .....	286
Construction of statutes .....	472
Who liable to repair discontinued burial ground...	473
<b>CANAL.</b>	
Rating of—Local act .....	165
<b>CERTIFICATE.</b>	
Of dismissal in assault bars an action.....	243
<b>CERTIORARI.</b>	
To remove coroner's inquisition .....	169
Interested magistrate on the bench.....	170
Imperfect warrant of committal—What documents may be recovered .....	174
<b>CHAPEL.</b>	
Proprietary rights .....	200
<b>CHARITY.</b>	
Conflicting clauses—Jurisdiction of commissioners	55
Scheme for selling parochial school.....	81
Scheme for—Ambiguity .....	150
Scheme—Repairs of old and new church .....	219
Increase in value of property—Application of surplus rents .....	414
<b>CHURCH.</b>	
Right of incumbent to open mines in glebe .....	266

Right of incumbent to burial fees .....	286	COURT MARTIAL.	
Scheme for fitting up .....	321	Imprisonment abroad—Mutiny Act—Articles of War.....	249
Stipendiary curate—Revocation of licence.....	336	CRIMINAL LAW.	
Appropriation of funds subscribed for.....	382	(See <i>False Pretences</i> .)	
CHURCH-RATE.		CRUELTY TO ANIMALS.	
Sufficient refusal to pay to ground an order .....	6	Cock-fighting—Locality.....	86
If <i>bona fide</i> objection to rates, summons must be dismissed.....	138	DISTRESS.	
What sufficient notice of meeting .....	202	Damages feasant—Duty of distrainer to provide a proper pound .....	97
Manner of assessing a church-rate.....	239	Damages feasant—First escape through defect of fences—Liability.....	503
Power to order payment of by a Quaker.....	268	Tender of amends for.....	505
Must not be founded on poor-rate unless the latter be just .....	431	ELECTION LAW.	
Service of notice of objection—Signature of duplicate.....	476	In successive occupation—Payment of rates .....	12
CHURCHWARDEN.		Objector must state place of abode at time of objection made—Construction of sect. 101.....	13
Appointment of, under New Parish Acts.....	306	Is collection of rent a necessary outgoing in estimating value .....	18
Election of—Polling for .....	375	Copyhold in tenements under one roof.....	26
Disqualified— <i>Quo warranto</i> .....	453	Occupier of house with land under same landlord	64
CLERK TO BOROUGH JUSTICES.		Note of objection—Entry of objector's name after list printed .....	215
Partner of conducting prosecutions.....	197	Right of member of a joint-stock company to vote in respect of property of company .....	252
CLERK OF THE PEACE.		Information for bribery—Corroborative evidence	257
Partner of in boroughs cannot conduct prosecutions .....	33	Corrupt Practices Act—Privilege of protection—Evidence .....	334
COAL MINES.		Notice of appeal—Practice.....	464
Meaning of term “constant ventilation” .....	91	Security for costs .....	468
COINING.		Service of notice of objection on overseer through post.....	481
Having possession of mould .....	366	Statement of objector's place of abode .....	483
COMBINATION ACTS.		County voter—Inmate of hospital .....	495
Threatening workmen.....	23	County voter—Parish clerk .....	499
Statement of offence on conviction .....	23	County voter—Preacher, lay clerk, bell-ringer ...	500
COMMITMENT.		Borough vote—Occupation by lay clerk as tenant	501
Omission to state if with or without hard labour	220	County vote—Dissenting minister .....	507
CONSPIRACY.		(See <i>Bribery</i> .)	
To cheat by false pretences of wagering.....	132	EMBEZZLEMENT.	
CONVICT.		What is an employment to receive money .....	237
Assignment of property by—Right of creditors ...	84	By assistant overseer of sums received for rates... ..	246
Right to costs after conviction of a plaintiff for felony after action brought .....	119	Person collecting orders on commission not a clerk or servant .....	297
CONVICTION.		Commercial traveller a servant .....	334
For threatening workmen, held good .....	23	By secretary of a friendly society .....	470
CORONER.		Servant or partner—Share of profits .....	480
Jurisdiction in case of fire .....	155	EVIDENCE.	
Holding second inquest on the same subject .....	157	Admission of dying declaration .....	120
<i>Certiorari</i> to change venue of inquisition .....	169	Husband and wife—Wife implicated but not charged—Husband admissible.....	121
Deputy of, privileged from arrest .....	300	Proof of being born alive .....	341
Removal of .....	381	Privilege not to answer criminatory questions.....	352
CORPORATION.		Confession—Inducement—Presence of police.....	387
Negligence by—Liability for .....	332	Prisoner's statements to police.....	449
COSTS.		(See <i>Witness</i> .)	
Of appeal against poor-rate—Liability of new officers for .....	91	EXCISE.	
Charge of relator's cost on borough funds .....	121	Statutory power to arrest.....	316
Sessions on appeal may order costs against informant, though not a party .....	139	FALSE IMPRISONMENT.	
Appeal against highway rate .....	213	Reasonable and probable cause .....	422
Order for at quarter sessions—Transaction after sessions over .....	487	FALSE PRETENCES.	
COUNTY RATE.		Tendering note of a bank that had stopped payment .....	19
Lands in ancient demesne not exempt.....	43	Sale by sample—False representation of quantity	58
Power of committee of justices to require attendance and production of documents .....	272	By wagering and cheating .....	132
Erection of in a street—Metropolis Management Act .....	398	Evidence of guilty intent .....	207
Injunction to restrain incumbent from altering arrangements in .....	399	Evidence of .....	208
Inhibition against strangers teaching or officiating in diocese.....	424	Obtaining goods by artifice.....	364
Doctrines repugnant to articles and Prayer-book...	445	Proof of the person from whom the property was obtained .....	467
Right of incumbent of district parishes .....	459	Venue must be in county where goods obtained ...	514
		FELONY (INTENT TO COMMIT).	
		May be convicted of breaking into house with intent .....	507

FRIENDLY SOCIETY.

Liability of members on judgments against trustees .....	68
Treasurer not a bailee for purpose of larceny .....	131
Action against treasurer for balance due—Jurisdiction of justices .....	291
Certificate of in a creditor's suit conclusive.....	418
Dispute not provided for by rules—Expulsion ...	493

GAME.

Right of tenant to authorise servant to kill .....	13
There must be <i>mens rea</i> to constitute trespass in pursuit of.....	53
Night poaching—Complaint .....	98
Day poaching—Apprehension.....	98
Dismissal of information on claim of title .....	241
Dealer selling live game within the prohibited season.....	247
Sufficiency of allegation of previous conviction on indictment for night poaching.....	345

HABEAS CORPUS.

Will go to the colonies.....	264
------------------------------	-----

HIGHWAY.

Obstruction by removing stepping stones of a brook Ground on which new trial refused.....	64
Duty to fence waste and quarry .....	66
Obstructing by laying down gas pipes.....	78
Stopping gap in hedge and ditch not an obstruction .....	98
Surveyor not bound to place posts across bridle-way and foot-way .....	114
Obstruction of by trestles placed during repairs... ..	126
Road impassable in winter .....	158
Dedication to use of the public, what is.....	163
Appeal against highway rate—Costs .....	213
Order to indict for non-repair .....	220
Refusal of justices to dedicate .....	301
Deviation from line of way—Dedication—Trespass .....	346
Liability to repair—Dedication .....	349
Surveyor's writs—Appeal to justices .....	380
When surveyor entitled to notice of action .....	423
Surveyor's writs—Allowance of law expenses.....	442
Steam threshing machine not a nuisance.....	495

HOUSEBREAKING.

Breaking and entering with intent to commit a felony .....	507
--	-----

HUSBAND AND WIFE.

Desertion—Proof of marriage.....	46
----------------------------------	----

IMPRISONMENT (FALSE).

Notice of action for.....	67
What a reasonable and probable cause for arrest... ..	68

INCLOSURE ACTS.

Rights of parties interested in ancient inclosures— When not barred .....	122
Setting out private road .....	323
Power of commissioners to set out private roads .....	506

INCOME TAX.

Liabilities of partnership—Some partners residing abroad.....	140
---	-----

INNKEEPER.

(See *Alchouse*.)

JUSTICES.

Right of interference between to be tried by <i>quo warranto</i> .....	125
Waiver of objection to an interested justice .....	126
An interested justice sitting on the bench .....	170
Action against for mistake of law .....	203
Where title is claimed .....	241
Dismissal of case for want of jurisdiction ..	284
Liability of for issuing distress-warrants—Protection of officer acting under them.....	450
Action lies against, for issuing warrant of distress on disputed church-rate .....	454

LANDLORD AND TENANT.

Determination of a tenancy at will.....	7
Land-tax and tithes are outgoings .....	75

LARCENY.

And receiving—Stolen as aforesaid.....	52
By trustee of a friendly society—Not a bailee ...	131
Of lead fixed to a building.....	296
By finding—Appropriation—Felonious intent.....	299
Ownership—Joint-stock bank.....	363
Obtaining goods by artifice.....	364
Bailee treasurer of a money-club .....	392
By member of a friendly society.....	466
Married woman not a bailee .....	471
Attempt to commit—Proximate act—Ownership ..	513

LICENSED VICTUALLERS.

(See *Alchouse*.)

LOCAL GOVERNMENT ACTS.

Market stallage .....	331
Rateability of workhouse to general district rate ..	344

LOCAL LAWS.

Southampton .....	30
Birkenhead Improvement.....	49, 168
Stockport Improvement .....	62
Devonport Improvement .....	62
Maidstone Gaol .....	124
Llandaff Market .....	167
Wolverhampton Waterworks .....	395
Nottingham Waterworks.....	402
Rye Harbour Improvement.....	465
Llandaff Market Act .....	474
Canton Market Act.....	475
Place within known boundary—Extending limits ..	394

LOTTERIES.

Evidence of keeping—Ignorance of law.....	260
---	-----

LUNATIC POOR.

Amendment of order of maintenance by justices ..	90
Practice in committal of a dangerous lunatic.....	99
Order may be made on parish at whose instance pauper is sent to the asylum .....	108
Unemancipated child follows father's irremovability .....	201

MARTIAL (COURT).

Removal of proceedings .....	387
------------------------------	-----

MASTER AND SERVANT.

<i>Bona fide</i> belief that employment has ended is sufficient cause .....	4
Master not liable for wilful act of servant against orders .....	7
Lawful excuse for not entering service .....	20
A summons for wages barred by previous decision in county court .....	86
Weavers may make special contracts .....	103
Servant absenting himself—Termination of the agreement .....	195
Who is not a servant in husbandry .....	283
Endeavouring to force master to discharge workmen.....	289
Conviction for absenting from service—Claim of right .....	355
Violation of rules of a factory—Loss of wages for .....	373
Abatement of wages — Adjournment — Trying several together .....	488
Contract of service .....	494

MEDICAL ACT.

Practice a question of fact for the justices .....	41
Insufficient proof of falsely pretending to be a surgeon .....	135, 224
Pretending to be an M.D.—Question of fact .....	226
Procuring entry of name on register by fraud ...	282

MERCHANT SHIPPING ACT.

Harbouring deserters—Evidence of being British ship.....	196
--	-----

## METROPOLITAN BUILDING ACT.

What is a building within .....	8
Fair expenses relative to a dangerous structure are recoverable.....	275

## METROPOLIS LOCAL MANAGEMENT.

Lighting rate—Scale of rate—Parish of Fulham .....	42
Principle of rating parishes.....	151
Right of appeal—What objection can be taken—Publication of rate .....	266
Right to purchase land .....	367
Liability of vestrymen for acts of workmen .....	371
What is a line of building in a street .....	398
Power to order water-closet to be substituted for a privy .....	489
Priority of sewerage works in particular places—Direction of registry .....	521

## MUNICIPAL CORPORATION.

Return of burgess list by overseers signing—Penalty .....	50
Adoption of Lighting Act by—Relinquishment of powers.....	107
Question of existence of a corporation .....	112
Indictment by—Prosecutors entitled to costs .....	114
Charge of relator's costs on borough fund .....	121
Quo warranto for office of town councillor may be tried in Middlesex .....	147
Description of premises on burgess-roll .....	182
Mayor has no right to preside.....	199
Bill for discovery and account against.....	209
Notice to voters of disqualification of candidate—Fresh election .....	274
Bye-law—Not to keep pigs.....	275
Election of alderman—Form of voting paper.....	804

## NAVAL STORES.

Possession of apparel .....	326
Possession without knowledge of the mark.....	388

## NEGLIGENCE.

Of parent to procure medical aid for her daughter of age.....	516
---	-----

## NOLLE PROSEQUI.

Attorney-general may enter for Crown .....	491
--	-----

## NUISANCE.

Sheep-droppings in a market .....	368
-----------------------------------	-----

## NUISANCES (REMOVAL OF).

Appeal—Recognizance—Computation of time—Sunday .....	25
Order to pay expenses out of highway rate .....	240
Trade of fellmongers is a nuisance .....	421

## OVERSEERS.

Penalty for not returning burgess-list.....	50
Nomination of is vested in justices .....	149
Recovering possession of lands the property of parish .....	159

## PARENT AND CHILD.

Father's right to custody of child under sixteen...	251
Father neglecting to maintain child—Evidence of paternity.....	263

## PARISH LAW.

Appointment of trustees of parish land.....	84
Contract to water streets—Construction of....	92
Auditors—Disallowances—Rent of house—Duplicate—Appointment of overseers.....	107
Recovery of land by overseers.....	185, 159
Lands vested in churchwardens—Notice to quit...	335

(See Poor Law, Settlement.)

## PAWNBROKER.

What a loss of pledge by default or neglect .....	1
Invalid order to return pledge—Sec. 14, c. 24 ...	2

## POLICE.

Lands in ancient demesne not exempt from rate .....	43
Rate for assessable on Romney Marsh .....	109

Police Clauses Act, sec. 35, applies to alehouse keepers .....	109
--	-----

## POOR LAW.

Unions under Gilbert's Act—One union supporting in its workhouse poor of another .....	138
Expenses of maintenance—Pauper not removable—Enforcement of payment .....	221
Settlement by apprenticeship .....	223
Settlement by renting tenement .....	223
Removal of children whose parent is irremovable .....	385
Unemancipated child follows settlement of parents (See Removal, Settlement.)	492

## POORS RATE.

Rating of anchorage and beaconage .....	5
Appeal to superior court not allowed on proceedings to enforce payment .....	33
Extra-parochial agreement with owner of estate to maintain his own poor.....	76
Liability of new officers for costs of appeal.....	91
Bond by collector with sureties—Change of duties—Discharge of surety .....	106
Question of occupation may be raised on application for warrant .....	112
Liverpool Library exempt from .....	128
Precise demand, fraction of a farthing .....	158
Rating of waterworks, passing through different parishes .....	164
Rating of a canal .....	165
Rating of docks .....	189
Tithe composition .....	224
Rating of railway .....	276
Rating of Stamp and Inland Revenue Office .....	278
Rating of a railway-station.....	279
Recovery of by overseers succeeding those who made rate.....	284
School of Licensed Victuallers' Society .....	339
Land covered with water-reservoirs—Water-pipes .....	339
Liverpool Docks not subject to .....	452
Deduction of curate's salary from tithe rent-charge .....	462, 478

## PRINTERS.

Registering presses .....	378
---------------------------	-----

## PUBLIC HEALTH ACT.

Mandamus to local board to levy rate—Meaning of "charge incurred" .....	36
No formal order needed under sec. 103 .....	80
If rate be good on face of it justices ought to enforce it.....	89
Compensation for damage by sewerage works—Claim .....	161
Recovery of expenses of improvements .....	193
Contract by—Rates.....	434
Attendance of clerk at hearing .....	492

## QUARTER SESSIONS.

Power to amend order of maintenance .....	90
Notice and grounds of appeal—Entering and respiting .....	235

## QUO WARRANTO.

Proper means of trying right of interference by justices with other justices.....	125
Issue may be tried in Middlesex .....	147
Change of venue.....	436

## RAILWAY.

Evidence on charge of engine not consuming its smoke .....	6
Liability to repair bridges over turnpike roads ...	46
Placing a truck across an uncompleted line.....	136
Tenant from year to year, when not entitled to compensation .....	149
Liability to keep roads in repair .....	178
There must be an intention to obstruct a line to justify a conviction .....	295
Refusal to produce ticket on request .....	359

<b>RAPE.</b>			<b>SUNDAY.</b>		
By father on his daughter .....	333		In computation of time .....	25	
<b>RATES.</b>			<b>THAMES CONSERVANCY.</b>		
Action to recover—Consent that Q. B. should decide it as a case stated by sessions .....	176		Construction of act .....	302	
<b>RATING.</b>			<b>THEATRES.</b>		
Highway rate in metropolis .....	42		A dialogue is a stage play .....	293	
Lands in ancient demesne not exempt from police-rate .....	43		<b>THREATENING WORKMEN.</b>		
Of parishes under Metropolis Local Management Act .....	151		Conviction for .....	23	
Of a workhouse under same act .....	344		Statement of offence in .....	23	
<b>RECEIVING.</b>			<b>TITHE COMMUTATION.</b>		
Effect of words "stolen as aforesaid" .....	52		Poor-rate on—Local Inclosure Act .....	224	
Jointly by husband and wife .....	72		Notice of application to justices for delivery of apportionment .....	225	
By wife—Afterwards agreement between prisoner and husband .....	515		<b>TRUCK ACT.</b>		
<b>REMOVAL (ORDER OF).</b>			Deduction from wages—Not within .....	2	
Jurisdiction of recorder to make .....	295		<b>TRUSTEES (STATUTORY).</b>		
<b>ROAD.</b>			Notice of meetings—Adjournment .....	73	
Local private act—Authority by tenant for life to set out—Who to use .....	28		<b>TURNPIKE.</b>		
<b>SADLERS' COMPANY.</b>			Milk is not agricultural produce .....	60	
Charter—Mandamus to restore—Assistant .....	310		Indictment for non-repair—Apportionment of fine .....	113	
<b>SALVAGE.</b>			What is not a van carrying goods for hire under sec. 28 .....	117	
Admiralty Court may review decision of justices .....	104		Cart laden with barley to be ground for pigs .....	204	
<b>SCHOOLS.</b>			Mortgage of tolls .....	262	
Scheme for settlement of Bristol free school .....	81		Injury by work done by trustees—Limitation of time .....	329	
<b>SETTLEMENT.</b>			Liability of volunteers .....	340, 411	
Emancipation of minor by entering police .....	2		Intending to travel on road more than 100 yards .....	372	
Suspension of order when bad .....	41		<b>VAGRANCY.</b>		
By rating of a wife living apart from her husband .....	45		Auction room is a place of public resort .....	11	
An articled clerk obtains settlement by apprenticeship .....	105		Leaving wife chargeable to parish does not justify apprehension without warrant .....	88	
By estate—By marriage of woman renting a cottage .....	107		Being on premises for purpose of fornication not an act of .....	205	
By payment of poor-rate and watch-rate .....	110		"Running away"—Desertion of children by mother .....	370	
By apprenticeship .....	223		<b>VENUE.</b>		
By renting a tenement .....	223		Charge of on charge of manslaughter .....	169	
By renting and payment of rates— Wesleyan minister .....	290		<b>VESTRY.</b>		
Marriage between a man and the niece of his deceased wife—Children do not take father's settlement .....	421		Right to vote in respect of property to which party is assessed as executor .....	455	
By renting a tenement—Evidence of amount of rent paid .....	463		<b>WATERMANS' ACT.</b>		
(See <i>Poor Law</i> .)			Liability of unlicensed parties .....	205	
<b>SMOKE CONSUMING.</b>			<b>WATERWORKS.</b>		
Evidence of .....	6		Compensation for damage by .....	61	
By a steam tug on the Thames .....	21		<b>WATERWORKS CLAUSES.</b>		
Penalty on a steam tug .....	131		Supply of public fountains—Right to water .....	127	
<b>STEAM ENGINE.</b>			<b>WEAVERS' ACT.</b>		
Evidence of non-consumption of smoke .....	6		Weavers may make special contract .....	103	
Steam tug liable for on Thames .....	21		<b>WEIGHTS AND MEASURES.</b>		
<b>SUCCESSION DUTIES.</b>			Unstamped earthenware cups .....	293	
Who is a predecessor .....	404		<b>WITNESS</b>		
Donee of a power .....	438		Committal for contempt in refusing to answer criminating questions .....	353, 439	
<b>SUMMARY JURISDICTION.</b>			Order to examine witness unable to travel .....	474	
Committal under—Imperfect warrant— <i>Certiorari</i> .....	174		(See <i>Evidence</i> .)		
			<b>WORKMEN.</b>		
			Threatening by .....	23	
			Statement of offence .....	23	





# REPORTS

OF

## All the Cases Decided

BY THE

# SUPERIOR COURTS,

RELATING TO THE LAW ADMINISTERED BY MAGISTRATES, AND  
TO PAROCHIAL AND MUNICIPAL LAW.

COMMENCING MICHAELMAS TERM 1859.

VOL. I.] SUTCLIFFE v. SURVEYORS OF HIGHWAYS OF SOWERBY.—HEALING v. CATRELL. [Q. B.]

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SACKBERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Wednesday, Nov. 9.

**SUTCLIFFE (appellant) v. SURVEYORS OF HIGHWAYS OF SOWERBY.**

*Footway—Brook—Stepping-stones—Alteration.*

*Up to 1855 a footway across a brook had been by means of fourteen stepping-stones. In that year the highway surveyors reduced the number of stones, increased their height, and placed flagstones on the top of them, forming thereby a kind of bridge:*

*Held, that the surveyors were not justified in so doing, and that the owner of the land adjoining the brook having removed the flagstones, could not be convicted of obstructing the way under the 5 & 6 Will. 4, c. 50, s. 72.*

Appeal against a conviction under the Highway Act (5 & 6 Will. 4, c. 50, s. 72), for wilfully obstructing a highway.

It appeared that there was a footway across a brook by means of fourteen stepping-stones and through the appellant's estate, which adjoined the brook. In 1855 the surveyors of the highways of the parish (Sowerby, Yorkshire, W.R.) reduced the number of stepping-stones to eight, increased their height, and placed flags on the top of them, forming a kind of bridge, for the public convenience, whereby the traffic on the footway was increased, to the annoyance of the appellant. The appellant thereupon resisted the right of the surveyors to alter the means of crossing the brook, and caused the flagstones to be removed. For such removal the justices convicted the appellant upon an information by the surveyors.

*Made* for the respondents.—The conviction was right. The substantial thing is the right of footway over the brook. It is clear the surveyors might renew the stones, or repair or replace them. If they thought proper, they might reduce the number; and it is submitted that, for the safety and convenience of the public, they had a right to put flagstones on the stepping-stones.

*Necessity*, contra, was not called upon.

By the COURT.—It is an act of trespass putting down flags upon higher stepping-stones, and it is  
[MAG. C.]

enlarging the public right. It could not be contended that a permanent bridge could be erected over the brook, and yet the placing of flagstones on the stepping-stones is of that nature. The overseers must repair the way across the brook with stepping-stones. Down to the year 1855 the passage across the brook had been by means of fourteen stepping-stones, and the owners had been content to allow the public to cross it in that way. The conviction must therefore be quashed.

Conviction quashed.

**HEALING (appellant) v. CATRELL (respondent).**

*Pawnbroker—Loss of pledge by neglect—39 & 40 Geo. 3, c. 99, s. 24.*

*A pawnbroker placed a gold watch pledged, with other valuable property in a strong room on premises left at night without any guard or person to sleep on them. The premises were broken into and the watch stolen:*

*Held, a loss by default or neglect in the pawnbroker within 39 & 40 Geo. 3, c. 99, s. 24.*

Appeal against a conviction by the magistrate of Liverpool under the Pawnbrokers Act, 39 & 40 Geo. 3, c. 99, for improperly refusing to restore a pledge on the money being tendered, whereby the appellant was adjudged to pay to the pawnor the full value of the pledge (a gold watch).

The pledge in question was deposited by the pawnbroker in a strong room, in a house, of which at night there was no one to take care, and no person slept on the premises. The house was entered at night, the room broken open, and the pledge stolen among other property.

The magistrate was of opinion that it was not safe to keep such property in such a building without leaving a person to guard it at night, and that it was a case of loss by default and neglect in the pawnee within the meaning of sect. 24 of the Act.

*Aspmall* for the appellant.—There was no such default or neglect as authorised the magistrate to convict the pawnbroker under sect. 24.

COCKBURN, C.J.—A pawnbroker has a large amount of valuable property belonging to other people, and it is his duty to take such care of it as a prudent person would of his own property. In this case the pawn-  
B

Q. B.]

REG. v. THE INHABITANTS OF SELBORNE.—SHACKELL v. WEST.

[Q. B.]

broker leaves it in a room on premises unguarded at night, except by the ordinary means of bolts and locks. Can any one doubt that this is an act of default and neglect on the part of the pawnbroker of the property entrusted to his care?

The rest of the Court concurring,

Conviction affirmed.

#### REG. v. THE INHABITANTS OF SELBORNE.

*Poor—Settlement—Minor—Emancipation.*

*A minor entered into the metropolitan police force as a constable, and remained till his marriage, at which period he was still a minor:*

*Held, that he did not become emancipated from parental control by entering into the police force.*

Case granted by the Middlesex court of quarter sessions on confirming an order of removal of a pauper by justices.

The simple point was, whether a minor, by entering into the metropolitan police force as a constable, where he remained until his marriage, at which period he was still a minor, became emancipated from parental control.

*Smart.*—The son became emancipated by entering the police force. That is a position inconsistent with parental control, as thereby the son entered into the service of the state. Cases referred to:—*R. v. Rotherfield*, 1 B. & C. 345; *R. v. Lytchet Ma'raverse*, 7 B. & C. 226.

*Metcalf*, contra, referred to *R. v. Scammonden*, 8 Q. B. 349.

By the COURT.—The distinction is obvious between a soldier and a police constable. By becoming a police constable a minor is not emancipated. Indeed, by giving a month's notice, he may quit the police force, and the case expressly finds that the son had contracted no engagement which excluded him from returning to his home. From *R. v. Woburn*, 8 T. R. 479, where it was held that service in the militia did not emancipate a son, *R. v. Higgate*, 2 B. & Al. 582, where apprenticeship to a certificated man, the son not returning to his father's house till after he was twenty-one, was held not to emancipate the son, and other cases down to *R. v. Scammonden*, the authorities are clear to show that the minor in this case was not emancipated.

Friday, Nov. 4.

ARCHER v. JAMES.

*The Truck Act*—1 & 2 Will. 4, c. 37.—*Deduction from wages.*

*Deductions from wages are not within the operation of the Truck Act. Where, therefore, certain deductions or stoppages in respect of frame-rent, machine-rent, standing, winding, steam, gas, firing, and waiting-room, were made from the earnings of the plaintiff, who was a frame-work knitter, working in the factory of the defendant:*

*Held, that such deductions or stoppages were not illegal within the operation of the above statute.*

This was an action tried at Nottingham, when the plaintiff was nonsuited, with leave to move to enter a verdict in respect of certain items.

The question turned upon the proper construction of the Truck Act (1 & 2 Will. 4, c. 37), the 3rd section of which enacts, "That the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null and void."

The plaintiff was a frame-work knitter, working in the factory of the defendant, and he was paid by the piece at the rate of 7d. a dozen. But from this payment there were certain stoppages deducted, under the several heads of frame-rent, machine-rent, standing, winding, steam, gas, firing and waiting-room.

*Hayes*, Serjt. now moved accordingly, and contended that these stoppages were illegal, and amounted in fact to a payment of wages other than in the coin of the realm. [COCKBURN, C.J.—Is not this a mode of measuring the wages? Is it not a deduction from wages which the master has a right to make in consideration of the accommodation he affords his workmen? The 5th section gives the clue to the whole statute.] That section is only an amplification of the others. [COCKBURN, C.J.—You can't say to the workmen, "You shall take such and such home in lieu of wages;" but can't you say, "Instead of working at home, you shall work here in the factory at less wages?" The case of *Chowner v. Cummings*, 8 Q. B. 311, shows that such deductions are not within the Act.] These deductions are in the nature of wages.

COCKBURN, C.J.—It seems to me that this case is clearly within the decision of *Chowner v. Cummings*, and that this is merely a mode of ascertaining the amount of wages the artificer is to receive.

WIGHTMAN, J.—Whatever doubt I may have entertained if this case had now come before us for the first time, I think myself bound by the decision in *Chowner v. Cummings*.

HILL, J. concurred.

Rule refused.

Saturday, Nov. 12.

SHACKELL v. WEST.

*Pawnbrokers' Act*—39 & 40 Geo. 3, c. 99—ss. 14, 24. *A. summoned a pawnbroker under the 14th section of the above Act, for neglecting or refusing, without reasonable cause, to deliver back a watch pawned for a sum under 10l., which had been stolen in consequence of the pawnbroker's negligence. The justices made an order that, the goods being lost by the negligence of the pawnbroker, and he having failed to show reasonable cause why he should not return the watch, he should forthwith restore it, or pay the value and costs:*

*Held, that the order was bad, as being made under the 14th section, although a valid order might have been made under the 24th section; and as any amendment would prejudice the pawnbroker, by depriving him of his appeal under the 35th section of the Pawnbrokers' Act, the court refused to amend, and remitted the case back to the justices.*

This was a case stated by the magistrates of Weston-super-Mare for the opinion of the court under 20 & 21 Vict. c. 43.

The appellant is a pawnbroker at Bristol, but with another establishment at Weston-super-Mare. In March of last year a silver hunting-watch had been deposited with him by the respondent, on an advance of 2l. On the night of Saturday the 1st May and Sunday the 2nd, the appellant slept at his residence at Weston-super-Mare, and in the mean while his premises at Bristol were left unguarded, no one sleeping there on either night. In that interval the house was broken into by burglars, and, amongst other property—which, it was alleged, had been locked up in an iron safe—the respondent's watch was taken away. West shortly afterwards tendered to the appellant the sum of 2l. 1s. 4d., being the sum advanced with interest, and demanded the restoration of his watch, when the appellant expressed his inability to restore it by reason of the robbery; and thereupon he was summoned by the respondent before the magistrates at Weston-super-Mare, under the 14th section of the 39 & 40 Geo. 3, c. 99, when the magistrates

Q. B.]

SHACKELL v. WEST.—REG. v. JOHN BROWN.

[Q. B.]

having heard the case, adjudged that, by reason of the defendant having absented himself from his premises during two nights and leaving them totally unguarded, he must be considered guilty of negligence as a bailee, and that, therefore, having failed to show reasonable cause why he did not return the watch, he must be ordered forthwith to restore it, or otherwise to pay 5*l.* 2*s.* 8*d.*, less the 2*l.* 1*s.* 4*d.*, the sum advanced, with interest, together with 3*l.* 7*s.* for costs—the magistrates at the same time intimating that the fact of a robbery having occurred at all was not fully established.

*Coleridge* for the appellant.—After the decision of this court on Wednesday last in the case of *Healing v. Cathrell*, 1 L. T. Rep. N. S. 7, the question of negligence in the pawnbroker was abandoned. This appeal, therefore, now rests on the ground that the magistrates, in ordering the appellant to deliver the watch, or in failing to do so to pay over the full value with costs, had exceeded their jurisdiction. The information was laid under the 14th section of the Act, and the order of the magistrates purported to be made under that section. The 14th section enacts that if any pawnbroker, without showing reasonable cause for so doing, neglect or refuse to deliver back the goods or chattels pawned for any sum or sums of money not exceeding 10*l.* to the person or persons who borrowed the money thereon, any justice or justices of the peace, on the application of the borrower, is required to cause such person or persons who took such pawn to come before such justice or justices, and if tender of the principal money due and all profit thereon shall be proved, such justice or justices shall thereupon by order direct the goods or chattels so pawned forthwith to be delivered up to the pawnor or pawnors thereof, his, her, or their executors, administrators, or assigns, and on neglect or refusal, then any such justice or justices shall commit the party or parties so refusing until he, she, or they shall deliver up the goods or chattels so pawned, or make such satisfaction or compensation as such justice or justices shall adjudge reasonable for the value thereof; but that section says nothing about the pawnbroker, in default of delivering the article, being ordered to make compensation. The 14th section is simply applicable and directed against such pawnbrokers as withhold from the person pawning; it only applies to cases of continuous nondelivery when an article is in the possession of the pawnbroker, and he withholds it, having the power to deliver it. On the other hand, the 24th section deals with negligent bailees, or with those through whose negligence or want of sufficient care, property not exceeding in value 10*l.* is lost or stolen, and in such case the magistrates are empowered to order compensation not exceeding 10*l.*, and then, if there is a failure in complying with the order of the magistrate, the remedy is against the goods of the defendant. It was plain, therefore, the magistrates had proceeded upon the wrong section, and that the order, if made at all, could only have been made under the 24th section. The proceeding was misconceived: (*Ex parte Cording*, 4 B. & Ad. 198; *Reg. v. Ryan*, 4 Ad. & Ell. 39. [COCKBURN, C.J.—But have we not a power to amend the determination of the magistrates, or to remit the case for a hearing?]) Not in such a case as this, for the whole proceeding of the magistrates was misconceived. The 24th section of the Pawnbrokers Act says, "that if in the course of the proceedings before the magistrate it should appear that the chattel had been lost through neglect," &c. Now here, in the course of the proceedings it did become evident that the goods had been lost through neglect—nevertheless the magistrates persisted and made their order. There is an error in the 24th section of the Act; it refers to the neglect of the person "by" whom the goods were pawned; this should evidently be "with." The mistake was noticed by Campbell, C.J. in *Syred v. Carruthers*,

4 Jur. N. S. 949, and he said, "We are bound to read "with" instead of "by;" the cause of loss there was by fire. [COCKBURN, C.J.—The Act is badly drawn, and is certainly obscure.]

*Kinglelake* Serjt. contra.—In the case of an information under the 14th section of the Act, if the pawnbroker gave evidence that the goods had been lost through a burglary, the magistrates must be held to have power to decide the question of negligence. In such cases the magistrates were of opinion it was the intention of the Legislature to supersede the common law rights of the parties and to give a more speedy remedy. The question is, whether, on an information under the 14th section, the magistrates had jurisdiction, assuming that on the evidence produced there was enough to show that a robbery had been committed. [BLACKBURN, J.—Then if they have erroneously made an order under the 14th section, instead of the 24th section, cannot we amend it?] On the part of the respondent it is not admitted that any amendment is necessary.

*Coleridge* in reply.—The 14th section alone warrants this order, and to make an amendment would be putting the court in the position of justices, and making, under another section, such an order as they should have made. [WIGHTMAN, J.—The difficulty of making an amendment is this: if the justices had decided under the 24th section, the pawnbroker might have appealed to the quarter sessions under the 35th section, and he has now lost that power.]

COCKBURN, C.J.—The order as made cannot stand. It is made under the 14th section of the Pawnbrokers Act, and it professes to be applicable to a case in which the pawnbroker was no longer able to deliver up the thing in specie in consequence of his own negligence, and to such a case I think that section does not apply; but I think the justices might have made a valid order under the 24th section. It is not necessary to say whether it was satisfactorily established that the goods were securely locked up, but it is clear that the premises were left unguarded, and under these circumstances I think the justices were justified in coming to the conclusion that the pawnbroker was guilty of negligence, and that they could have given relief to the complainant under the 24th section; but having proceeded under the 14th section, and there being a substantial difference between the two, I think the order cannot stand. Then there is the question, ought we to amend if the appellant would in no way be prejudiced? I think we ought; but in this case there is the difficulty which I think cannot be got over, that the appellant would have been entitled to his appeal under the 35th section, and that in such appeal he might have adduced evidence to clear himself of the alleged negligence, and of that he ought not to be deprived.

WIGHTMAN, J.—The 14th section applies to refusal to restore, and not to a case like this, and therefore the present order cannot be supported, although a valid order might have been made under the 24th section of the Act. And as we cannot amend without prejudice to the appellant, I think the case ought to go back for reconsideration.

BLACKBURN, J. concurred.

Case remitted for rehearing—no costs.

Monday, Nov. 14.

REG. v. JOHN BROWN.

*Bastardy order—Service of summons—Jurisdiction*  
—7 & 8 Vict. c. 101, s. 3.

An affidavit summons was served by leaving it at the place of abode of the putative father of the bastard child, from which he was absent temporarily, without any notice of the proceeding, and his address was not known. The justices declined to adjourn the hearing and made an order:

Q. B.]

REG. v. JOHN BROWN.—RIDER v. WOOD AND OTHERS.

[Q. B.]

*Held that this court could not interfere, the justices having jurisdiction.*

Price moved to quash a bastardy order on the ground of irregularity.

The order was made under the 7 & 8 Vict. c. 101, s. 3, and was regular on the face of it. The following facts were relied on:—It appeared that a summons was taken out against the defendant, a farmer's son, as the putative father of the child, and left for him at his father's residence, which was his home, during his absence. It was stated in the affidavits that he left home on the 3rd July (that was before the summons was taken out), without any notice or intimation that such a proceeding was about being taken; that he was in the habit every year of taking a month's trip, and that on the occasion in question he left home for that purpose, not leaving any address, as he was going on a tour and did not know where he might be during the time. The summons was for the defendant to appear at the petty sessions on the 18th July, and on that day the defendant's mother attended at the sessions, and stated these facts to the justices, and that her son for that reason had not had notice of the summons, and asked for an adjournment. The justices, however, refused to adjourn the hearing and made the order in question. There was an affidavit of the defendant denying that he was the father of the child.

Price contended that the moment the justices were told by the mother that the son was absent, under the above circumstances, they ought not to have gone on with the hearing and made the order. It is true the 7 & 8 Vict. c. 101, s. 3, "on proof that the summons was duly served on such person, or left at his last place of abode, six days before the petty sessions," gives the justices jurisdiction to act; but, nevertheless, the circumstances here are such that it amounts to a case of an *ex parte* proceeding: (*R. v. Davis*, 22 L.J. 143, M.C.; *R. v. Toomes*, 7 Q.B. 690.) In *R. v. Evans*, 19 L.J. 181, M.C., there was no affidavit on the part of the defendant denying that he was the father of the child.

COCKBURN, C.J.—The order is regular on the face of it, and the requirements of the statute have been complied with. The justices might have exercised a discretion which we may regret that they did not exercise. But there is no irregularity, and the court cannot interfere.

HILL, J.—Everything appears to be regular according to the statute. The summons was left at the defendant's last place of abode, but he was temporarily absent, and the justices may have treated this excuse of the mother as an idle one. The principle on which the court proceeds in quashing orders on *certiorari* is, that there must be some defect of jurisdiction in the tribunal making the order. Here there is none.

BLACKBURN, J.—If the justices thought it right not to adjourn the hearing, can we say that they acted without jurisdiction? *Rule refused.*

Wednesday, Nov. 16.

RIDER (appellant) v. WOOD AND OTHERS  
(respondents).

*Master and servant—Leaving employment without lawful excuse—Guilty intent.*

Under the 4 Geo. 4, c. 34, s. 3 (*Masters' and Workmen's Act*), a workman who leaves his master's employment upon a bona fide belief that his employment is regularly terminated, though it has not been so terminated in fact, is not liable to be convicted; and the bona fides of his conduct is a question to be determined by the justices.

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction of the appellant by certain justices of Flintshire, under the 4 Geo. 4, c. 34, s. 3, for absenting himself from his service.

By the above section it is enacted, that if any artificer, &c. shall contract with any person to serve him for any time whatsoever, and having entered into such service shall absent himself from his service before the term of his contract shall be completed, then it shall be lawful for any justice of the peace upon complaint to issue his warrant for apprehending such person, and to examine into the nature of the complaint, and if it shall appear that such artificer, &c., hath not fulfilled his contract, or has been guilty of any other misconduct or misdemeanor, it shall be lawful for such justice to commit any such person to the house of correction, there to remain and be held to hard labour for a reasonable time not exceeding three months, and to abate a proportionate part of his wages for and during such period as he shall be so confined.

It appeared that the appellant entered into the service of the respondents as an anchormsmith on the 4th Jan. 1859, for an indefinite period, at certain specified prices, determinable on either of the parties giving to the other fourteen days' notice of his intention to determine, the contract, certain rules and regulations to be observed by the workmen.

The appellant entered into and remained in the respondents' employment for many months.

Amongst other rules of the factory was the following:—

"Contractors, firemen and daymen, to give fourteen days' notice into the office before leaving their employment, and to receive the same."

On the 23rd July he gave the manager of the respondents' works the following notice:—

"July 23, 1859.

"Mr. Wood, Brothers.

"In the beginning of January last you reduced our prices, with a promise that as soon as trade was a little brisker you would give us our price back again; we now earnestly hope and trust that you will fulfil your promise, as we consider that our price is very small indeed, and we hope that you will take it into your serious consideration—if you will not fulfil your promise, we all (the anchormsmiths in your employ) do hereby give to Mr. Wood, Brothers, fourteen days' notice.

"Dated this, the 23rd of July, 1859.

"THE ANCHORMSMITHS OF SALFNEY."

On the following 6th Aug. the appellant left the employment of the respondents—the request contained in the notice not having been complied with. Thereupon proceedings were taken before justices against the appellant, and he was convicted, and sentenced to fourteen days' imprisonment, with hard labour, with an abatement of 4l. from his wages.

WELBY, for the respondents, contended that the notice given on the 23rd July was not valid, and was a nullity, and that the appellant therefore had left without lawful excuse.

J. BROWN, for the appellant, argued that this being a criminal charge it could not be adjudged that the appellant had been guilty merely because he may have given an informal notice. [COCKBURN, C.J.—It certainly appears to me that the leaving the employment must be with a guilty purpose.] It is not suggested that he acted viciously. The appellant ought not to be punished criminally for a matter which turns upon the legal sufficiency of notice. To constitute an offence under the statute, there must be a guilty intention: (*Fowler v. Padget*, 7 T. R. 509; the maxim of *actus non facit reum, nisi mens sit rea* applies; *Horne v. Garton*, 28 L. J. 216, M.C.)

WELBY was here called upon, and argued that every absenting of himself without a lawful excuse is an offence under the statute. [HILL, J.—Suppose such a case as this—a man who has occasion to be absent sends a fellow-workman to ask for leave, and he tells

Q. B.]

THE OVERSEERS OF BISHOPWEARMOUTH v. THE EARL OF DURHAM.

[Q. B.]

him that he has obtained it when he has not, would this be an absenting of himself within the statute? COCKBURN, C.J.—Must not two things concur—a wrongful absence, and a knowledge that it is a wrongful absence? I think not; it is merely necessary that the absence should be without lawful excuse in fact. [COCKBURN, C.J.—The Act treats the absence as a misdemeanor and offence, and if so, the well-known principle applies that there must be a wrongful intention. HILL, J.—The Act must not be taken in its naked words, for if so a man would be liable if he were laid upon a bed of sickness.]

COCKBURN, C.J.—If a man absents himself with a knowledge that his employment is not at an end, he is guilty under the statute; but if he believes that his contract is at an end, and so leaves, he is not guilty. The committing justices do not appear to have considered the subject in this point of view. The case therefore ought to go back to them under the 6th section of the statute, with our opinion upon this point, and then they will decide whether the appellant left the employment in the *bona fide* belief that he had properly put an end to it, for if he did he would not be guilty under this statute. *Rule accordingly.*

REG. on the prosecution of THE OVERSEERS OF THE TOWNSHIP OF BISHOPWEARMOUTH v. THE EARL OF DURHAM.

*Poor rate—Tolls—Anchorage—Beaconage.*

*The port of Sunderland extends from the bar of the mouth of the river Wear, and low-water mark of the sea up the river about eight miles, including so much of the river as is within such limits, and is in the several adjoining parishes. Any ship entering the river might have to cast anchor. Beacons had been set up and mooring buoys, posts, &c., placed within the port by the officers of the Bishop of Durham, who was the owner of the soil and freehold of the port below low-water mark, and these were maintained by them for the use of the ships using the port. A payment of 1s. 2d. had been immemorially made to the Bishop called "anchorage or beaconage tolls," by every ship entering the port. These tolls having been assessed to the poor rate:*

*Held, that they were not tolls in gross, but were connected with the occupation and use of the soil, and were rateable to the poor rate in all the parishes in which the port was situated, and to which ships paying the toll came, in the proportion of the number of ships coming into each of the parishes respectively.*

Atherton, Q.C. and Liddell appeared for the appellant, and Welsby and Davison for the respondents.

The facts and arguments sufficiently appear in the following judgment:—

WIGHTMAN, J.—In answering the first question, whether the tolls are rateable, we have to consider whether they are tolls in gross or tolls connected with the occupation of the soil; and this must be determined in the same manner as if the nature of the soil had been discussed when they were received by the Bishop of Durham or his lessees before the 3 Geo. 3, the 6 & 7 Will. 4, c. 19, and the 21 & 22 Vict. c. 45—none of these statutes having severed the tolls from the soil if they ever were connected together. According to the statement in the case, these tolls have always been taken in respect of ships entering into the port of Sunderland. This port begins on crossing the bar at the mouth of the river Wear, extends to a bridge near Finley Park, and comprehends the whole space of the river from low-water mark on the north side to low-water mark on the south side, and is in several contiguous parishes or townships on both sides, *usque ad medium filum aquæ*. The bishop was the owner of the whole soil and freehold of the said port

between low-water mark on the one side and low water-mark on the other side; every ship entering the port may have to cast anchor there, or to be moored to some moorings fixed in the river and taken in the river, or on the quays or shores adjacent. The bishop and his lessee maintain the beacons and moorings in the river Wear. Previously to the appointment of the commissioners, the port and the affairs and business thereof were managed and conducted by the Bishops of Durham or their lessees under leases similar to those granted to the appellants by officers or others in that behalf appointed or employed by such bishops or their lessees; and by such bishops' lessees or officers beacons were set up, moorings, buoys, posts and rings were placed and fixed within the port for the use and benefit of the ships entering the port, and other works were done for the maintenance of the port and the use and benefit of ships resorting to it. The tolls rated have been paid immemorially to the bishop or his lessee, and they have been called anchorage and beaconage tolls, being 1s. 2d. for and in respect of every British ship which enters the port. Formerly double that sum was paid, and now by Act of Parliament, in consequence of reciprocity treaties, the same sum is paid on every foreign ship which enters the port. The tolls are supposed formerly to have been collected by the water-bailiff appointed by the bishop or his lessee, but are now received by the collector of all the sound dues in the port of Sunderland, at his office in the Custom-house there. The tolls appear to have been rated to the relief of the poor of the parish of Sunderland since 1719, but they were not rated in any of the townships into which the port of Sunderland extends till 1857. In that year the ancestor of the appellant, who was then lessee of the tolls, appealed against the rate for the parish of Sunderland, but abandoned that appeal and agreed with the overseers of Sunderland to be rated on 150l. Immediately afterwards the five townships named in the above case were rated, those tolls making an aggregate of 403l. 3s. 4d., which, if they are rateable, is admitted to be a fair amount. Taking all these facts into consideration, we are of opinion that these tolls are not tolls in gross, but are tolls connected with the occupation and use of the soil. They seem to us to be much more in the nature of dock dues. The bishop was the owner of the soil of parts of the port, and by the outlay of money on various works, he rendered the port safe and commodious for shipping, in consideration whereof, by the exercise of the highest prerogative of the Crown, he appears to have been authorised to receive a fixed sum as a reasonable amount for every ship which entered the port. Customdues, or tolls, are almost incident to every ownership of a port, and we think are to be considered as payable *rationi soli* for a benefit conferred, not as a matter of extortion under the colour of law. The toll here is called anchorage and beaconage, but must be considered as covering all the accommodation afforded by the user of the port to the ships which frequent it, as no other payment is made to them. There was as strong objection offered to beaconage; but the owner of this port does not appear to have erected beacons within the port, and the anchorage and mileage show a direct use of the soil within the parish and township comprised in the rate; but if the use of the soil is in part consideration for the payment of the toll, we think this is enough to connect them with the occupation and use of the soil, and to render them rateable. We lately held, in the *Runcorn* case, the tolls called anchorage, which probably were for the use of the soil, were not rateable, but that was because it was agreed that the corporation of Liverpool, the appellants, were not owners and occupiers of any land within the township, the place where the ships anchored being extra-parochial. Here the soil where

the ships anchored and the mooring chains were fixed was within the parish or township of the respondents. If there be a payment to the owner of the soil by the party who uses the soil, and no other consideration can be suggested for the payment, must not the use of the soil be regarded as the consideration for the payment? The tolls originally connected with the soil may be severed from the soil and become tolls in gross. Here there is nothing to show such a severance, for the tolls and the soil have remained united in the same owner. Counsel for the appellant chiefly relied upon the *Swansea* case, 5 E. & B. There all the tolls, whosoever collected within the port, were considered to be of the same uniform nature, and part of them being clearly not for the use of the soil and not rateable, this was supposed to give the same character to the whole. *Rez v. Cook*, 5 B. & C. 797, and the other lighthouse cases, were likewise referred to, but they merely decided that the owner of a lighthouse cannot be rated for passing tolls collected out of the parish, as they do not constitute part of the annual profits of house or land where the light is placed. The tolls in question, on the contrary, constitute part of the annual profits of the land occupied by the appellant within the township, and, therefore, are rateable. An objection was made that the fore shore, between high and low water mark, did not belong to the defendant: payments were sometimes made to private owners of the fore shore by ships for the use of it. How can these conventional payments made to others for the use of their soil at all affect the nature or the incidents of payments made to the bishop for the use of his soil? We are likewise asked by the first question whether the tolls are rateable in one, or which, of the townships or parishes? We answer, all or any part of them in which the port of Sunderland is situated to which ships paying the toll come; these seem to be the parish of Sunderland and the five townships in which the tolls are now rated. There are other parishes and townships into which the port extends, but it is not stated that ships which have paid the toll come into those parishes and townships. We do not think, that in respect to the tolls there is any profitable occupation of the soil of the port within those parishes or townships. In answer to the second question, we are of opinion that in the parish and five townships in which the tolls are rateable, they ought to be rated upon a calculation of the number of ships paying toll and coming into those parts of the port which were within the parish of Sunderland and the five townships respectively, and that they ought not to be rated according to the frontage or population, neither of which would afford any criterion for the profits of the soil of the port made within the parish or the township.

*Judgment for the respondents.*

THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY (apps.) v. WOOD (resp.)  
*Railway—Engine not consuming its own smoke—Conviction—8 Vict. c. 20, s. 124.*

*The 8 Vict. c. 20, s. 124 (Railway Clauses Consolidation Act) imposes a penalty upon railway companies using any locomotive steam-engine (in which coal is used) not constructed on the principle of consuming, and so as to consume, its own smoke:*

*Held, that the fact that a locomotive steam-engine emits smoke is not conclusive against the company, but that it should be ascertained whether or not such emission of smoke is caused by the neglect of the party in charge of the engine, or from the engine not being so constructed as required.*

This was an appeal against a conviction of the above company for using an engine not constructed so as to consume its own smoke.

By sect. 114 of the 8 Vict. c. 20 (Railway Clauses Consolidation Act), it is enacted that "Every locomotive

steam-engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming, and so as to consume, its own smoke; and if any engine be not so constructed, the company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway."

It appeared that the appellants had been found using an engine burning coal, which at certain times was emitting smoke. At the hearing of an information for this under the above section the justices considered the fact of the emission of smoke as conclusive against the appellants, and they were accordingly convicted.

*Quinn*, in support of the conviction, contended that the justices were right, for that an engine which was actually emitting smoke must be deemed as against the appellants to be one not constructed so as to consume its own smoke.

*Mellish*, for the appellants, argued that the fact that smoke issued from the engine was not conclusive, for that it might be constructed on the principle of consuming its own smoke, and so as to consume its own smoke, and yet it might emit smoke by the wilful neglect of the engine-driver or stoker, and that the justices ought to have entered into the question of whether or not the smoke was by the default of the driver.

*Quinn*, in reply, argued that, even if it were by default of the stoker, the company would be equally liable.

COCKBURN, C.J.—The words of the Act are, "constructed on the principle of consuming, and so as to consume, its own smoke." Now, it may be that it is not the fault of the engine, but of the person who uses it. I think, therefore, we should send this case back to the justices, with our opinion that they ought to inquire whether the emission of the smoke was the fault of the engine or of the person who had the management of it.

HILL, J.—The penalty is imposed only in case the company use engines not constructed on the principle of consuming their own smoke. The justices do not appear to have ascertained this fact.

BLACKBURN, J.—The justices have found that in consequence of the engine smoking on the occasions mentioned, that is conclusive evidence of its not being constructed on the principle of consuming its own smoke. In this they were wrong.

*Case to go back with the opinion of the court.*

Thursday Nov. 17.

Re MIREHOUSE.

*Church-rate—Refusal to pay—Order of justices—53 Geo. 3, c. 127, s. 7.*

*The collector called for the rate and produced the receipt book as his authority to collect; the son of the ratepayer, by the authority of his father, refused to pay the rate, handing to the collector a written statement of his refusal:*

*Held, a sufficient refusal to ground an order of justices for payment under the 53 Geo. 3, c. 127, s. 7.*

Rule nisi for a certiorari to quash an order of justices under the 53 Geo. 3, c. 127, s. 7, for the payment by Mr. Mirehouse of 1*l.* 4*s.* 0*d.* for arrears of church-rates, and 10*s.* costs.

The validity of the church-rate was not disputed, but it was said that the order was made without jurisdiction, inasmuch as the refusal to pay on which the order was made happened more than six months before the complaint was made to the justices: (11 & 12 Vict. c. 43, s. 11.) It was admitted that if there was a sufficient refusal on the 8th Sept. 1858, the order was without jurisdiction.

The facts were, that on that day the parish clerk called at Mirehouse's mill, and saw his son (the father

C. B.] POLLON AND WIFE v. BREWER.—GREEN v. MACNAMARA AND OTHERS.

[C. B.]

not being at home), and asked the son for the church-rate; the son asked him if he had got the rate; he replied, "No, here is my authority," showing the receipt-book which had been handed to him by the churchwarden for the purpose of collecting the rate. The son thereupon refused to pay, handing him a written paper stating the grounds of his refusal, and it was proved before the justices that the son refused to pay by the authority of his father.

*Prideaux* showed cause.—There was no sufficient refusal within the 53 Geo. 3, c. 127, s. 7, which gives the justices jurisdiction to make the order "if any one duly rated shall refuse or neglect to pay the same." The demand should have been made on the ratepayer. Again, no amount was demanded: (*Reg. v. Justices of Shrewsbury*, 31 L. T. Rep. 114; *Hurrell v. Wink*, 8 Taunt. 369.) If the demand was insufficient, the refusal was insufficient.

*A. Wills*, in support of the rule, was not called upon.

By the COURT.—There is no authority for saying that the demand should be made personally on the ratepayer. Here the refusal was by the authority of the father, and it was such as prevented the clerk from making any further demand. *Rule absolute.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAUGHAN WILLIAMS, Esqrs., Barristers-at-Law.

Thursday, Nov. 3.

POLLON AND WIFE v. BREWER.

*Landlord and tenant—Tenancy at will—Determination of—Newton v. Harland*, 1 M. & Gr. 644, *questioned*.

*A tenancy at will may be determined by the landlord sending for the keys, or demanding possession.*

*And (per Erle, C.J.) a landlord going to a house to take possession eo instanti determines a tenancy at will.*

This was an action tried before Williams, J., and brought against the defendant for an assault upon the plaintiffs, and for illegally expelling them from a house. The jury found a verdict for the plaintiffs, damages 3*l.* upon the assault counts, and 20*l.* on the other counts. It appeared that there had been negotiations between the plaintiff Pollon and the defendant for the assignment to the former of the lease of a house; and the keys had been delivered to the former for the purpose, as the defendant thought, of his looking over the premises, but, as the plaintiff contended, so as to establish a tenancy between them. The defendant refused to assign the lease, and called upon the plaintiff to give up possession, and sent for the keys. He afterwards went with two men and removed the goods and turned the plaintiffs out. The jury found that a tenancy at will was created. T. Jones last term obtained a rule nisi to reduce the damages to 3*l.*, on a point reserved at the trial, viz., that the tenancy had been determined previous to the expulsion.

*Macnamara* now showed cause.—It is intended to question the authority of *Newton v. Harland*, 1 M. & Gr. 644. The majority of this court there held that, if a person hold over after a notice to quit, the landlord cannot expel him by force, *manu forti*. [WILLIAMS, J.—I don't think the point in *Newton v. Harland* was raised at the trial. I was expecting it would be raised, and alluded to the case myself, because I know that a great part of the profession thought that Coltman, J., who differed from the majority of the court, was right. I did not reserve the point; but, if you say that in consequence of what fell from me you considered the point to be taken, and were prevented from yourself taking it, I should be sorry to shut you out from it.] I cannot say that.

ERLE, C.J.—Then we must dispose of the case as it is, and I think the rule must be made absolute. The

plaintiff at the utmost had a tenancy at will; while it existed the landlord sent to ask for the keys, and called upon him to give up possession. I think either of those things sufficient to determine a tenancy at will. And I also think that the landlord coming to take possession *eo instanti* determines the tenancy at will. I think therefore there is abundant evidence of the determination of the tenancy.

WILLIAMS, J.—I am of the same opinion. It is said that the sending for the keys would not do, because accompanied by a denial that there was any tenancy at all. I think the true construction of that is, "I deny that there is any tenancy at all; but if there is a tenancy at will I determine it."

CROWDER and BYLES, JJ. concurred.

*Rule absolute to reduce the damages to 3*l.**

Saturday, Nov. 5.

GREEN v. MACNAMARA AND OTHERS.

*Master and servant—Wilful act of the latter.*

*A master is not liable for the wilful act of his servant done contrary to his orders.*

The declaration in this case charged the defendants with combining together by a variety of acts to injure the plaintiff's trade as an omnibus proprietor: verdict against Price one of the defendants, and for the other defendants. At the trial Price was shown to have actively interfered and to have done many acts within the terms of the declaration. It was not shown that the other defendants interfered, and at the trial they denied that they knew of the acts complained of, and they said also that they gave orders that such acts should not be done. It appeared that whenever an omnibus of the plaintiff started, two or more omnibuses of the defendants immediately started, and, as far as they could, surrounded the omnibus of the plaintiff and prevented passengers from entering it; one of the methods of doing which was for the omnibus of the defendants to drive up with the pole close to the door of the plaintiff's omnibus. It was urged at the trial that the other defendants as well as Price were liable for the acts of their servants. Erle, C.J., who tried the case, directed the jury that, upon the facts proved, the defendants, who knew nothing of the acts done, and gave orders that they should not be done, were not liable.

KNOWLES, Q.C. now moved for a new trial, on the ground of misdirection. In this case the act done is the result of the employment, and was done for the benefit of the employers. There is some difference between the case of a private person and a public body such as the company represented by the defendants. My telling my servant not to drive on the wrong side of the road will not exempt me from liability if he does it. [ERLE, C.J.—I think I put the distinction between the case where a servant so commanded drives negligently, and where he wilfully, out of spite, drives against another person's carriage. The acts proved at the trial were the wilful acts of the servants of the defendants, contrary to their express orders.] "Polling" an omnibus is a wilful act no doubt, but it is also a negligent act. It is a negligent mode of doing the work, and is done for the benefit of the masters. [WILLIAMS, J.—How far will you carry this? Suppose a coachman, zealous for his master, strikes another coachman with his whip, would the master be liable?] That is clearly an illegal act.

WILLIAMS, J.—I am of opinion that there should be no rule. I can find no fault with the direction of my Lord. The law is laid down exactly as it has been laid down over and over again.

CROWDER, J.—I am of the same opinion. These acts were clearly wilful acts done by the men contrary to the orders of their masters. I cannot see how the summing up could have been different.

BYLES, J. concurred.

*Rule refused.*



C. B.]

STEVENS v. GOURLLEY.

[C. B.]

Thursday, Nov. 3.

STEVENS v. GOURLLEY.

*Metropolitan Building Act—What is a building within that Act.**By 18 & 19 Vict. c. 122, schedule 1, "Every building shall be inclosed with walls constructed of brick, stone, or other hard and incombustible substance."**Held, that the words of the above schedule amount to a prohibition against building the walls of wood or other combustible substance.**A wooden structure intended to be used as a shop, of a considerable size, and likely to last a considerable time, resting on joists, but having no footings or foundations in masonry, and capable of being lifted bodily off the ground by the application of sufficient mechanical power, is a building within the above statute, and a contract to erect such a structure within the limits of the Act is illegal.**Declaration—For money payable by the defendant to the plaintiff for work done, and materials provided by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them.*

Third plea—That the said work was done, and the said materials were provided by the plaintiff, under an illegal contract between the plaintiff and the defendant, made after the Metropolitan Building Act 1855 came into operation, (to wit) on the 5th Dec. 1858, for the erection of a certain building within the limits of the metropolis so defined by the Act passed in the session of Parliament held in the eighteenth and nineteenth years of her Majesty's reign, intituled "An Act for the better local management of the Metropolis," which building was a new building within the meaning of the said Building Act, and was not within any of the exemptions in the said Act mentioned, which building was agreed by and between the plaintiff and the defendant, should be inclosed with walls constructed of wood, and not of brick, stone, or any other hard or incombustible substance, contrary to the form of the statute in such case made. And the defendant further says, that the plaintiff, before and at the time of making the said contract, was a builder, and that the said contract was entered into by the defendant at the suggestion of the plaintiff, and that the plaintiff, before and at the time of making the said contract, represented to the defendant that the said building might be lawfully erected, and was not contrary to the law. And that the defendant, when he entered into the said contract, believed the said representation, and did not know to the contrary thereof, and entered into the said contract and allowed the said work to be done, and the said materials to be provided, and stated the said accounts, believing the said representation to be true. And that the said work was illegally done, and materials were illegally provided by the plaintiff in and about constructing the said building, within the limits of the metropolis as aforesaid, with such walls as aforesaid, contrary to the said statute. And the said accounts were stated concerning the money claimed by the plaintiff to be due to him from the defendant under the said illegal contract, and for the said work and materials so illegally done and provided, and the money which the plaintiff alleges was found to be due upon the said accounts was the money so claimed; and that after the said work had been so done, and the said materials had been so provided, and the said accounts had been so stated, the district surveyor gave the plaintiff's sub-contractor, then being the builder engaged in erecting the said building, due notice to remove the said work within forty-eight hours, (that is to say) to pull down the said building. And the plaintiff and his said sub-contractor having failed to comply with the said notice, the said district surveyor caused complaint to be made before a magistrate of the police courts of the metropolis, duly authorized in that behalf;

and the said sub-contractor was thereupon duly summoned to appear before the said magistrate, according to the said Act; and the said magistrate thereupon duly ordered and commanded the said sub-contractor to comply with the requisitions of the said notice; and the plaintiff or the said sub-contractor, or the said district surveyor, pulled down the said building, the same being necessary for enforcing the requisitions of the said notice, and for bringing the said building and work into conformity with the rules of the said Act. And all conditions precedent, necessary matters and things, were done in that behalf to justify and render necessary the pulling down of the said building, and by reason of the premises and of the said work and materials being so done and provided by the plaintiff illegally and contrary to the said statute, the defendant never derived any benefit or advantage whatever from the said work or materials, or any part thereof.

The plaintiff was a builder residing at Castle-terrace, Kentish-town. The defendant was a surgeon residing at Wilton-house, Regent's-park. The action was brought to recover the sum of 58*l.* balance of account for work done and materials provided for the defendant at his request. The circumstances under which the claim originated were as follows:—

The defendant, Dr. Gourley, being the lessee of a house, No. 1, Bentinck-terrace, Regent's-park, desired to have a shop erected in the forecourt or garden attached to that house; and consulted the plaintiff about it. Several interviews took place, and the defendant at first wished the building to be a brick one, but the plaintiff intimated that a brick building would require a previous application to the Metropolitan Board of Works, and occasion considerable delay, and the cost would be upwards of 100*l.*; whereas he would put up a wooden one, which would look as well and last as long, and only cost 58*l.*, and not require a notice to or permission from either the Metropolitan Board of Works or the district surveyor. During the negotiation the following letters were written by the plaintiff to Dr. Gourley:—

"21, Western-terrace, Westbourne-grove west.

"To Dr. Gourley.

"Dear Sir,—I have just considered and found out a new plan for us to work on in reference to the shop, Bentinck-terrace, which is to build it all in wood; it will be less expensive and answer your purpose just as well, and it will look as well, and then we shall evade the Metropolitan Board of Works, and the district surveyor also. It will last quite long enough for you, and, answer all you require; if you consider it over, and, write me this evening, I will put it in hand at once.—Yours obediently,

JOHN STEVENS.

"Nov. 6, 1858.

"P.S.—I think 50*l.* will pay that.—J. S."

"Dear Sir,—The plan of building the shop will be a facsimile of what you have; the elevation will be just as I show you on the plan. The only difference will be wood instead of brick-work; you would not know the difference in any other way, and the cost of erection will be 55*l.* I have thoroughly gone into the matter, and therefore assure you it cannot be erected for less.—Yours obediently,

"JOHN STEVENS.

"Nov. 10, 1858."

Previous to these letters an agreement was entered into between the plaintiff and defendant for the erection of a wooden house according to a specification. Although agreed to before the letters were written, it was dated on the 5th Dec., some time after the date of the letters. It was as follows:—

"Specification of works required to be done at No. 1, Bentinck-terrace, Regent's-park, for D. D. Gourley, Esq., M. R. C. S. E. Excavator: To dig out and remove clay to level of pavement, 16 feet back and 14 feet wide, to receive house. Bricklayer: To build

C. B.]

STRENS V. GOURLEY.

[C. B.]

three course of footings and sleeper walls, bed all quartering in mortar. Carpenter: To erect in wood a house, the dimensions to be 16 feet from front to back, at 13 feet 8 inches frontage; the height to be 13 feet frontage and 9 feet from floor to floor. To be built of quartering 3 x 2, and weather-boarded on outside, also to be match-boarded all over the inside. Ground-floor joists to be 4½ by 2 on sleepers 2 x 3 with ¾-inch yellow deal flooring, properly laid; also to put ceiling joists 3 x 2, rough boarded on top and match-boarded under, with one skylight in roof, the whole of the roof to be covered with zinc, with proper fall for water, the front to be made with two sashes, with door in centre, with all pilasters, mouldings, &c., as shown on plan, with 1½-inch bead and butt shutters, stall-boards, &c., complete, on cross partition, to be framed in 1½-inch yellow deal, with glass in upper part, with 1½-inch framed door in centre, and leave all perfect. Zinc work: To cover the whole of the roof with No. 9 zinc, properly solder all joints, eaves, &c. Smith: To provide all cocks, bars, nails, screws, &c. necessary for the completion of the aforesaid works. Painter: To paint the whole of the works in three oils outside and inside, and leave all perfect.

"I hereby undertake to complete the whole of the aforesaid works to the satisfaction of Mr. Gourley or his surveyor, as per specification, for the sum of 58*l*. To be completed on the 18th Dec. 1858.

"JOHN STEVENS,

"21, Western-terrace, Westbourne-grove west, builder.

"Dated Dec. 5, 1858."

The plaintiff employed a sub-contractor of the name of Way to execute the contract. No brick foundations were made, but joists were laid on the ground, and the wooden structure built upon them. Way was summoned before a magistrate by the district surveyor. The plaintiff attended on that occasion, and contended that the building was not within the Act, but Way, without the concurrence of the plaintiff, consented to the building being taken down, no penalty being inflicted upon him. The building was finally removed, and the man who took it away said he drew no nail, but lifted it right off the ground. The jury found a verdict for the plaintiff for 58*l*. A rule was obtained by M. Chambers, Q.C. calling upon the plaintiff to show cause why the verdict should not be set aside, and a verdict entered for the defendant, on the ground that the contract was an illegal contract, being contrary to the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 122, and that upon that question the decision of the magistrate was conclusive; or why a new trial should not be granted on the ground of misdirection, it having been left to the jury to say whether the defendant, knowing there were no footings, took to the building.

*Barnard* now showed cause.—The question is, whether a structure entirely of wood, which can be carried about, is a building within the Act. It is contended that a building within the Act must be on foundations. The test, according to sect. 8, whether a building is to be deemed a new building or not is, whether it is a certain height above the foundations. Where the Act speaks of old buildings it also refers to foundations: a building, therefore, must have foundations. This structure could be, and was, lifted bodily off the ground, and was no more a building than a box would be a building. Then the decision of the magistrate is not conclusive upon the plaintiff, who was not summoned. Lastly, the building was delivered to the defendant, and he cannot now say it was an illegal building.

*Chambers, Q.C.* and *Joyce* in support of the rule.—The building was of combustible materials, and therefore illegal. By the first schedule to the Act the walls of any building must be of some incombustible

materials. There is no definition in the Act showing what is a building, and we must look at the whole Act to see what is meant by building. The Act, in saying the walls shall consist of stone or other incombustible material, by implication says they shall not consist of anything else. They cited *The Galight Company v. Turner*, 6 Bing. N.C.; and *Beasley v. Bignold*, 5 B. & Ald. 335.

*ERLE, C.J.*—I am of opinion that this rule ought to be made absolute. It appears to me that the ultimate contract that was made to between these parties was a contract for a building, known to the plaintiff to be in violation of the Building Act; or, there was a contract which, whether known to him or not, was in violation of the provisions of the Building Act. The difficulty we have had is in defining the word "building;" and we do not intend to attempt to lay down any definition of the word "building;" but we think that, to take the intermediate word, the structure in question here was a building within the Act. I look at the original contract between the parties, and there it is called indifferently, "a house" or "a shop." The original contract between the parties was for a structure upon a brick foundation, to be permanent, to have a permanent foundation, and to last probably for as long as the defendant's lease and all that he held should last; and the substitution of the contract came afterwards, in which, instead of a brick foundation, a wooden structure was to be raised on joists, and so a timber foundation was to be put there in lieu of a footing of brickwork; that was an entire structure composed of wooden joists laid on the ground, and wood added to it, until the shop was made. It appears to me, by the letters between the parties, it was clearly to have answered the purposes of what had been called originally either a house or a shop, and the letter expressly declared that it will answer all the purposes and look as high, and last as long, as the structure originally contemplated. Now the structure originally contemplated was, within the understanding of all the parties, a structure and building within the provisions of the Metropolitan Building Act, and a substitution of a wooden foundation in lieu of a foundation of masonry was, in the language of the letter, for the purpose of evading the Metropolitan Building Act, and to prevent the jurisdiction of the district surveyor of the Metropolitan Board of Works applying. I am of opinion that the plaintiff was wrong in his notion. I am of opinion that a building or house constructed of wood to have no masonry let into the ground as its foundation—a house constructed of wood—would have all the peril of being built of combustible material that it would have had in case it had a brick foundation. I consider that the 12th section of the Metropolitan Building Act does command that all walls shall be constructed of such substances, of such thickness and in such manner as mentioned in the schedule thereunto annexed, and the first schedule thereunto annexed says, that every building shall be inclosed in walls constructed of brick, stone or other hard and incombustible substances; the foundation shall rest on the solid ground, or concrete, or any other substance. It appears to me that is a command to build the wall of an incombustible substance, and a command to build it so is a prohibition against building it of wood or other combustible substance, and so the contract between the parties was a contract in violation of that express provision. I think the words of the clause and the schedule I have just read constitute an answer to a great part of the argument addressed to us on there being no foundation dug into the ground and composed of masonry, because there may be a foundation resting on the ground as well as a foundation that should be dug into the ground and so composed of masonry. A great deal of the argument raised on behalf of the plaintiff upon this occasion rested upon the fact that the structure was a

[Mag. C.]

C. B.]

STETENS v. GOURLEY.

[C. B.]

structure that" was removed in its entirety. I think that was in evidence. And it was said, because it had been removed in its entirety, it was in the nature of a box or a small article, and could not, with any correct use of language, be considered to be a house. But I think the answer to that is, that the contract was for that which is called in one part of the case and in another a shop, and the construction of a structure big enough for the purposes of human habitation, 16 feet by 13, with sufficient strength for use; and though by the application of great mechanical power a large structure of those dimensions can be removed in its entirety without being taken to pieces, that remarkable application of mechanical power does not prevent it being a building within the meaning of the Act. On the whole consideration of the matter I think the statute applies, and that this whole contract was a violation of the statute. These grounds are entirely irrespective of the opinion formed by the magistrate. The parties are to go before a magistrate, whose powers are set out, but that is independent of the principle on which my opinion is founded.

WILLIAMS, J.—I am of the same opinion, though not without some doubt and hesitation. My doubt is founded on this: I entirely agree that a building of this sort is within the mischief contemplated by the Act, and therefore, if the Act of Parliament can be so construed as to include this case, we ought so to construe it. On the other hand, however great the benefit to the public may be in giving a large interpretation, we ought not to construe an Act in a beneficial way if on the face of it it is apparent that the Legislature did not mean to extend the Act, however useful that it should be extended. The doubt in my mind has arisen in this way: that, by the 7th section it is provided the Act shall apply to all new buildings. Then comes the question, what are new buildings? It says a building shall be deemed to be new whenever the inclosing walls and roof have not been carried higher than the footings previously to the 1st Jan. 1858. Suppose in a case like the present that, at the date of the 1st Jan. 1858, the building in question had been previously carried up a certain height, is that a new building within the meaning of the Act of Parliament? That is to be ascertained by applying the parliamentary test. Then the test is to see whether the walls have been carried higher than the footings. It is impossible to apply that test, because there are no footings. Therefore the argument founded on that, not with reference to the main question in this case, but only as an argument, is, by implication, that the intention of the Legislature was, that the Act should apply to cases where the building was a building that had footings. This had not footings. I have some doubt still whether this Act meant it to apply to any sort of building to which the test I have given to ascertain whether it is a new or old building cannot be applied; but that is not a sufficient doubt to induce me to differ from the rest of the court. On the whole I concur, assuming this to be a building within the meaning of the Act. It is clear the contract is a violation of the Act of Parliament, according to the principle laid down in *Forster v. Taylor*, 5 B. & Ad. 887, where it was held that the vendor of butter in firkins, under the provisions of the 36 Geo. 3, c. 88, could not recover the price of the butter, because the provisions of that Act had not been complied with. It is clear the plaintiff cannot avail himself of the contract entered into here, and therefore that part of the rule, about being misled and the thing becoming useless to him because the magistrate had the building removed, has become immaterial. It is sufficient to constitute a good bar to the action; and, in my judgment, the rule ought to be made absolute.

CROWDER, J.—I am of opinion that this rule should

be made absolute, upon the ground that the plea has alleged that which has been established in proof that the building in question—or the contract rather for the building in question—was a contract made and carried out in violation of the Building Act. I agree with my brother Williams that the rest of the plea is immaterial. The main substance of the contract was in violation of the Metropolitan Building Act. Now it would have been much more satisfactory, no doubt, if, in giving definitions as this Act has done—particularly what a public building is—some definition had been given of what the meaning of building must be taken to be. That has not been done, nor has any authority been cited in which the definition of the term "building," as used in this Act, has been given; nor do I intend to do more than my Lord Chief Justice, or to attempt to define precisely the extent of the term "building" in the Metropolitan Building Act. The question is, so far as we can ascertain it, whether the contract in this case was a contract for a building, which building was within the meaning of this Act? And looking at the facts, it certainly appears perfectly clear that the original intention of the parties was the erection of a structure about which there could be no doubt, by setting brick-work into the ground and putting the structure upon it. No doubt could be entertained that this would have been a building. The intention appears to be shown by the two letters given in evidence, and the effect of those letters was to endeavour to evade (and the plaintiff thought he had succeeded in evading) the provisions of this Act. But in looking at these letters, and throughout the whole of the evidence, it appears to me it was still the intention of all the parties that this should be a permanent structure, and it is with reference to its permanency I desire to give my opinion that it falls within the terms of the Metropolitan Building Act, because I observe that in the first letter it is said that the shop is to be built all in wood: "I have found out a new plan for us to work in reference to this shop;" and it was to be placed there as a permanent thing. It is to be built all in wood; it would be less expensive and answer all the purposes and it would avoid the Metropolitan Building Act; "and it will last quite long enough for you." Now, what was intended originally by this specification. It appears it was to last a considerable time, according to the terms of the letter; the change in it was thought to effect an evasion of the Act. Does that alter its permanency? The other letter is to the same effect. Now a difficulty that occurred to me during the argument was upon the first schedule, which is referred to by the 12th section, that the walls shall be constructed of a particular substance. The language of the schedule is, "Every building shall be inclosed with walls constructed of brick, stone, or other hard and incombustible substances, and the foundations shall rest on the solid ground, or upon concrete or other solid substance;" assuming, therefore, whatever the structure should be it is to be a building that should have foundations that might rest upon the solid ground, or on concrete in the ordinary way. Then there was certainly raised a considerable doubt in my mind whether this thing that was to be put up had any foundations at all; but I think the Lord Chief Justice has stated that which I am inclined to agree to, that a foundation of some kind in fact must have been laid for it on which the rest of the superstructure was attached. It would probably be an answer to the objection there must be a foundation, that there was in this case a foundation. Then with respect to sect. 8, which has been referred to, I own I incline to think that the terms there, "that a building shall be deemed to be new whenever the inclosing walls thereof have not been carried higher than the footings previously to the said 1st day of Jan. 1856;

C. B.]

SEWELL v. TAYLOR.

[C. B.]

any other building shall be deemed to be an old building," were intended to apply to one species that is deemed to be unlawful, namely, a building such as wooden buildings only; and I think up to the period when the Act passed it would be difficult to say that is the only definition of an unlawful construction. In this case the parties could hardly contend, if they had let the wood into the ground five feet deep without any footing and so erected it, that this would not have been a building within the meaning of the Act of Parliament. I am inclined therefore to say the 8th section only refers to one species of building, not making the definition to include any building, on the ground that this is a structure of some considerable magnitude for a shop—a large room—set up for a permanent purpose, and with the intention to be permanent. It does seem to me that it falls within the meaning of "building," as far as I can collect, within one of the meanings, at all events, intended by the statute; certainly it is within the mischief, and therefore being clearly within the mischief contemplated by the Act, I am bound so to construe it. It seems to me it is within the terms of the Act as well as within the spirit. Therefore this was a contract for an unlawful building, and was in violation of the Act of Parliament.

ByLES, J.—I also am of opinion that this rule must be made absolute. The respect I entertain for my brother Williams' opinion, who has expressed some doubts, has created the only difficulty I feel. I agree with my brother Crowder that, as far as sect. 8 applies to buildings of a particular class, a question might arise whether they were new buildings or old buildings, and the 8th section is directed solely to the solution of that difficulty, leaving it quite independent of other sections of the Act, which embody the schedule No. 1, enacting that every building shall be constructed of incombustible substances. That being so, the question is, whether this is a building; and that seems to me to be the only question, because it does not appear from this plea but that the defendant may have derived some benefit from the erection; therefore it is quite necessary for him to make out the first part of the plea, that is to say, that it is an illegal building. Then that brings the question to this: what is the meaning of the word "building?" It is to be observed the word "building," as often happens is used in a sense wider than the substantive building. It is suggested by my brother Williams, that we speak of the building a carriage, or building a ship—it is said that birds build nests; but neither of those three things would be called buildings. The meaning of the word building must be decided by that which is its ordinary acceptation, and it is a well-established rule, that words in a statute are to be construed according to their ordinary meaning. It is difficult, I may say impossible, to define the word building, but that is an impossibility which is not peculiar to the word building, and arises from the imperfection of human language. It is easy to say this thing is a building, and to say that is not a building; then, if it is not possible to define the line where the true description ends, common language must be our guidance, and we must follow the rule expressed in the maxim *res ipsa loquitur*. What is the ordinary meaning I do not pretend to say. It is usually understood to be a structure, an edifice, or an erection, or something of considerable size, intended to be permanent, and intended to last for a considerable time, whether let into the ground or not. A church built of iron, or an edifice built of wood, a house or a stable, or a night house for cattle, or a coach-house, are evidently buildings; but it is equally clear that a birdcage, with a handle for lifting it off the ground, is not a building; or, a wig box; the value of these things consisting of their portability. On the other hand, a dog kennel, though fixed to the ground, would not be a building, because it was not of any size as a coop for fowls.

It is not necessary to say whether they would or not; in this case this shop, many feet wide and many feet high and long, intended for the ordinary business of human life, is a building in the ordinary sense of the word. But then what is the object of the Act of Parliament? The object of the Act of Parliament is, that land should not be covered with combustible structures. To depart from the ordinary sense of the word building would, therefore, frustrate the object of the Act. On these grounds, looking at the ordinary signification of the word—the meaning—there cannot be a doubt of this, that it is a building within the Act: the plea is proved, and the rule should be made absolute.

Rule absolute.

Monday, Nov. 14.

SEWELL (appellant) v. TAYLOR (respondent).

*Vagrant Act, 5 Geo. 4, c. 83, s. 4—Rogue and vagabond—"Place of public resort"—Sale by auction.*

*A sale by auction, called by public placards, and held in a house and garden in and adjoining a public street, to which sale the public had free access, and where a large number of persons were assembled, is a "place of public resort" within the meaning of the 4th section of the Vagrant Act, 5 Geo. 4, c. 83; therefore a "suspected person" apprehended in such a place was held rightly convicted as a rogue and vagabond.*

Case for the opinion of the court under the statute 20 & 21 Vict. c. 43:—

"On the 4th April 1859 Joseph Sewell was brought in the custody of Walter Taylor, a constable for the borough of Congleton, in the county of Chester, before us, Edward Harrison Solly (mayor), and Edward Lowndes Mallabar, two of the justices of the said borough, and charged,

"For that he, on the 30th day of March 1859, being a suspected person or reputed thief, did frequent a place of public resort in the said borough with intent to commit felony, contrary to the provisions of the Vagrant Act, 5 Geo. 4, c. 83, s. 4.

"The prisoner was remanded twice, and the examination was concluded on the 13th April 1859.

"We found it proved that the prisoner was a suspected person, and that on the 30th day of March 1859 he was at a sale of household furniture, books, pictures, &c., held at a place called Moody Hall, in this borough; that such sale was called by public placards posted in the town and neighbourhood several days previously to its being held; that at least three hundred persons were there congregated; that the sale was by public auction, and that it was held on two consecutive days in a house and garden adjoining one of the public streets of this borough, and that the prisoner was there with intent to commit felony.

"On behalf of the prisoner it was contended that private premises on which a sale by public auction was being held did not come within the meaning of the term "place of public resort" in the fourth section of the Act; that a place of public resort meant a place to which the public were in the habit of resorting, and not a mere special assemblage or collection of persons for a purpose which might never occur there again.

"We decided that there was a difference between a place of public resort and a place of common resort; that the above-mentioned place of sale was a place of public resort to all intents and purposes, for the time being; for that the public had full and free access thereto, and passed and repassed at will to and from the said sale; and that as many persons did actually resort thereto, it was such a place as was intended to be protected by the section.

"We accordingly convicted the prisoner of being a rogue and vagabond, within the intent and meaning of the fourth section of the said statute, and ordered him to be committed to the house of correction at Nether

C. B.]

ROGERS v. LEWIS.

[C. B.]

Knutsford, in the county of Chester, with hard labour, for two calendar months.

"The prisoner's attorney having applied to us to state a case on the above question for the opinion of the Court of Common Pleas, we granted the application, and we now state the grounds of our determination pursuant to the statute 20 & 21 Vict. c. 43.

"Dated at Congleton aforesaid the eighteenth day of April in the year of our Lord one thousand eight hundred and fifty-nine.

"EDW. H. SOLLY.

"E. L. MALLABAR."

*M. Lloyd* for the appellant.—The point here raised is, whether the house and garden on the occasion mentioned formed a "place of public resort" within the meaning of the 4th section of the 5 Geo. 4, c. 83, which enacts (*inter alia*), that "every suspected person or reputed thief frequenting any river, canal, or navigable stream, &c., or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, &c., shall be deemed a rogue and vagabond within the true intent and meaning of the Act, &c., and it shall be lawful for any justice of the peace to commit such offender to the house of correction," &c. It is contended that a place of public resort, as contemplated by the statute, means a place where not only the public may resort, but which they are in the habit of resorting to. The house where the sale by auction was held was a private house, and the fact of a sale being held there on this particular occasion did not alter its nature as a private place: (*Ex parte Elizabeth Jones*, 27 L. J. 117, M. C.) The places of public resort mentioned in the statute mean places of a permanent nature for the resort of the public. Suppose, instead of occupying two days, the sale had only taken one day, then would arise, if the court should uphold the conviction, this palpable absurdity, that a house may be a place of public resort one day out of the 365 which constitute a year, and during the remaining 364 days a private house. In *Davis* (app.), *Douglas* (resp.), 28 L. J. 193, M. C., it was held that a booth used as a theatre by strolling players is not a house or place of public resort within 6 & 7 Vict. c. 68, s. 2. [ERLE, C.J.—You need not refer to that statute, for that is a case under the Licensing Act.] It assists the argument that a "place of public resort" must be permanent and not temporary in its nature. The house in question is to all intents and purposes a private house and garden; the public had only licence to come there on one occasion at a stated time and for a particular purpose; and as the place is not a place of resort of a permanent character, it is not a place of public resort within the meaning of the statute; furthermore it is not a place of public resort, because the public had only a licence to go there on this particular occasion of the sale by auction. For these reasons the judgment of the court should be for the appellant.

*M'Intyre*, for the respondent, was not called on.

ERLE, C.J.—I am of opinion that there is no ground whatever for the appeal, and that the conviction should be affirmed; for it seems to me that the magistrates were right in their decision, and that the place where the appellant was taken, the same being a public auction, was a place of public resort within the meaning of the Vagrant Act. I see no reason whatever why the place should be one of a permanent nature where the public were in the habit of resorting. The object of the statute is to protect large assemblies, and it extends to places where such may congregate. Permanence is not a material element in the question. Suppose a public assemblage of persons—such, for instance, as races—takes place in a meadow for one day, I think that would be "a place of public resort," under the circumstances, and "the street, highway or avenue leading thereto," within the meaning of the

statute. Churches and theatres are places of public resort, where, at intervals, large numbers of persons assemble, yet they are not permanently open; but no one supposes that such places are not within the protection of the Act of Parliament. For these reasons I hold that this appeal must be dismissed.

CROWDER, J.—I am quite of the same opinion. The words of the statute are very large, comprehending a great number of places, and they must be taken, therefore, in a large and extended sense. A "place of public resort" may be construed to extend to a sale by auction under such circumstances as exist in this case. It need not be permanent in its nature—that is, a place where the public are in the habit of congregating or using.

BYLES, J.—I think that the true construction of the words in the 4th section of the Vagrant Act is that now put upon them by the court. The many places specified in the statute as within its protection fortifies me in this view, for they are not all necessarily places of permanent public resort. I need hardly observe that the place in question is within the mischief which it is the purpose of the Act to guard against; for we often see in London sales taking place in private houses, which, if unprotected, great opportunity would be afforded for the commission of robberies.

WILLIAMS, J. had left the court.

*Judgment for the respondent.*

Saturday, Nov. 19.

ROGERS (appellant) v. LEWIS (respondent).

Registration appeal—2 Will. 4, c. 45, s. 28.

*In case of successive occupation of premises in a city or borough for which a person claims to vote, proof of payment of the rates, without proof of rating, is sufficient.*

CASE.

At a court held before me, Henry Blencoe Churchill, barrister-at-law, duly appointed to revise the list of voters for the borough of Reading, Henry Pocock objected to the name of John Jones being retained on the list of voters for the parish of St. Giles. John Jones occupied a house in Crown-street till Dec. 1858, and was duly rated in the October rate, the only one made between July 1858 and the end of his occupation. He moved in December to a house in Boul's-walk. The claim is annexed. Another rate was made in April 1859, on which his name did not appear. He made no application to be rated; but the collector called on him, and he paid the rate, for which the collector gave the usual receipt. The house mentioned in the rate is that for which the claim is made; an exact copy of the rating in the book is annexed. It was contended that rating for the house to which the voter has removed was not necessary, and that, if it was, the payment of the rate to the collector under the circumstances stated was equivalent to a demand to be rated. I held that the rating to the second house was necessary, and that the payment to the collector was not equivalent to a demand to be rated; and I expunged the name of John Jones from the list.

(COPY OF RATE.)

Parish of St. Giles, Reading.

No. 365.—Rate made the 21st day of April 1860.

Name of owner.	Description of property rated.	Name or situation of property.
Hastell, James	House.	Boul's-walk.

Gross estimated rental, 18s.; rateable value, 12s. 10d.; rate at 1s. 4d. in the £. 18s.

(COPY OF CLAIM.)

Jones, John	{ Boul's-walk Whitley-str.	{ Houses occupied in immediate succession.	{ Crown-street Boul's-walk Whitley-str.
-------------	-------------------------------	--	---

*Dowdeswell* for the appellant.—First, under 2 Will. 4, c. 45, s. 28, rating to this rate was not necessary.

C. B.]

MELBOURNE v. GREENFIELD.

[C. B.]

That section enacts "that the premises in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any city or borough as aforesaid, shall not be required to be the same premises, but may be different premises occupied in immediate succession by such person, during twelve calendar months next previous to the last day of July in such year; such person having paid, on or before the 20th day of July in such year, all the poor-rates and assessed taxes which shall, previously to the 6th day of April the then next proceeding, have become payable from him in respect of all such premises so occupied by him in succession." Payment of the rate is all that is necessary: (Rogers on Election, 73.) By sect. 27, rating as well as payment is required in the case of the same occupation. The change of language in the 28th section shows the intention of the Legislature.

No counsel appeared for the respondent.

ERLE, C. J.—I am of opinion that our judgment ought to be for the appellant. It appears to me that the argument of Mr. Dowdeswell, in respect of the construction of the 28th section applying to premises occupied in succession is well founded. Where the qualification arises on one set of premises, the party must be rated and must have paid the rates; where the qualification is for premises occupied in succession, according to the words of the statute, the party must have paid the rates. Now it appears to me the difference of wording does warrant the conclusion which Mr. Dowdeswell wishes us to found upon it; and looking at the nature of property occupied in succession and the length of time for which rates are made, and during which the rates are in the course of being collected, and looking at the provisions which are made in several statutes, in case there should be a change of occupation, about the allowance to be made to the incoming tenant, and his liability, and that of the outgoing tenant, I think it was clearly under the consideration of the Legislature to make provision for the payment of rates where there has been a succession of occupation. There would be great inconvenience if the Legislature required a person to interfere and have his name put on the rate which might have been made two quarters before, or may be nearly expired, or may be in the process of formation. I think that the purpose of the change of language in the two sections was to say that in the case of successive occupation the qualification should be sufficient in respect of rates, provided the rates should have been paid, and it does not require that the party's name should be on every rate due in respect of each of the two premises. I am also of opinion, if it were necessary to go into it, that the appellant is entitled to succeed on the other point; but it is not necessary to resort to that.

WILLIAMS, J.—I agree with my Lord as to the construction of the 28th section, and it is unnecessary to give any opinion upon the other point.

CROWDER, J.—I am also agreed as to the construction of the 28th section, and I do not desire to give any separate opinion upon the other point. (a)

*Judgment for the appellant.*

Wednesday, Nov. 16.

REGISTRATION APPEAL.

MELBOURNE (appellant) v. GREENFIELD (respondent.)

*Election law—County vote—Notice of objection—6 & 7 Vict. c. 18, ss. 7 and 101—"Place of abode"*

*—Mistakes and misnomers.*

*An objector to the name of a voter being retained on the list must state his present "place of abode."*

(a) But it must be observed that this decision is applicable only to the case of a successive occupation. Where there is no change of occupation there must be an actual rating as well as a payment of rates, and payment will not supply the defect in the rating.

*that is to say, the place where he resides at the time when the objection is made.*

*In a notice of objection the objector described himself as of "Cowhill, Belper," on the register of voters for the parish or township of Belper. In the register of voters his "place of abode" was described as of "Cowhill, Belper." It was proved in evidence before the revising barrister, that he had left Cowhill, Belper, for another residence nearly a year before the date of the notice of objection:*

*Held, that the description did not comply with the requirements of 6 & 7 Vict. c. 18, s. 7, sched. A. No. 5, and was therefore insufficient.*

*Sect. 101 only applies to cure mistakes or misnomers, not where the party has put down what he intended to put down, but acting on a misapprehension of the law.*

The following case was stated by the revising barrister:—

At a court for the revision of voters, held before me at Derby, James Melbourne objected to the name of Richard William Greenfield being retained on the list of voters for the parish of All Saints, Derby, in the southern division of the county of Derby.

The following is a copy of the notice of objection:—

"To Mr. Richard William Greenfield.—Take notice, that I object to your name being retained in the All Saints, Derby, list of voters for the southern division of the county of Derby.

"JAMES MELBOURNE, of Cowhill, Belper,  
"On the register of voters for the parish or township of Belper.

"Dated, August 15th, 1859."

The appellant's name appeared in the register of voters for the township of Belper, and was therein described as follows:—

Name of voter.	Place of abode.	Qualification.	Street.
Melbourne, James.	Cowhill, Belper.	Freehold houses & land	Gutter

It was proved in evidence before me that James Melbourne, the appellant, had removed from Cowhill, Belper, in Oct. 1858, to a place called Gutter, in the same township of Belper, and that he was not residing at Cowhill at the time he signed the objection, and described his place of abode, "Cowhill, Belper," and upon this it was contended that the notice of objection so signed was invalid, as not giving the true place of abode of the objector within the meaning of the Registration of Voters Act 1843.

On that ground I held the notice of objection insufficient, and retained the name of the respondent on the list of voters without requiring proof of his qualification. If I am right in so holding, the name of the respondent is to be retained; otherwise it is to be expunged.

Hayes, Serjt. for the appellant, contended that the description was sufficient. It is optional to give the present abode or that in the register. The court has generally upheld notices where they give substantially what is required by the Legislature.

Macnamara contra.—This notice of objection is bad: (*Knowles v. Brooking*, 1 Lutw. Reg. Cas. 461; *Walker v. Payne*, 1 Lutw. 324.) The place mentioned in the list of voters might give no information at all to the person objected to as to the whereabouts of the person making the objection. The objector might be travelling abroad: (*Toms v. Cunningham*, 8 Scott N.R. 910; *Woollett v. Davis*, 4 C. B. 115.) There Wilde, C. J. said "that no notice can be deemed to be in the form or to the effect required by the statute, which does not in itself contain a sufficient statement of the place of abode. We think it is contrary to the intent and meaning of the Legislature, that the party receiving the notice should be compelled to take trouble, and to resort to other sources than the notice itself, in

order to obtain the necessary information as to such place of abode." It is most essential that the person objected to should have on the face of the notice itself, and without further trouble, means of knowing the true residence of the objector, in order, first, that he may learn accurately from him the nature or ground of objection, and secondly, that he may be enabled to enforce costs if awarded against him. It is important that the description should be specific, and that the person objected to should not be liable to be misled, as here he is. [WILLIAMS, J.—At one time the requirement as to correctness of description was thought so strong that the name of Nickless was objected to, the name being Nicholas; but the court in that case held that the sufficiency of the notice was a question of fact, and not of law, and that as the name was so stated in the list of voters as to be commonly understood it did not signify.] Yes. That was the case of *Hinton v. Hinton*, 1 Lut. 25. This, however, is not misdescription, which means erroneously describing what was intended to be described, but a false statement calculated to mislead: (*Gadsby v. Warburton*, 7 M. & G. 11.) The true rule on the subject is to be found in *Knowles v. Brooking*, ubi supra. There Tindal, C. J. says: "The giving the true place of abode of the objector must afford a better opportunity for inquiries and communications than the adding of the old place of abode, which it must be assumed from some cause or other is incorrect at the time of giving the notice."

Hayes, Serjt. in reply.—As to the objection, that the notice is bad because for anything it shows the objector may be travelling abroad, it is submitted that the notice would be sufficient if it described the objector as in the United States of America. It is a new question whether this notice is bad; it answers substantially all that is required by the Legislature, and is, therefore, sufficient. If the court should think it a misdescription, that is cured by 6 & 7 Vict. c. 18, s. 101: (*Feddon v. Sayer*, 12 C. B. 693.)

ERLE, C.J.—I am of opinion that the decision of the revising barrister was right. The objector is bound, upon his notice of objection, by the Act of Parliament, to give his "place of abode," and the question has been argued, in consequence of the way in which those words "place of abode" appear in the Act of Parliament, whether "place of abode" there, when the abode has been changed since the last register is published, means place of abode mentioned upon the register—that which was his place of abode then, or his present place of abode. Now, I am of opinion that the words, taken in their ordinary acceptance, would mean his present place of abode; but I give that decision at the present moment with the more confidence, because I consider it was a decided question at the time when the case of *Knowles v. Brooking* was before this court. There the question was, whether the present place of abode, in case of the change I have mentioned, was a sufficient compliance with the Act of Parliament; and it was decided by the majority of the court, and so must be taken to have been then *res judicata*, that his present place of abode was a compliance with the Act. And I am at a loss to see how I can judicially say that in the words "place of abode" the Legislature intended to say "two places of abode," either his past or present, at the option of the objector. I think they meant one; and, it having been decided by the case of *Knowles v. Brooking* that his present place of abode was a compliance with the Act of Parliament, I consider I should be conflicting with that decision if I were to hold that his past place of abode, namely, that which he had when the register was published, was also a compliance with the Act of Parliament. I could not come to this decision without saying that place of abode was intended in two perfectly distinct and irreconcilable senses, as giving an option to use either of them. As that was

decided on great deliberation, I adhere to it on account of its great importance, as many rights are affected, and we are to abide by what I consider to be a decision on the point. I observe in that decision the conveniences of one construction and the other construction with elaborate minuteness are gone into on the one side by Tindal, C. J., and on the other side by Maule, J., and I took part in the decision, and concurred in the opinion that the present place of abode would be sufficient. I do not say that if it was purely *res nova* I should not have strained, and used my utmost ability to put any construction on those documents to hold them to be valid, had the parties intended to exercise a right, and nobody had been misled by the document. If I did so now I should be running contrary to that which has been taken to be the law upon the construction of the 101st section.—I should have been running contrary to that which has been taken to be the law, assumed to be the law, known to be the law, and acted on as being the law in numerous decisions, if I were now to say that by virtue of the 101st section, containing the provision, that no misnomer, or inaccurate description of any person, place, or thing, shall abridge the operation of this Act. If I were to hold that the section could be applied where the party distinctly intended the place that he has put down, and made no mistake, no misnomer, no inaccurate description of that place, but mistook the requirement of the law, intending to put down the place which he did put down, and did intend to put down that place under a mistaken interpretation of the law, I take that to have been held, and assumed, if I may so say, through a great number of decisions, that the construction does not apply, and could not be used to support the notice. The party had named the place according to the intention, minutely and accurately, and intended that only, but mistook the requirement of the law. Under those circumstances I am of opinion that the revising barrister was right. I say nothing of a great deal of what has been argued as to the comparative advantages or disadvantages of either construction. I consider that it is impossible to add anything to the respective statements of the balance on either side, by the Lord Chief Justice on the one hand, and Maule, J. on the other.

WILLIAMS, J.—I am entirely of the same opinion. The point arises on the construction of No. 5, schedule A of the 6th Vict. c. 58, the question of construction being on the meaning of the words "place of abode" in the form given in No. 5. It seems to me abundantly clear that it must either mean place of abode as described in the list, or it must mean the present place of abode. The Act of Parliament, by using the expression "place of abode," never could have meant either the place of abode mentioned on the register of voters or the present place of abode. If that be so, the question is to decide what it means. I certainly think, if this case was free from authority, I should have no hesitation about it, that the natural meaning of the expression in the form given by the statute is the present place of abode. If it was a question of authority the case of *Knowles v. Brooking* is clear and direct, that it is sufficient to state the present place of abode. If it is sufficient to do that, it can only be because the Act of Parliament means that; if it does not mean that, it does not mean the place of abode mentioned on the register. The decision of that case binds us to hold that it must be the present place of abode, and therefore the notice is not in conformity with the statute. But then it is said that the objection is cured by the 101st clause of the 6 & 7 Vict. c. 18, by the enactment that no misnomer or inaccurate description of any person, place, or thing named shall in any way prevent or abridge the operation of the Act, provided that such person, place or thing shall be so denominated in such schedule, list, register or notice, as to be com-

C. B.]

PADWICK v. KING.

[C. B.]

only understood. Now, for the purposes of this point it must be assumed that the law is that the objector ought to have described his present place of abode. I apprehend the meaning of the Act of Parliament is that, the rule being so, if he had intended to comply with the Act, and intended to describe his present place of abode, then, notwithstanding he had given an inaccurate or an inapt description of his present place of abode, that that inaccuracy and that inaptitude shall not vitiate if the description could be commonly understood. It does not appear to have any application to a case where he did not intend to describe his place of abode, but intended to describe something else. That is not found in this case, and it cannot be decided on that ground. I entirely agree with the Lord Chief Justice.

CROWDER, J.—I must own I have been unable, during the whole of the argument on the part of the appellant, to bring my mind to entertain any doubt whatever upon this question, either looking at the section and reading it without reference to authority, or looking at the authorities which have been decided upon it. Anybody taking up this schedule and finding that a man gives notice and puts a date—"dated this 10th day of Aug. 1859, A. B., place of abode"—would never entertain a doubt that the clear construction of that was, that the man who was writing the notice at the date at which he fixes it, meant that at that date, that is the place of abode in which he then is at the time he signs the notice. Great ingenuity, when one looks at the cases, certainly has been used to show that it means something different. Looking at the schedule A, No. 5, itself—"A. B. of — place of abode"—and then mentioning "on the register of voters," I should never myself have been able, without a great deal of argument, to entertain a doubt what that means. Then the authorities have been referred to. I agree with the Lord Chief Justice that *Knowles v. Brooking* contains every argument that can be urged on one side and the other by men of great learning, and who seem to have had sufficiently brought to their attention everything that could be urged, and nothing omitted, by the Lord Chief Justice on the one side, and Mr. Justice Maule on the other. I may say that which the present Lord Chief Justice could not say, that, in addition to the arguments urged by the Lord Chief Justice, there were the cogent arguments of Mr. Justice Erle in agreeing with the judgments of the other judges. There was a great deal of good sense and sound argument on that side. It is clear, looking at that case, the foundation of my brother Hayes' argument is at once destroyed—namely, that it may be optional to give the one or the other. I think it is clear that those who entertained different opinions in the case of *Knowles v. Brooking*, each entertained the opinion that there was only one place of abode to which the statute could refer. I cannot in the least comprehend how they can have intended that it may be one or the other. I think we must come to the conclusion that it is one: then the authority seems to me conclusive. I do not desire to go into the question of the balance of convenience, though I must own in my own mind I am able to agree with the majority of the court in *Knowles v. Brooking*. The question has been decided in 1846; and I agree with the Lord Chief Justice in thinking that decision most clearly made, after great deliberation. As to the 101st section, the authorities clearly show that it was never intended to be applied to such a case as this, for the inaccuracy or misdescription referred to is different. No case has been shown in which such an inaccuracy has been brought within the section. It might be somewhat inferential—I do not say it is at all conclusive—when a great case like that of *Knowles v. Brooking* was before the court, the majority on one side and that learned person, Maule, J. on the other, they both and each conclude for the abode being the

present one; nor was it at all adverted to by the counsel that it could possibly come within the 101st clause. Then can it be said that there is an inaccuracy of description? A man intends to describe himself particularly; he does not put down Cowhill instead of Gutter by mistake. If he clearly intended to give his present place of abode, and put in Cowhill somehow or other, there might be something in it. It is clear he put in one instead of the other, intending to put it there. I am at a loss to understand how that can be within the 101st section. The case is perfectly clear, and our judgment ought to be for the respondent.

BYLES, J.—I agree with the conclusion at which the rest of the court have arrived, and I agree with that judgment entirely on the weight of authority. It seems to me that the case referred to has decided the question, and I rather think that that case, though not expressly, yet impliedly, has decided the other point, namely, that the 101st section is not applicable to a case of this description. On the ground that this is *res judicata*, I concur in the judgment of the rest of the court. *Judgment for respondent, with costs.*

Friday, Nov. 18.

PADWICK (appellant) v. KING (respondent).

Game—Information under 1 & 2 Will. 4, c. 32, s. 30—Right of tenant to authorise servant to kill rabbits.

*By a lease the landlord reserved to himself liberty to hawk, hunt, course, shoot, fish and jowl upon the demised lands; and by agreement with H. (a subsequent tenant, who held in all other particulars except the game on the same terms as the lessee his predecessor) the right to sport on the land was reserved to H. H. directed his servant to go on the land and shoot a rabbit, whereupon an information was laid against him by the landlord, which the justices, acting on the authority of Spicer v. Barnard, 28 L. J. 177, M. C., dismissed:*

*Held, that the justices were right; that the case came within the authority of Spicer v. Barnard, and, therefore, the information was properly dismissed.*

Case stated by the justices of the Havant petty sessions to the Court of Common Pleas under the 20 & 21 Vict. c. 43, on the application of William Frederick Padwick.

William King was charged under the 30th section of 1 & 2 Will. 4, c. 32, at the Havant petty sessions, held on the 10th May 1859, with having on the 30th April 1859, at the parish of Hayling South, in the county of Southampton, committed a certain trespass, by entering in the daytime upon certain land there situate, the property of William Padwick, in pursuit of coney, contrary to the statute, to which he pleaded not guilty.

It appeared in evidence that at 7.35 p.m. on the 30th April 1859, William King, the parish clerk of Hayling South, was in a field, the property of William Padwick, in the occupation of Henry John Hawkins, with a gun in his hand; that the gun was pointing towards a bank, beyond which was a hedgerow, beyond which was a road, and beyond which was a coppice. The hedgerow and coppice were the property and in the occupation of William Padwick. The road was an occupation road, and used by Padwick and Hawkins. The road was distant about fourteen yards from where King stood. William Frederick Padwick, who holds a deputation from William Padwick, the lord of the manor, jumped over the hedge into Hawkins' field, went up to King, and said, "What are you up to?" King replied, "I am come to shoot a rabbit; my master (Hawkins) told me I might come and kill a rabbit for my wife, who has been confined." Loddard, a witness who accompanied William Frederick Padwick,



C. B.]

PADWICK v. KING.

[C. B.]

stated that King said that Hawkins had asked him if he knew anything about wiring; and that he had replied by saying that he knew nothing of wiring. William Frederick Padwick thereupon called Loddard, a servant of his, who took the gun from King and handed him over into the custody of the police, by whom he was taken to the Havant station, and locked up for the night upon a charge of night poaching, which the justices strongly reprobated.

King stated, in defence, that he went into his master's field with the leave of his master, to kill a rabbit for his wife, and he called Hawkins, his master, who proved that he was the occupier of the field as part of the manor farm; that he had succeeded James Christmas under agreement with William Padwick, as tenant, upon the terms generally of Christmas's lease, of which there had been no assignment, and that he had constantly killed rabbits on the land of his occupation; that the terms of the lease with regard to game had been varied by the agreement. The lease between William Padwick and James Christmas, dated the 10th Feb. 1846, was put in. It contained the following reservation and covenant:—

"Except and always reserved unto the said William Padwick, his heirs and assigns, and his and their friends, companions and gamekeepers, free liberty from time to time, and at all times during the term granted, to hawk, hunt, course, shoot, fish and fowl in and upon the said demised premises, or any part thereof.

"And also that the said James Christmas, his executors and administrators, shall and will use his and their utmost endeavours to preserve the partridges, pheasants, quails, hares, and other game; and also the fish in the ponds, and the spawn, and the eggs thereof, for the sole use and pleasure of the said William Padwick, his heirs and assigns, on the said demised premises, except, nevertheless, that the said James Christmas shall be at liberty to course hares on the said farm, in case the said William Padwick, or William Frederick Padwick, shall not keep hounds, or greyhounds, but not otherwise."

The agreement between William Padwick, of the one part, and Henry John Hawkins of the other part, dated Oct. 6, 1857, was put in, and showed that Hawkins had agreed to become the tenant of Padwick, under and subject, and upon the same conditions, covenants, clauses, and agreements in every respect (except as to the amount of rent) as in the lease of the said James Christmas severally specified, with an exception in reference to the game in the words following:—

"Excepting that the said Henry John Hawkins shall have permission to sport over the said farm and lands."

The justices, John Deverell, Esq., and Henry Spencer, Esq., considered that under the circumstances Hawkins was a *quasi* assign of Christmas; that it was doubtful, under the terms of the reservation, whether Christmas and his assigns had not a concurrent right of sporting with Padwick; that rabbits were not mentioned in the reservation; and that the agreement of the 6th Oct. 1857 conferred a right of sporting upon Hawkins which he might lawfully exercise to the extent of killing rabbits by his authorised servant.

On these grounds, therefore, and on the authority of *Spicer and others v. Barnard*, reported in the Justice of the Peace of the 14th May 1859, they dismissed the information.

Dated the 1st day of June 1859.

JOHN DEVERELL.

HENRY SPENCER.

*Lush, Q.C.* for the appellant.—The justices were wrong in dismissing the information in this case. [The learned counsel recapitulated the facts as stated above in the case.] Here the person charged with the offence was found in the daytime in the pursuit of coney; the landlord has the game reserved to him, limited permission being given to the tenant himself to sport over

the farm and lands, and it was beyond his power to give authority to another to shoot upon the lands. The leave given to Hawkins, the occupier of the farm and lands, to shoot, is contained in these words: "The said Henry John Hawkins shall have permission to sport over the said farm and lands." Now this is clearly a limitation to himself alone. If we go further back to the reservation of the game in the lease to Christmas, it will be found as follows:—"Except and always reserved unto the said William Padwick, his heirs and assigns, and his and their friends and companions and gamekeepers, free liberty from time to time and at all times during the term hereby granted, to hawk, hunt, course, shoot, fish and fowl in and upon the said premises, or any part thereof." [BYLES, J.—Rabbits are not mentioned in the reservation in the lease.] No; but the tenant has covenanted to preserve the game, and rabbits are game. Though the question turns on the 30th section of the general Game Act, 1 & 2 Will. 4, c. 32, the 7th and 8th sections should be looked at. The 7th section enacts "that under existing leases the landlord shall have the game, and no person occupying any land under lease or agreement, either for life or years, made previously to the passing of the Act, shall have the right to the game, unless such right has been expressly granted by such lease or agreement, or except where on the original granting or renewal of such lease or agreement a fine shall have been taken, or except where, in the case of a term for years, such lease or agreement shall have been made for a term exceeding twenty-one years." The 8th section provides that nothing in the Act shall affect any existing or future agreements respecting game, nor any rights of manor, forest, chase or warren. The 30th section, which is the material one, enacts "that if any person shall trespass in the daytime in pursuit of game, or woodcock, snipes, quails, landrails, or coney, such person shall on conviction forfeit and pay such sum not exceeding 2*l.* as to the justices shall seem meet, together with costs of conviction," &c. "Provided always, that any person charged with such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass, save and except that the leave and licence of any occupiers of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor or other person shall have the right of killing the game by virtue of any reservation or otherwise; but such landlord, lessor, or other person, shall, for the purpose of prosecuting for each of the two offences last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or licence." It will be seen that, if the case stood upon the lease to Christmas, Hawkins could have no right himself to kill and take game, much less to authorise another to do so. Then again, the permission to him "to sport over the farm and lands" cannot confer a power on him to authorise King to do so. [BYLES, J.—The master having the right to take rabbits, may authorise his servant to do so for him: there are cases enough going that length.] Yes; but he can only empower the servant to shoot for his, the master's, benefit. The proviso to the 30th section is here material. It is submitted that the justices in this case should have convicted King, and the judgment of the court should therefore be for the appellant.

*J. J. Powell* for the respondent.—It is submitted, that both in fact and law, Hawkins, the tenant, had a right to go upon the land and kill rabbits, and that he could authorise the respondent, who was his servant, to do so. The respondent wanted a rabbit for his sick wife, and he asked his master for one, and it makes no difference that his master having no rabbit at hand to give, tells him to go and shoot a rabbit for his wife. It is just the same as if he said, "Go and shoot a rabbit and bring it

C. B.]

PADWICK v. KING.

[C. B.]

to me, and I will give it you for your wife." It is found in the case that respondent acted by Hawkins' directions. This being so, the case comes within the authority of *Spicer and others*, apps., *Barnard*, resp., 28 L. J. 177, M.C., where it was held that the occupier of land may, by himself or servants, kill coney, notwithstanding that in his demise there is a reservation of game to the landlord, nothing being said about coney. [ERLE, C. J.—In that case the rabbits were regarded by the tenant as a nuisance, and he hired a man and paid him to kill rabbits, which is a different thing.] Though the case finds that respondent went into the field with his master's leave to kill a rabbit, the reasonable intent is, that Hawkins directed him to do so; just as if, in fact, he had said, "I want a rabbit to give to you, I have not one at hand, go on the ground and kill one." In the 2nd section of the Act coney are not enumerated as game. That section says that throughout the Act the word "game" shall include hares, pheasants, partridges, grouse, heath or moor game, black game and bustards." Rabbits are not there named; they are only specified in the 30th section. The 12th section enacts, that where the right of killing game is given to the landlord or lessor in exclusion of the right of the occupier of the land, or where such exclusive right has been specially reserved by or granted to the lessor, landlord, or any person other than the occupier, then, if the occupier shall kill or take any game on the land, or shall give permission to any other person to do so without the authority of the lessor, landlord, or other person having the right of the game, such occupier shall on conviction forfeit for such pursuit, and pay, &c., for every head of game so killed or taken, such sum, not exceeding one pound, as to the justices shall seem meet. [CROWDER, J.—The difficulty is, that the reservation to Hawkins of a right to sport over the farm does not authorise him to empower another to do so.] It is contended that Hawkins had power to employ his servant to kill a rabbit under the 12th and 30th sections, which have been already referred to. For these reasons the judgment of the court should be for the respondent.

*Ask in reply.*—The distinction between the cases is this, whether the person who kills the rabbit does it for his master's benefit or for his own. In *Spicer's* case the man was employed and paid to kill the rabbits because they were a nuisance. The Game Act means to empower the occupier in certain cases to kill rabbits himself or by his servant, but it must be for the occupier's benefit, and not for that of another person.

ERLE, C. J.—I am of opinion that the order of the justices dismissing the information ought to be affirmed. I take it that this case is within the principle of the case in the Q. B. (*Spicer v. Barnard*, ubi supra), on the authority of which, as the case finds, the justices decided it. Hawkins, the tenant, had a clear right to sport and kill game upon the land, and I think he had power to employ others to kill rabbits; it makes no difference whether he employs the person to kill for presents or not. The case finds that the respondent went into the field to kill a rabbit for his sick wife, with the authority of Hawkins, which is much the same as if Hawkins killed it himself and gave it to the respondent; and it seems to me quite within the authority of the case in the Q. B. The justices thought that that case governed the present case. It is a very different thing authorising a stranger to come in upon the land to shoot a rabbit, and allowing or directing a servant to do so. Here the respondent is a labourer in the service of the tenant, who had, at all events, himself the right to sport over the farm and lands, and he had also the right to authorise his servant to shoot a rabbit under the circumstances of this case. The reservation of the game is in somewhat peculiar terms, but I do not go into the

consideration of anything arising from that fact, but decide upon the other ground. The judgment of the court must be for the respondent.

WILLIAMS, J. was absent.

CROWDER, J.—I am of the same opinion. I think the decision of the justices was right, and may be sustained under the authority of the case in the Q. B., which they had before them. As regards the question of sporting, that would perhaps require consideration; but there is no necessity of deciding upon that in the present instance.

BYLES, J.—I concur in opinion with the rest of the court. The justices, as it appears, had before them a case in which the legal distinction between leave and licence, and authority given by express directions, has been pointedly put and clearly stated. (a)

*Judgment for respondent, with costs.*

(a) This case, taken in connection with that of *Spicer v. Barnard*, 28 L. J. 177, M.C., decides, first, that a tenant (when the game is reserved by the lease) may employ a paid person to kill rabbits for him, and may direct his servants to assist such person.

Secondly, that a tenant may permit or direct his servant to kill rabbits, either for the use of the tenant, or of any other person he, the tenant, may think fit.

Consequently, the question in all cases will be not as to the purpose for which the rabbits were killed, but what was the relation between the tenant and the defendant, and the character of the employment, direction or permission given by the tenant. Upon this some very useful hints are given by a correspondent of the *LAW TIMES*, vol. 31, p. 151, who says:—The question in future cases to be decided will be, whether the evidence shows a direction or employment by the tenant to the accused, falling within the principle of *qui facit per alium facit per se*, or a leave and licence independent of that principle. If the evidence brings the case within the former, the accused should be acquitted; if within the latter, he should be convicted. It is not necessary to constitute a servant or an agent, that he should be paid. Suppose, then, the following case:—A, tenant of land on which the game is reserved, has a few friends staying and resident with him. He says, "Take the gun and dog, and shoot a few rabbits, and we will have a rabbit-pie for dinner." As he could do this himself, he could, it would seem, authorise his guest to do it for him. But suppose one of these guests wrote from his own home to the tenant, and asked for a day's rabbiting; then, the leave of the tenant would be no justification. Again, if the tenant, seeing a man with a gun, said, "Will you shoot me a few rabbits?" and he did so, the man would be justified, as the agent of the tenant *pro hac vice*; but if the stranger said to the tenant, "Will you let me have a few shots?" the tenant's leave would be no defence. This distinction is a fine one, but appears to be correct. For this, C. J. says, "It is a very different thing authorising a stranger to come in upon the land to shoot a rabbit, and allowing or directing a servant to do so." It would seem still more difficult to decide between an authority to a stranger, and a direction to a servant. In future cases, the line of demarcation will probably be adopted, where the accused person occupies the position of a servant (properly so called), to the tenant, whether such servant be resident or not; or where the accused is residing with the occupier as a son, guest, or friend, and follows the directions of the tenant, as the master of the farm, there he will be considered as acting under *per se* will apply, and he will be protected. But where the accused occupies the position of a stranger, sporting for his own pleasure and wholly independent of the tenant except his leave, there the leave of the tenant will be no justification. In short, the deciding point will be, Did the accused act as the agent or servant of the tenant, or as an independent person? In the former case he should be acquitted; in the latter convicted, notwithstanding the tenant's permission. While on this subject another question arises. In *Spicer's* case, ERLE, C. J. says: "Although we put this construction upon the Act, the landlord is not without protection. His rights as to rabbits should be the subject of contract at the time of letting the land." Looking at the subject with reference to the 1. & 2 Will. 4. c. 32, and criminal proceedings thereunder, this may be doubted. Suppose the landlord to reserve the game and the rabbits as well. Can the tenant be convicted for killing them? It is submitted he could not. True, he might be liable in a civil action for breach of contract; but the killing rabbits by the occupier, or his giving permission to another person to do so, when the right of killing game or rabbits is in the landlord by reservation or otherwise, is not within the 12th section, which relates only to "game," neither does such a case appear to be within the 30th section, that section applying only in terms to others than the occupier. Such an act by the tenant does not appear to assume the character of a criminal offence, though it may subject him

[Mag. C.]

D

Saturday, Nov. 19.

## REGISTRATION APPEAL.

SHERLOCK (appellant) v. STEWARD (respondent)

40s. freehold.—Necessary outgoing.

*Where the revising barrister finds that a sum paid for collecting the rent is a necessary outgoing, that sum is to be deducted from the rent, in ascertaining whether the claimant had a freehold of the clear yearly value of 40s.:*

*But (per Williams, J.) such deduction is not generally to be made; it being difficult to conceive a case where such an expenditure is necessary.*

## CASE.

At a court held by me at Manchester, on the 20th day of Sept. 1859, John Steward objected to the name of Joseph Sherlock, junior, being retained in the Manchester list of voters for the southern division of the county of Lancaster. The said Joseph Sherlock was entitled to one undivided thirty-fifth share in property in Bloom-street and Richmond-street, Manchester, the gross rental of which is 110*l.* 14*s.* 4*d.* The outgoings for the year ending on the 31st July 1859 amounted to 39*l.* 17*s.* 6*d.*, without including the sum of 5*l.* hereafter mentioned, leaving 70*l.* 16*s.* 10*d.*, or about 2*l.* 0*s.* 6*d.* per share. The property was managed by one of the owners, who was allowed a commission of 5*l.* per annum for receiving the rents and transmitting to each owner his share, and which sum being deducted from 70*l.* 16*s.* 10*d.*, left less than 40*s.* per share. It was objected that the property did not produce a clear 40*s.* per share to the several owners. I found that the allowance of such commission was, from the nature of the property, necessary for the collection of the rents, and I thought that such allowance was a charge reducing the clear yearly value of the property to each of the owners to a sum below 40*s.*, and therefore struck out the name of the appellant, and twenty-one others, owners of shares in the property. And as the validity of a considerable number of objections determined by me at such court as aforesaid depended upon and was decided by me upon the same point of law, and several appeals depend upon the same decision, and ought to be consolidated, I named Joseph Sherlock, jun., to be the appellant, and John Steward to be the respondent in such consolidated appeal.

(Signed),

*Welsby* for the appellant.—The question turns upon the construction of 8 Hen. 6, c. 7; 10 Hen. 6, c. 2, and 18 Geo. 2, c. 18. The statutes of Hen. 6 require as a qualification for an elector, that he "shall have freehold to the value of 40*s.* by the year at the least, above all charges." He must have that "to expend." The 18 Geo. 2, c. 18, requires him to have a freehold estate "of the clear yearly value of 40*s.* over and above all rents and charges payable out of or in respect of the same." The 5*l.* paid for collecting the rent is not to be deducted from the sum divisible among the several landlords, for the purpose of ascertaining whether they have 40*s.* within these statutes, any more than the cost of a dinner given to a tenant, or the salary of a steward. The test is, what the tenant

would give: (*Hamilton v. Bass*, 12 C. B. 631; *Ashmore v. Lees*, 2 C. B. 31.) The parties here are entitled to receive 2*l.* 0*s.* 6*d.*; and it makes no difference that they choose to give 5*l.* to one of their number to save them the trouble of collecting the rent themselves. Property which might be let for building land for 15*l.* a year, but has not been let, gives a vote: (*Asbury v. Henderson*, 15 C. B. 251.)

*Mont*, Q.C. for the respondent.—I do not propose to argue that this is a charge. I say this amount of 5*l.* paid for collecting the rent lessens the value just as repairs do. The necessity for such a payment is apparent. No one would occupy property to be divided in this way among a variety of landlords, unless there was one person appointed to collect and divide it. But the revising barrister has found that the payment was necessary, and it must, therefore, now be assumed to be so. (He cited *Moorhouse*, app., v. *Gilbertson*, 14 C. B. 207.)

*Welsby* in reply.—The necessity pointed to in the case only means the reasonable state of things.

*ERLE*, C.J.—I am of opinion that the revising barrister was correct; that is to say, my judgment concurs with his by reason of the fact stated by him, that the allowance of this commission was, from the nature of the property, necessary for the collection of the rents. The qualification claimed by the voter upon this occasion is by the statutes which have been referred to, and he alleges that he has got a freehold tenement "of the value of 40*s.* by the year, above all charges," which the statutes 8 Hen. 6, c. 7, and 10 Hen. 6, c. 2, require. In those statutes more than once it is stated that the elector must have "a freehold of the value of 40*s.*" out of which he "may expend 40*s.* by the year." Now the clear yearly value of 40*s.* is what we are to look to; and it is found by the revising barrister that the owner of this property could not obtain 40*s.* required by the statute without the necessary expenditure of 5*l.* for the obtaining of the total rent, of which his aliquot part was 40*s.* If it was a necessary outgoing, he has not 40*s.* Mr. Welsby, in his argument, has dealt with the nature of this outgoing with an entire disregard of those words—of its being an outgoing necessary for the owner of the property. The illustration Mr. Welsby has put, of a landlord choosing at his option to give a dinner to his tenant, or of a landlord choosing at his option to employ a steward, to save himself the trouble, are both of them occasions where the expense would not be necessary for the obtaining the money, but would be an optional expenditure, and the landlord, in the case put by him, would not only have "to expend" 40*s.* by the year, but it would be at his option either to give a dinner to the tenant, or employ the steward or not, according to his pleasure. But the revising barrister having found here that the expenditure in question of 5*l.* was necessary for the collection of the rent, I consider the party who received the 40*s.* minus the aliquot part of 5*l.*, which the revising barrister has found reduced it below 40*s.*, not to have had a freehold of the value of 40*s.*, whereof he might expend 40*s.* by the year.

*WILLIAMS*, J.—I am of the same opinion. I think we are bound by the finding of the revising barrister, which, I take it, amounts to this, that the property is not of the value of 40*s.* There may be cases where the actual rental represents the actual value, but it is not always so. Here is a case with the fact found that the rental does not represent the value, because you must necessarily, according to the statement here, deduct from the rental so much as to reduce it below 40*s.* I certainly have some difficulty in conceiving a case where that can be; but, as I cannot say it is impossible and cannot be so, we are bound by the statement as found by the revising barrister. I protest against its being supposed that in my opinion collection expenses, generally speaking, go in diminution of the

to a civil action. Again, if in such a case the tenant directed his servant to kill rabbits, then, as his master would not, I take it, be criminally liable if he had killed them himself, would his servant be in a worse position, considering the principle of the above cases? The servant's defence would be, not by pleading the leave or licence of the tenant—for where the game is reserved it will not do; but by saying, "I knew nothing as to the reservation of the rabbits; what I did was by my master's express command, and as his servant. If he had done the same, he would not have been criminally liable; and I, acting for him, cannot be in a worse position than he would have been. My master and myself may be liable to a civil action, but there is nothing in the Act to make the killing of rabbits by him, either directly *per se*, or through me as his instrument, a criminal offence."

C. C. R.]

REG. v. CHARLOTTE ADAMS.

[C. C. R.]

rental. A man may collect the rent for himself if he pleases, and can do so. The rental represents the value, and that cannot vary because a man chooses to save himself the trouble of collecting it and pay for it; that will not diminish the value; that is an expense which is incurred to save trouble; it is an expense incurred to save the annoyance a man would have, and it would be no necessary expenditure.

CROWDER, J.—I am of the same opinion. I think the revising barrister has come to the right conclusion upon the premises. The only way in which it is argued by Mr. Welsby that he is wrong, is by showing the facts as stated are wrong, because he has told us that it was quite voluntary on the part of the claimant to pay the commission. The revising barrister says it is absolutely necessary. Now, if he had said it was voluntary or a mere charge in the shape of a commission, I am clearly of opinion it would not go in reduction of the rental; but, as he has said it is absolutely necessary, I can understand there may be cases of the very nature of this where such a charge would be necessary. He says the nature of the property is such as to make it necessary, and, as he has not given us any other facts, I am bound to come to the conclusion that the fact is that it is necessary, and that it goes necessarily in reduction of the rental, and that the party could not obtain 40s. by the year for the purpose of the franchise.(a)

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 19.

(Before POLLOCK, C.B., WILLIAMS and CROWDER, JJ., CHANNELL B. and HILL, J.)

REG. v. CHARLOTTE ADAMS.

*False pretences—Guilty knowledge—Note of bank which had stopped payment.*

*The prisoner tendered a five-pound note of a bank which had stopped payment, and obtained change to the full amount. At the close of the prosecution it was objected on the part of the prisoner that there was no proof of the allegation in the indictment that the note was not good, or of the value of 5l., or of any value. The chairman told the jury that he thought there was some evidence from which they might infer that the note was not of any value. The jury found the prisoner guilty:*

*Held, that the question was not properly left to the jury; that the question of value was an immaterial one, and that simply producing the note and leaving it to tell its own story did not constitute a false pretence, and that therefore the conviction could not be sustained.*

Charlotte Evans was indicted at the Michaelmas Quarter Sessions 1859 for the county of Glamorgan, for falsely pretending that a piece of paper was a bank note then current, good and of the value of five pounds, by which false pretence she did unlawfully obtain from one Mary Miles certain money with intent to defraud; whereas, in fact, the said piece of paper was not a bank-note then current, or good, or of the value of five

pounds, or of any value whatever, as the said Charlotte Evans at that time well knew.

It appeared in evidence that the prisoner on the 20th July 1859 tendered to one Sarah Thomas a piece of paper purporting to be a five-pound note of the Newport Old Bank, and obtained change to the full amount of five pounds. There was no question as to the identity of the note or of the prisoner; but to prove the allegation in the indictment that the said note was of no value, Mr. John Parry Morgan was called, who stated that he was now cashier of the West of England Bank at Cardiff; that he remembered the Newport Old Bank; that that bank does not now exist; that he saw the doors of it shut; that it was a private bank, and paid a dividend of two shillings and fourpence in the pound in the year 1852 or 1853; that he knows Newport, which was the place where the bank named in this note transacted its business, and that there is no such bank to which it could be presented.

It was also proved by David Jones, who was one of the several parties to whom this note was transferred for value after it was changed for the prisoner, that he went to a bank in Merthyr Tydfil, and there tendered it, but did not get change for it.

It was objected on behalf of the prisoner that the above was not sufficient evidence to go to the jury in support of the allegation that the note was not good, or of the value of five pounds, or of any value whatever.

I overruled the objection, and told the jury that I thought there was some evidence from which they might infer, if they thought fit, that the note was not of any value, and read to them the evidence of the witnesses above referred to *verbatim*.

The prisoner was convicted, and sentenced to four months' imprisonment with hard labour, subject to a case for the opinion of the court above, as to whether there was sufficient evidence before the jury to sustain the allegations in the indictment as above stated.

JOHN COKE FOWLER, Vice-Chairman and Stipendiary Magistrate.

*H. Giffard* for the prisoner.—The conviction cannot be supported. The case of *Reg. v. Williams*, 7 Cox Crim. Cas. 351, is in point. There the prisoner was indicted for falsely pretending, that a certain promissory note of the Newport Old Bank was a good and valid note (he well knowing that the said bank had long before stopped payment); and the evidence was, that the prisoner was drinking in a public-house, and said that he would pay for a gallon of beer, if any one would change a 5l. note for him; that the prosecutor handed over 5l. in exchange for the note, which the prisoner assured him was a good one; that the prisoner, on being taken into custody, said that he had taken the note at Abergavenny, and had afterwards heard that the bank had stopped, and that the bank stopped payment in Oct. 1851. Upon this evidence Martin, B., after consulting Bramwell, B., ruled that the prisoner could not be convicted, observing that the estate might pay twenty shillings in the pound. So also in the present case, there was no evidence to show that the note was of no value.

POLLOCK, C.B.—I am of opinion that the conviction is bad. The question seems to have gone to the jury with the direction that there was evidence on which they might find that the note was of no value. Very likely the case might have been so put to the jury as to sustain a conviction; but, as the matter now comes before us, the conviction cannot be supported. As my brother Crowder, J. has suggested, if the prisoner had represented the note to be of the value of 5l., she might have been guilty of false pretences; but by simply producing the note and letting it tell its own story, she is not. The conviction must therefore be quashed.

WILLIAMS, J.—I am of the same opinion. As the

(a) This is a very inexplicable decision. The annual value of property is what a tenant will give for it, unless there are some special circumstances affecting the rent in the particular case. But the tenant does not give more or less accordingly as the landlord collects the rent personally or by an agent. If the landlord employs an agent to save himself trouble, the commission paid to that agent is not properly a deduction from the rent itself. It can never be a necessary expenditure, that is to say, an expenditure attaching to the property like repairs and taxes; it is simply a landlord's luxury, like a servant or a horse. Suppose the landlord to be lame, and it was necessary to hire a horse to ride to receive his rent—would the hire of the horse be a deduction from the value of the property? Wherefore should the cost of the employment of an agent to collect the rent be other than the cost of a horse to enable the owner to collect it for himself?

Q. B.]

ASHMORE v. HORTON.

[Q. B.]

case is submitted to us, I think that the conviction was not right. I wish to guard myself, however, from being supposed to intimate that there may not be an indictment for false pretences, which might be supported by proving, that the party charged had induced the prosecutor to believe that the note was the note of a bank open and solvent, when the bank had, in fact, stopped payment.

CROWDER, J.—I also think that it does not appear from the case before us that the question was properly left to the jury. It was an immaterial question for the jury to determine whether the note was of any value, and to tell them that there was evidence from which they might infer that it was of no value. It is quite sufficient to sustain the charge of false pretences if a person presents the note of a bank which has stopped payment, as a current note, though there may be a dividend afterwards and a great portion of the value paid.

CHANNELL, B.—I also think that this conviction cannot be sustained. The evidence is not very clearly stated. I agree that another and different question might have been put to the jury, but upon the evidence as stated to us the conviction cannot be supported.

HILL, J. concurred.

Conviction quashed.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTSFORD, Esqrs., Barristers-at-Law.

Saturday, Nov. 19.

ASHMORE (appellant) v. HORTON (respondent).

*Under the 4 Geo. 4. c. 34, s. 3, it is a lawful excuse for a servant not entering into the service of his master, that he was at the time in the service of another master whom he could not leave without being guilty of an offence under the Act.*

A. in October contracted with B., in writing, to enter his service and serve him for five years. He was at that time in the service of C. under a written engagement entered into in the July previously for five years' service. Being convicted under the above enactment for not entering into the service of B. pursuant to his written contract:

*Held, that his being at the time in such service of C. as aforesaid was an answer, and that the conviction was wrong.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices of the appellant, under the 4 Geo. 4. c. 34, s. 3, for not entering into his service according to his written agreement, whereupon he was sentenced to be imprisoned and kept to hard labour for fourteen days.

It appeared that, on the 15th May 1858 the appellant entered into the following written agreement:—

"Smethwick, 15th May 1858.

"I, the undersigned, hereby engage and agree to work for and serve Messieurs Joshua and William Horton, in the trade of boiler and gasholder making, in every branch or part they may think proper to employ me in, for the term of five years, at the weekly wages of thirty shillings for the first and second years, and thirty-two shillings for the third, fourth and fifth years. As witness my hand this 15th day of May 1858.

"WILLIAM ASHMORE,

"JOSHUA and WILLIAM HORTON."

This agreement not having been signed by Joshua and William Horton at the time, was not then acted upon, but on the 15th Oct. in the same year a second memorandum in writing was signed by all parties, being written on the face of the first agreement, and the appellant (Ashmore) thereupon received from Joshua Horton the sum of 9*l*. for the purpose of defraying his travelling expenses to Dundee, where his services were

required by Joshua and William Horton. This money was on the following day repaid by the appellant, who then stated, as a reason for it, that one Thomas Pigott, by whom the appellant was then employed, insisted on his continuing in his service. The second agreement with the Hortons was in these words:—

"We the undersigned, Joshua and William Horton, agree with the undersigned William Ashmore to hire him from this day for five years on the terms and conditions of the written document. And I, William Ashmore, also agree to the same. Dated this 15th day of Oct. 1858.

"JOSHUA and WILLIAM HORTON,

"WILLIAM ASHMORE."

It further appeared, that the said appellant did not enter into the service pursuant to the last agreement, but continued in the service of the said Thomas Pigott, by whom he had been theretofore employed for many years, being at the time of entering into the agreement of the 15th Oct. 1858 in such employment, under a written agreement dated the 5th July 1858, for the term of five years.

Lush, Q.C. (*O'Brien* with him) now appeared for the respondent, and contended that the conviction was good. Here was a hiring for five years from the 15th Oct. under a valid agreement, and every incident exists to bring the appellant within the statute. [COCKBURN, C.J.—Your civil rights are no doubt untouched, but here he is charged with a criminal offence. He could not go into the employment, for he was under a binding engagement with another person. Had he left that person he would have been liable to have been proceeded against at his instance. BLACKBURN, J.—He could not have entered into Horton's service without violating his contract with Pigott.] This would be enabling a person to take advantage of his own wrong. [COCKBURN, C.J.—I think he has a lawful excuse when he says he cannot enter into the service without committing an offence. WIGHTMAN, J.—That is to say, I have a lawful excuse, inasmuch as I must commit an unlawful act if I go into the service.] Every word of the statute is satisfied. An action for the breach of contract would be no remedy in such a case; the statute intended a criminal proceeding in such a case as a substitute for a civil one. [BLACKBURN, J.—If the statute had said, "We impose a penalty upon a man for entering into a contract which he cannot fulfil," that would have been another thing; but that is not so. COCKBURN, C.J.—If he had left Pigott, and had entered into the service of Horton, then he would have been liable for leaving Pigott's employment.]

*Willis*, for the appellant, contended that the conviction was bad. In *Re Turner*, 9 Q. B. 80, it was held that it must appear that the act of the servant must be without lawful excuse. So also *Re Greenwood*, 2 Ell & Bl. 952. Here his excuse is, he cannot lawfully enter into the service—it is the same as though he were in prison. If he is liable under the Act, he will be liable to be imprisoned for the whole five years, since the contract will endure for that period, and so, were he to have entered the service, his master Pigott might proceed against him under this statute; so that, whichever service he should be in, he could never escape imprisonment under the Act. [BLACKBURN, J.—And, indeed, if Horton had taken him into his service, he might probably have been himself sued for harbouring Pigott's servant.] (*Ex parte Baker*, 2 Hur. & Nor. 219.)

*Lush* in reply.—The object of the statute is to punish by imprisonment persons who cannot pay damages—it makes it a criminal act to violate a civil contract.

COCKBURN, C.J.—This conviction must be reversed. It appears that this man having entered into a binding contract with a master which is

Q. B.]

WALKER v. EVANS—WOODHOUSE v. WOOD.

[Q. B.]

still subsisting, he enters into another with another person. Now this second contract is a valid one upon its face, and it is for a breach in not entering into the service in pursuance of it that these proceedings are taken. But I think that he is not within the Act, and for this reason. The Act does not make it an offence to make a contract which he is not in a situation to perform. It seems to me that, when it is impossible for him to fulfil the contract, except by the breach of another contract, the penalty of the Act does not attach. The penalty is incurred where he omits to enter the service without lawful excuse. The question here is—*is there a lawful excuse?* I think that there is a lawful excuse when he says, "I cannot enter into the service without doing a criminal act." It may be that this is no excuse against a civil action. Suppose a man were to enter into a contract to do some work prohibited by the Legislature. That would be an answer under this statute. He might say, "My first duty is to obey the law." Here he could not enter into the second contract without breaking his first contract. I think, therefore, that the conviction cannot be sustained.

WIGHTMAN, J.—I at first entertained some doubt, as the appellant is clearly within the words of the 4 Geo. 4. The words, taken as they stand, certainly bring the appellant within the Act. But it has from an early period after the statute been held that the mere act of not entering into the service is not sufficient—it must be not entering into the service without some lawful excuse; and indeed this must obviously be so, for he might be bodily disabled from entering into the service. Then, how stands the case with the appellant? Has he a lawful excuse? Now it seems he had proposed to enter into a contract in May, but before he entered into a valid one, in October, he had entered into a contract and served with Mr. Pigott. It seems to me that the statute did not contemplate such a case as this, for the consequence might be that he would be liable to each master. His excuse is, that he could not enter into the contract, as he would subject himself to penal consequences at the instance of Mr. Pigott. Is this a lawful excuse? I think it is. It is not the question whether Mr. Horton has any remedy, but whether the appellant is liable under this Act. I think he had lawful grounds for not entering into the service.

BLACKBURN, J.—I am of the same opinion. The appellant certainly comes within the literal meaning of the words of the statute; but then the statute means, not entering into the service without lawful excuse. The appellant says, "True, I have entered into the contract, but I had previously entered into another contract, and if I violate that, I shall be liable to criminal consequences." The Legislature has not made it an offence to enter into a contract which he is not in a situation to fulfil. (a) *Judgment for the appellant.*

Nov. 19.

WALKER (appellant) v. EVANS (respondent).

*Steam-tug plying between London-bridge and the Nore.*

(a) This case should be read with reference to that of *Rider v. Wood* (ante, p. 4), which determined that a servant leaving his employment under a *bond fide* belief that he had a right to do so, is not subject to the penalty, even although in point of fact he had no such right to quit his employer. That case also determines a point which it is of great importance that justices and their legal advisers should note, as its application is so wide that it may arise in all cases of summary conviction. It is this: that there must be the guilty knowledge and intent that is the essence of all criminal charges, of which nature are summary convictions. They are punishments for offences, and the rules recognised in the administration of the criminal law must be applied in the hearing of them. But justices should also observe that it is not necessary that the wrongful *intent* should be positively proved in all cases; it may be, and ought to be, presumed from the act itself; but it is open to the defendant to show by direct evidence, or by reasonable inference from the facts of the case, that in point of fact no such intent existed.

*light not consuming its own smoke—Conviction—16 & 17 Vict. c. 128—19 & 20 Vict. c. 107.*

*A steam-tug which plies on the river Thames, and in towing vessels up and down the river between London-bridge and the Nore-light, is within the meaning of sect. 1 of the 19 & 20 Vict. c. 107, which applies to "steam-vessels plying to and fro between London-bridge and any place on the river Thames to the westward of the Nore-light," and should therefore be constructed so as to consume its own smoke.*

This was a case stated upon a conviction of the appellant for using a steam-tug on the river Thames between London-bridge and the Nore-light, which is not constructed so as to consume its own smoke.

By the 16 & 17 Vict. c. 128, s. 2, it is enacted, that every steam-engine used in the working of any steam-vessel on the river Thames above London-bridge shall be constructed so as to consume the smoke arising from such engine and furnace, under a penalty of 5*l.* And by the 19 & 20 Vict. c. 107, s. 1, it is enacted that all steam-vessels plying to and fro between London-bridge and any place on the river Thames to the westward of the Nore-light, shall be subject to the provisions of the first-mentioned Act relating to steam-vessels above London-bridge.

It appeared that the vessel in question was a steam-tug called the *Tam O'Shanter*, and plied on the river Thames below London-bridge and the Nore-light, but not plying to any place in particular on the river, its engagement being to tow up or down the river such vessels as might require its services.

*Bosack* appeared in support of the conviction, but the Court called upon the appellants to support their appeal.

Sir F. Kelly, Q.C. (*Sleigh* with him) argued that the vessel in question was not within the terms of the Act, which applies only to vessels plying "to and fro" to certain places between London-bridge and the Nore-light, and not to a steam-tug, which plies between no places, but is engaged as it is wanted to tow vessels up and down the river.

COCKBURN, C.J.—We are all agreed that the case is within the statute. The statute makes a distinction between sea-going vessels and those which ply between London-bridge and any place on the river Thames to the westward of the Nore-light. The Legislature has not thought proper to impose the condition upon sea-going vessels. But the question is, whether or not this steam-vessel is within this enactment. It is said that it is not at present plying to and fro between London-bridge or any place on the river Thames to the westward of the Nore-light; but she is equally within the mischief and the provisions of the statute by plying, in fact, on the river within those limits. I think that, when she is employed between London-bridge and the Nore-light, she is within the meaning of the Act.

WIGHTMAN, J.—The Act is not limited to a vessel plying between two definite places.

HILL, J.—The case finds that the vessel, for the most part, is employed on the river Thames westward of the Nore-light. It cannot be successfully contended that the vessel must actually start from and go to some particular place on the river Thames; for, if so, if a vessel did not actually come to London-bridge, it would not be within the statute. The real construction of the statute is, every vessel plying between the limits of London-bridge and the Nore-light.

*Judgment for the respondent.*

Monday, Nov. 21.

WOODHOUSE v. WOOD AND ANOTHER.

*Appeal from decision of justices—20 & 21 Vict. c. 43, s. 2.*

*A. was convicted by certain justices on 23rd Aug., and gave notice to them of his intention to appeal, and called upon them to state and sign a case under*

20 & 21 Vict. c. 43, s. 2. *The clerk of the justices forwarded to respondents' attorneys the draft case, and it was returned by them on the 5th Sept. The appeal was set down for hearing, and the clerk of the justices forwarded the case, signed, to the attorney for the appellant on the 7th Sept. Respondents' attorneys had received no notice of the appeal from the appellant or his attorney until early in November:*

*Held, that the provision in the above section, that the appellant shall within three days after receiving the case, transmit the same to the court, first giving notice in writing of such appeal, with a copy of the case, to the other party, is a condition precedent to the right of appeal, and that where such provision is not complied with the court has no jurisdiction*

Major Cooke showed cause against a rule calling on the appellant Joseph Woodhouse to show cause why this appeal should not be struck out of the Crown paper, on the ground that the provisions of the statute 20 & 21 Vict. c. 43, s. 2, had not been complied with. It appeared from the affidavits that on the 23rd Aug. last the appellant was convicted by certain justices for the county of Flint for absenting himself from the service of the respondents without leave, or without giving them notice, and the appellant gave notice to the said justices of his intention to appeal, and required them to state and sign a case pursuant to the above-named statute. That the clerk of the justices subsequently forwarded to respondents' attorneys the draft of the case, and that it was returned by them on the 5th Sept. The appeal was set down for hearing, and the clerk of the justices forwarded the case, signed by the justices, to the attorney for the appellant on the 7th Sept. Respondents' attorneys had received no notice of the appeal from appellant, or his attorney, until early in the present month. The 2nd section of the Act says, that either party dissatisfied may apply within three days to the justices to state a case, and such party "shall within three days after receiving such case, transmit the same to the court, first giving notice in writing, with a copy of the case, to the other party." The words are directory only, and this is only a question of practice, which may be altered by the court under the 11th section. In *Syred v. Carruthers*, 27 L. J. 273, M. C., Lord Campbell held service on an attorney instead of service on the party sufficient, but that notice served on respondent afterwards was not sufficient. If the Act had intended to have excluded an appeal in case notice and a copy of the case have not been delivered within three days, it would have been more clearly so expressed. He referred to 8 & 9 Vict. c. 10; 7 & 8 Vict. c. 101, s. 4; 4 Geo. 4, c. 95, s. 87; 4 & 5 Will. 4, c. 76, s. 81; 13 & 14 Vict. c. 61, s. 14, in support of this view. In *Evans v. Mathews*, 26 L. J. 166, Q. B., the notice and grounds of appeal had to be served within ten days; they were served on one defendant only within that time, and on the other on the eleventh day, and it was held a good service. The omission to give the notice is an irregularity only, and unless the parties are prejudiced they cannot complain; here they are not so, and their appearance is a waiver. [HILL, J.—In *Peacock v. The Queen*, 27 L. J. 224, C. P., the court said they had no jurisdiction unless the provisions of the 2nd section were complied with.] The case is settled as soon as it is signed by the magistrates, and that has been done here; therefore the present is distinguishable from that case. The notice may be a mere matter of irregularity; the court is possessed of the case as soon as it is signed, and if the notice be bad the court may impose terms on the party guilty of irregularity, but the irregularity does not take the case out of the jurisdiction of the court. Here the parties considered that the notice sent by the clerk was sufficient.

*Welsby contra.*—The Act is imperative. The party dissatisfied may apply, but if he do, it must be within three days; and then the section goes on to say that he shall, within three days after receiving the case, transmit the same to the court, first giving notice of such appeal, with a copy of the case, to the other party. *Peacock v. The Queen* shows there is no jurisdiction; it is a condition imposed on the appellant. [BLACKBURN, J.—If the Legislature meant to make it a condition precedent, I don't see what other words they could have used.] That is so, and this appeal is entirely a creature of the statute. (He was stopped by the court.)

CROMPTON, J.—I think this rule should be made absolute. No excuse is offered for the noncompliance with the terms of the Act. On the first branch of the section there is a distinct decision in Mr. Welsby's favour. The words show that it was intended that the transmitting the case, first giving notice, with a copy of the case so stated and signed, to the other party, should be a condition precedent, and it means that if the parties do not do as the Act requires, within the time named, they shall be deprived of their appeal.

HILL, J.—I am of the same opinion. This is a very important statute; it says the appeal must be made in a certain specified way, and no other way will do: the language is distinct and clear. In *Peacock v. The Queen* the Court of C. P. held that Sunday is not to be excluded in computing the three days within which application must be made to the justices to state a case under this section; and the court said it had no jurisdiction to hear the appeal unless the provisions of the section were complied with. That is a decision in point. Notice must be given so as to reach the party. If the provision is complied with, that is all that is required; but if it be not, the court has no jurisdiction.

BLACKBURN, J., concurred. (a) *Rule absolute.*

JOHNSON (appellant) v. SIMPSON (respondent).  
*Appeal—Entitling affidavits*—20 & 21 Vict. c. 43.  
*When a case is de facto in this court, all affidavits should be entitled in the names of the parties. Where, therefore, upon an appeal under the 20 & 21 Vict. c. 43, a motion was made to strike out such appeal, on the ground that a requisite had not been complied with, and the affidavit upon which the motion was made was only entitled in the court, and not in the names of the parties:*  
*Held, that the affidavit was irregular, and the rule was discharged.*

This was a rule, calling upon the appellant to show cause why this appeal should not be struck out of the paper, the appellant not having entered into his recognisance within three days, as required by sect. 3 of the 20 & 21 Vict. c. 43. The affidavit upon which the present rule was moved was entitled, "In the Queen's Bench," but not in the name of the case.

LUSH, Q.C. now showed cause, and contended that the rule should be discharged, upon the ground that the affidavit was not properly entitled, inasmuch as it was not headed with the names of the parties in the appeal.

WIGHTMAN, J., having conferred with the Master of the Crown-office, said, the officer says the affidavits ought to be entitled in the names of the parties.

MAULE, in support of the rule, argued that, as this is not a case originating in this court, but is brought here by appeal, and is not actually dealt with by the court, it being as yet merely in the paper for argument, the usual rule as to entitling would not apply.

WIGHTMAN, J.—It is here *de facto*, and should be entitled in the names of the parties.

The other Judges concurred. *Rule discharged.*

(a) It appears from this case that great strictness will be necessary in the observance of all the requisites to an appeal, otherwise the court will have no jurisdiction to hear it. They cannot, it would seem, be departed from even by consent of the parties.

Q. B.]

Ex parte PEARHAM—REG. v. PEARHAM.

[Ex.]

Nov. 22 : ad 23.

Ex parte PEARHAM.

*Conviction under 6 Geo. 4, c. 129, s. 3—Threatening workmen—Metropolitan Police Act.*

*Where a conviction under 6 Geo. 4, c. 129, s. 3, stated that A. B. unlawfully and by threats endeavoured to force one C. D., who was then a trade workman, hired in his trade and business of a mason by E. F., to depart from his said hiring contrary to the Act :*

*Held that, inasmuch as the offence was stated in the words of the statute declaring the offence, the conviction was good under the Metropolitan Police Act, 2 & 3 Vict. c. 71, s. 48. And further, that, independently of that statute, the offence was sufficiently stated.*

Edwin James, Q.C. (Wheeler and Gordon Allan with him) moved for a writ of *habeas corpus* to bring up the body of William Pearham, who had been convicted by one of the Metropolitan police magistrates under the 6 Geo. 4, c. 129, s. 3, with a view to quashing the conviction.

The arguments and authorities fully appear in the judgment. (W. adv. vult.)

**Nos. 23.**—HILL, J.—Mr. James moved yesterday for a rule to show cause why a writ of *habeas corpus* should not issue to bring up the body of William Pearham, on the ground that he was illegally detained in custody. It appears that Pearham was convicted by one of the Metropolitan magistrates within the Metropolitan police district, for an offence against the 3rd section of the 6 Geo. 4, c. 129. It was alleged by Mr. James that the conviction was insufficient. The statute in question enacts as follows: "That from and after the passing of this Act, if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman manufacturer, workman or other person hired or employed in any manufacture, to depart from his hiring and employment, or to return any work in an unfinished state," &c., then "imposing a penalty." The following are the grounds of this conviction. It convicts him that "unlawfully, and by threats, he endeavoured to force one William Jocelyn, who was then a trade workman, hired in his trade and business of a mason by Thomas Piper and Wilson Piper, to depart from his said hiring contrary to the Act." And Mr. James contended that, although the conviction followed the language of the statute on which it was founded, yet that it was insufficient, as it did not set out the threats that were used, nor did it allege to or against whom the threats were offered, and he referred to Paley on Convictions, last edit. p. 173; *Turner's case*, 9 Q. B. 23; and *Re Greenwood*, 2 Ell. & Bl. 952. Mr. James also directed the attention of the court to the Metropolitan Police Act, as relied upon by those who supported the conviction. By that statute, the 2 & 3 Vict. c. 71, s. 48, it is enacted "that in every conviction for an offence contrary to any statute or statutes, it shall be sufficient if the offence shall be stated in the words of the statute declaring the offence, or attaching any penalty thereto." In our judgment this enactment is a complete answer to the application. The conviction complained of was one made by one of the magistrates of the police courts of the Metropolis, within the Metropolitan police district, and in the conviction the offence is stated in the very words of the statute declaring the offence. The Act of Parliament expressly declares that to be sufficient, and concludes the question; therefore on that ground there can be no rule. If, however, it were necessary to give an opinion on the validity of the conviction in point of form, irrespective of the conviction under the Metropolitan Act, we should be disposed to hold it valid. Generally speaking, it is sufficient that the conviction should follow the words of the statute on which the conviction is founded; but it

would not be enough were the statute so worded as by its words to include acts manifestly within its intent. The cases referred to by Mr. James are apt illustrations, but it appears to us that the language of the statute in the present case brings it within the rule, and not within the exception. We therefore think that there should be no rule. *Rule refused.*

## COURT OF EXCHEQUER.

Reported by C. J. B. HERTSFORD, Esq., Barrister-at-Law.

Nov. 24 and 25.

REG. v. PEARHAM.

*Conviction—Statement of offence—9 Geo. 4, c. 129—Combination Acts.*

*A conviction under the stat. 9 Geo. 4, c. 129, s. 3, stated that "T. P. was convicted of having unlawfully by threats endeavoured to force one W. J., who was then and there hired in his capacity and business of a mason by T. P. and W. P. to depart from his said hiring."*

*The information of C. R., on which the summons was granted, stated, "I live, &c. On Saturday night, the 1st Oct. inst., I was in the G. road, with W. J. and fifteen or sixteen other workmen, all engaged by Mr. P. as workmen. W. P. was there; he came in; he said to the men, 'If you there work, we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London.'"*

*Held, that, under the 2 & 3 Vict. c. 71, s. 40, the conviction sufficiently stated the offence, as it followed the words of the statute creating it :*

*Secondly, that the information sufficiently stated facts which constituted an offence under the statute.*

*Semble, that, as the information need not be in writing, if all the parties had appeared before the magistrate without any previous information, and he had then heard the case, the conviction would be supported.*

Edwin James, Q.C. (with him Wheeler and Gordon Allan) applied for a writ of *habeas corpus* to bring up the body of William Pearham, then in custody on a conviction under the 6 Geo. 4, c. 129, s. 3, with a view to quash the conviction. A similar application had been made to the Court of Queen's Bench, which had refused the writ. The section on which the conviction was founded states: "That from and after the passing of the Act, if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any journeyman or workman to depart from his hiring, employment, or work, every person so offending, being convicted thereof as in manner hereinafter mentioned, shall be imprisoned," &c. The conviction in this case was as follows:—"Metropolitan Police District and Middlesex, to wit. "Be it remembered that on the 1st day of Nov. in the 23rd year of the reign of her Majesty Queen Victoria, and in the year of our Lord 1859, William Pearham is convicted before one William Corrie, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell police-court, in the county of Middlesex, and within the metropolitan police district, of having, on the 1st day of October, in the year of our Lord 1859, and within six calendar months before the complaint on oath on which the conviction is founded was made, at the parish of St. Luke, in the said county of Middlesex, and within the said metropolitan police district, unlawfully, by threats, endeavoured to force one William Jocelyn, who was then and there a workman, hired in the trade and business of a mason by



[Ex.]

REG. v. PEARHAM.

[Ex.]

Thomas Piper and Wilson Piper, to depart from his said hiring, contrary to the Act made in the sixth year of the reign of King George the Fourth, intitled, 'An Act to repeal the laws relating to the combination of workmen, and to make other provisions in lieu thereof.' And I, the said magistrate sitting at the police-court aforesaid, do hereby order and adjudge the said William Pearham for the said offence to be committed to and confined in the House of Correction at Coldbath-fields, in the said county, and within the said district, for the space of two calendar months. Given under my hand and seal the day and year first above written, at the police court aforesaid, in the county aforesaid, and within the said metropolitan police district. (Signed) WILLIAM CORRIE (L.S.) To this conviction it was objected before the Court of Q. B. that it did not, on the face of it, contain or set out any offence within the statute; that it did not set out what the threats were, and did not state that they were made, in point of fact, to anybody. To constitute a good conviction, it should set out on the face of it—first, what the threats were, that the nature of them might appear, and the court be able to judge of them; secondly, it should apply the threats to some person, and state that they were used to the party sought to be intimidated, or at least to some person, in order to affect him. Sufficient should appear on the face of the conviction to enable the court to judge whether it was in accordance with the Act: (*Re W. Baker*, 2 H. & N. 219.) On the hearing of the appeal against the conviction, counsel for the prisoner called for the production of the information which formed the foundation of the whole proceeding, contending that the offence should appear on the face of it. The information was not produced; but since the unsuccessful application for the writ to the Court of Q. B. a copy of it had been procured: it was as follows:—"The complaint, on oath, of Charles Robjohn, taken before William Corrie, Esq., one of the magistrates of the police-courts of the metropolis, sitting at the Clerkenwell police-court, within the metropolitan police district, on the 18th Oct. 1859. Charles Robjohn, on oath, says:—"I live at No. 37, Luard-street, Caledonian-road. I am in the employ of Messrs. Piper and Son, Bishopsgate-street. On Saturday night, the 1st Oct. inst., I was in the Goswell-road with William Jocelyn and fifteen or sixteen other workmen, all engaged by Messrs. Piper as workmen. William Pearham was there—he came in; he said to the men "If you there work we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London." He followed us all the way to my house." This sets out no offence at all; it merely relates the idle gossip of a public-house—it ought to state an offence clearly: (*Reg. v. Bew*, 2 Car. & K. 157.) [BRAMWELL, B.—No particular form of information is required—it need not be in writing.] It need not be in writing, but if it is in writing it must be sufficient. There is nothing in the information or in the conviction as to whom the threats were addressed. [CHANNELL, B.—That is all matter of evidence for the magistrate.] The Act of last session, 22 Vict. c. 34, makes a combination by workmen legal. He also cited Paley on Convictions, 173.

*Cur. adv. vult.*

Nov. 25.—POLLOCK, C.B. delivered judgment.—In the case of William Pearham, convicted before a magistrate, and the conviction affirmed on appeal, Mr. Edwin James yesterday applied for a writ of *habeas corpus* to bring him up before this court on the ground that he was unlawfully detained, the conviction being illegal. The conviction was founded upon the 6 Geo. 4, c. 129, s. 3, which makes it an offence. It is better to state it, using the words of the Act of Parliament. The section of the Act makes it unlawful to "force or endeavour to force" any workman from his engagement, either by violence to the person or property, by threats

or intimidation, or by other methods stated in the Act of Parliament; the offence being the endeavouring to force a man from performing his duty and contract, the means being either personal violence or violence to the property, threats or intimidation, and the other means mentioned in the Act of Parliament. On the present occasion the charge is that it was by threats and intimidation. It appears that an application had been made to the Court of Q.B., who gave judgment refusing the writ, on the ground that the objections made to the conviction were not well founded. The objections which were repeated by Mr. James yesterday on the application to us were these: first, he said that the nature of the threats was not set out; and, secondly, that it was not set out to whom the threats were made. And then Mr. James stated that the character and description of the threat ought to be set out, so that the court might judge whether it was that description of threat that would be within the intention of the Legislature; and, secondly, that it should be set out to whom the threat was made, that the court might see that the threat was made under circumstances so that the offence could be committed by the means charged in the conviction. The answer to these objections given by the Court of Q.B. is in substance this: The 48th section of the 2 & 3 Vict. c. 71, commonly called the Metropolitan Police Act, provides that in all cases of conviction it shall be sufficient if the offence is set out in the conviction in the very language in which the offence is described in the Act of Parliament creating it. My brother Channell, yesterday, in the course of the argument, did in reality give a very distinct and clear answer to this objection, which was this: the offence is, "forcing, or endeavouring to force, a workman to leave his employment"—the means charged in the present instance, "by threats and intimidation." To whom the threats were addressed, and whether they were threats of a description that might have acted on his mind so as to produce the effect of working out the crime charged, that is all matter of evidence; and if the magistrate be satisfied that the evidence is of threats addressed to a person so as to create the offence, it is only necessary for him to set out in the conviction that he convicts the party of the offence in the very language of the Act, and the conviction in the present case complies with the requisites of the statute. We are of opinion, therefore, that the judgment given by the Court of Q.B. upon this precise point is perfectly correct. In reality, the grounds of objection taken by Mr. James reduce themselves to one, namely, that the offence is not so described as that the court can perceive that the offence has been committed. We think the Q. B. is perfectly right, and in conformity with what they have held, as far as that ground is concerned, we ought to refuse the writ. But Mr. James presented another matter to our attention. He brought before us by affidavit what professes to be a copy of the information that was filed, and upon which the magistrate granted the summons; the parties being before him, he then proceeded to inquire, and convicted the defendant. Now, the information which is brought before us is this: "The complaint of Charles Robjohn, made before William Corrie, Esq., one of the magistrates," and so on; then "the informant upon his oath says, 'I live, &c. &c. and then he says this, 'On Saturday night, the 1st Oct. inst., I was in Goswell-road with William Jocelyn and fifteen or sixteen other workmen, all engaged by Messrs. Piper as workmen; William Pearham was there; he came in; he said to the men, 'If you there work we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London.' He followed us all the way to my house.'" It appears to me and to all my learned brethren that this is a statement of the facts which constitute the offence, though it is not a statement of the offence as it is

[Q. B.]

*Ex parte* PEARHAM—REG. v. JUSTICES OF LEICESTERSHIRE.

[Q. B.]

described in the conviction or in the statute. It is impossible, I think, to doubt what is the meaning of this, and what is the object of it. It is impossible to doubt that there is here evidence of a threat—"we shall consider you as blacks." It is not necessary that in the information those words should be explained. It appears to us, therefore, that this information does substantially contain a complaint of the offence, because it contains a statement of those facts which constitute the offence. It may, however, be very much doubted whether, as it is clear the information need not be in writing, if all the parties were before the magistrate, and complaint was made not in writing, and the magistrate then and there heard all the parties and came to the conclusion which he has recorded in the conviction—it may be very well doubted whether it would not be perfectly sufficient, and whether it was necessary that there should be any other information than what was given on the occasion. Apart from that, we think that this information does contain substantially a statement of a part of the offence upon which the justice was justified and entitled and empowered to act, and that it was his duty to do so. On the whole we think the conviction right. The additional objection presented has really no foundation when it comes to be examined. With respect to this ground also the application for the writ must be refused.

*Writ refused.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HEATLEY, Esqrs., Barristers-at-Law.

Wednesday, Nov. 23.

REG. v. THE JUSTICES OF LEICESTERSHIRE.

Nuisances Removal Act—18 & 19 Vict. c. 121, s. 40—*Appeal—Recognisance—Computation of time—Sunday.*

*The Nuisances Removal Act, by sect. 40, provides that the appellant shall not be heard in support of the appeal unless, within fourteen days after the making of the order appealed against, he shall give notice of appeal, and shall, within two days of giving such notice, enter into a recognisance to try the appeal.*

Certain justices made an order under the above Act on the 13th, which was served on the 24th. On the 26th notice of appeal was given, and on Saturday, the 27th, the appellant made unsuccessful efforts to find a justice to take the recognisance, and on his going on the following Monday, the justice refused to take it:

*Held, that the justice was right; that Sunday was to be considered as one of the two days allowed for entering into the recognisance after notice of appeal.*

Mr. Wether moved for a rule, calling on the justices of Leicestershire to show cause why they should not hear an appeal from an order made under the Nuisances Removal Act, 18 & 19 Vict. c. 121. It appeared that applicant (Simkins) was summoned by the inspector of nuisances before two justices for an infringement of the Nuisances Removal Act, and the order in question was made by the justices against the present applicant on the 13th of the month, and was served upon him at his residence, three-and-a-half miles from Leicester, on the 24th. On the 25th he consulted with his solicitor on the subject of the order, and on the following day, the 26th, a notice of appeal was regularly served. On Saturday, the 27th, he went with the intention of entering into the requisite recognisances, but he was unable to find a justice, and on his presenting himself on the following Monday, an objection was made that he was too late, as the statute required that the recognisances should be entered into within two days after the appeal, and Sunday intervening the Monday was the third day. By

MAG. C.

the 40th section of the statute in question, it is enacted that "the appellant shall not be heard in support of the appeal, unless within fourteen days after the making of the order appealed against he give to the local authority notice, in writing, stating his intention to bring such appeal, together with a statement in writing, of the grounds of appeal, and shall within two days of giving such notice enter into a recognisance before some justice of the peace, with sufficient securities conditioned to try such appeal," &c. In the present case the applicant had done all he could do to comply with the requirements of the statute. The statute must be read to mean that the recognisance shall be entered into within two clear days on which business is transacted, and cannot be held to include Sunday as one of them: (*Morris v. Barrett*, 1 L. T. Rep. N S. 38.) The case of *Peacock v. The Queen*, 2 C. B., N. S., is distinguishable; there the party had power to comply with the terms of the Act; here he has done everything in his power, but was unable to do so. [CROMPTON, J.—It was not necessary that he should wait until the order was drawn up; he might have given his notice of appeal earlier.]

CROMPTON, J.—I am of opinion that we should not grant a rule. The general rule of construction is well laid down in *Peacock v. The Queen*; there the court of C.P. held that, unless Sunday was specially excluded by the statute, it counts as one of the days specified in it. No doubt a different rule obtains in matters of procedure before the courts; but that is under an old rule of court. Here the appellant might have given notice of appeal at an earlier time within the fourteen days, and by so doing have avoided the chance of being thrown over the Sunday. As it is, we cannot put a different construction from that put upon the statute in the case of *Peacock v. The Queen*.

HILL, J.—I am of the same opinion. When an Act of Parliament gives a particular time for doing a particular thing, without making any special mention of Sunday, it must be taken that Sunday is to be regarded in construing the Act as any other day.

BLACKBURN, J. concurred.

*Rule refused.*

Tuesday, Nov. 22.

REG. v. JUSTICES OF MONMOUTHSHIRE.

Public bridge—43 Geo. 3, c. 59, s. 2—*Mandamus to justices to widen.*

*The 43 Geo. 3, c. 59, s. 2, provides that where any bridge repaired at the expense of the county shall be narrow and inconvenient, it shall and may be lawful for the justices at their general quarter sessions to order and direct such bridge to be widened, &c., and that no money shall be applied to the alteration of any such bridge until presentment shall have been made according to one of the statutes relating to public bridges:*

*Held, that the power so given to the justices is discretionary, and the court therefore refused a mandamus to compel them to widen a bridge:*

*Held, further, that the finding of an indictment at common law was not such a presentment as required by the statute.*

Dowdell moved for a rule calling on the justices of Monmouthshire to show cause why a mandamus should not issue commanding them to take steps for widening and improving, &c., Newport bridge. The 43 Geo. 3, c. 59, s. 2, provides that "when any bridge, or bridges or roads at the end thereof, repaired at the expense of any county, shall be narrow and inconvenient, it shall and may be lawful to and for the said justices at any of their general quarter sessions to order and direct such bridge or bridges or roads to be widened, improved, and made commodious for the public;" and it goes on to provide "that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconvenience or want

E

of reparation of such bridge or bridges in pursuance of some or one of the statutes made and now in force concerning public bridges." The bridge in question was built in 1810, the population of Newport at that time being 2000; the present population amounted to 28,000, and there were, further, 2000 living in Christchurch, on the other side of the bridge. The entire width of the bridge was twenty-one feet, and, allowing for footpaths, there was but fifteen feet left for the carriage-way, besides which there was a descent of one in twenty-one. In 1857 a discussion took place with reference to the bridge, and an indictment was found on the ground that it was too narrow; but it was afterwards discovered that the case of *R. v. Dixon*, 4 B. & C. 670, decided that no indictment would lie to widen a bridge; but for such a remedy it must be in a ruinous state. No other presentment had been made. The statute must be read as imperative, and a *mandamus* will lie.

CROMPTON, J.—I am of opinion that there should be no rule. We ought not to grant the prerogative writ of *mandamus* unless we see a clear right on which it should issue, and not to bring a party forward, that advantageous terms may be made. Then is this enactment discretionary or compulsory? and that depends principally upon the subject-matter of the enactment, unless there be something to the contrary. *Prima facie* these words are permissive; and so they should be held, unless it be clear that the Legislature intended otherwise. In the case of *Reg. v. The Bishop of Chichester*, 33 L. T. Rep. 301, Wightman, J. held that the issuing a commission under the Church Discipline Act was discretionary. *Prima facie* we should read "may" in its primary sense, but that will bear modification if it appears from the subject-matter to be dealt with, that it would be inconsistent or improper. Now I think it is clearly discretionary. The justices are to take all the matters into their consideration; and those are matters for their discretion; and in such cases no doubt the Legislature intended to give a discretion; and on that ground I think there should be no rule.

HILL, J.—Mr. Dowdeswell referred to the preamble of this statute, and to the 2nd section. The words "it shall be lawful" may undoubtedly be imperative or otherwise, and that depends on the subject-matter. Then looking at the subject-matter here, I do not think it is such as to be imperative. Great expenses might be incurred; who are to judge of them? It appears to me that they are left to the discretion of the justices; they have considered, and think the expenses ought not to be incurred. I think, therefore, the rule ought to be refused. I would add that I think the proviso at the end of the 2nd section is imperative, and Mr. Dowdeswell failed to persuade me that an indictment at common law is such a presentment as is there intended.

BLACKBURN, J.—The improvement made by the works and the expense must be proportionate, and it is not necessary that the justices should do works, however disproportionate the improvement and expense may be, and of this they are the proper judges; and therefore this enactment, to my mind, is clearly discretionary. And I further agree that the proviso at the end of the 2nd section has not been satisfied; therefore I think there should be no rule. *Rule refused.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAUGHAN WILLIAMS, ESQ., BARRISTERS-AT-LAW.

Nor. 16 and 24.

REGISTRATION APPEAL.

PROCTOR (appellant) v. ANNISON (respondent).

County rule.—Copyhold house in tenements—2 Will. 4, c. 45, s. 25.

*The respondent is the owner of a copyhold house of two stories high, situated in a borough. Neither floor is, with the staircase and entrance passage, of the yearly value of 10l. The floors are let as distinct tenements, at a yearly rent of less than 10l., to a separate tenant, from year to year. Except as to the common use of the entrance passage, each tenant has always had the exclusive use and occupation of the tenement so let to him. The house is of more than the clear yearly value of 10l. over and above all rents and charges payable thereout, and would therefore confer a vote for the borough. The owner claimed to vote in respect thereof at the election of knights of the shire:*

*Held, that, the tenements being in a vertical line under one roof, he was disqualified by sect. 25 of (Reform Act) 2 Will. 4, c. 45, from voting at elections for the county.*

#### CASE.

At the court for revision of the list of voters in the election of knights of the shire for the northern division of the county of Durham, holden at Sunderland, in the said northern division, on the 6th day of October, in the year of our Lord 1859, before me, Edward Thomas Chitty, the barrister appointed in this year to revise the list of voters in such election for the county of Durham, William Proctor the younger objected to the name of Ralph Annison being retained in the township of Bishopwearmouth list of voters in such election for the said division, and Ralph Annison appeared for the purpose of maintaining his right to be retained in the list.

Ralph Annison was entered in the list thus:—

Annison, Ralph .	13, Sanson-street ..	Copyhold house in tenements, D'Arcy-street.
------------------	----------------------	---

Many years ago he became seised at law in his demesne as of fee at the will of the lord of the manor, according to the custom of the manor, of the copyhold house so described in the list, and has ever since continued so seised and been in the actual receipt for his own use of the rents and profits. The house is of more than the clear yearly value of 10l. over and above all rents and charges payable out of and in respect of the same. It is situate within the borough of Sunderland, which borough was for electoral purposes created by the Reform Act (2 Will. 4, c. 45). It is two stories or floors high; has only one entrance from the street, and a door at that entrance with a bolt, but no lock on it. The entrance passage and staircase and landing at the top of the staircase are the same as in ordinary dwelling-houses. All the doors of the rooms of the house have locks. Neither floor is with the staircase and entrance passage of the yearly value of so much as ten pounds. Each floor has been always let separate, and as a distinct tenement of Ralph Annison, at a yearly rent of less than ten pounds, to a separate tenant from year to year, the tenant of the upper floor having the staircase and the use in common with the other tenant of the entrance passage. Except as to such common use of the entrance passage, each tenant has always, and throughout the six months ending on the last day of July, had the exclusive use and occupation of the tenement so let to him. The entrance door has very rarely been bolted or fastened; the doors of the rooms have been locked by night, and but for such locking there would have been free access from the street into the rooms. The whole house might conveniently be the residence of one family.

The objection was, that upon the facts above stated, Ralph Annison was, by the 25th section of the Reform Act (2 Will. 4, c. 45), not entitled to have his name retained on the list.

I decided that the section did not affect his right,

C. B.]

PROCTOR v. ANNISON.

[C. B.]

and that his name should be retained on the list. If I was wrong, his name should be erased from the list.

The same William Proctor the younger also objected to the retention on the said list of the names of the fifty-two other persons whose names are given in the list appended to this case. The facts material to the matter in question, and the objections, were in each case the same as in the above case of Ralph Annison. I overruled the objections and decided that each of the names ought to be retained on the said town-ship list. If I was wrong, the names ought to be erased from the list.

The said William Proctor the younger appealed from my decision in each of the above cases, and I entertained the appeals. The several appeals depend on the same decision, and ought to be consolidated. I named the said William Proctor the younger to be the appellant, and Ralph Annison to be the respondent in the consolidated appeal.

**Manisty** for the appellant.—Here the voter seeks to be retained on the list of voters for the county of Durham in respect of a copyhold house in Sunderland, the rent of which is now 10*l.*, and the question arises whether, under the circumstances, he is entitled to vote as he claims to vote. That will depend upon the construction the court will put upon sect. 25 of the Reform Act (2 Will. 4, c. 45), which enacts "that no person shall be entitled to vote in the election of a knight or knights of the shire in respect of his estate or interest as a copyhold or customary tenant, or tenant in ancient demesne holding by copy of court-roll, or as such lessee or assignee, or as such tenant and occupier as aforesaid, in any house, warehouse, counting-house, shop or other building, such house, warehouse, &c. being either separately or jointly with the land so occupied therewith of such value as would, according to the provision hereinafter contained, confer on him or any other person the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired the right to vote for such city or borough in respect thereof." The 27th section enacts, "that in every city or borough, every male person of full age, &c., who shall occupy within such city or borough, as owner or tenant, any house, warehouse, &c., being either separately or jointly with any land within such city or borough or place occupied therewith by him as owner or as tenant, under the same lordship of the clear yearly value of not less than 10*l.*, shall, if duly registered accordingly, be entitled to vote in the election of a member or members to serve in Parliament," &c. Here the respondent does not himself occupy the house, but he lets it out to tenants—say to two tenants, at 5*l.* a-year rent each—and he seeks to vote for the county in respect of the whole house. No doubt, if he were himself in occupation, he would be entitled to vote for the borough. It may be that no one is entitled to vote in respect of the house for the borough, but that is not the question. The point is, can a person claim to vote for copyhold premises situate in a borough, when the same is let out to several tenants, neither of whom holds to an amount of rent which would entitle him to a vote for the borough? It is contended that the owner of such a copyhold house so let out is not entitled to a vote for the county in respect of it. It is value, and not occupation, that is the test; and it is to value, and that alone, the 25th section relates.

**Davison** for the respondent.—It is clear that a person occupying to the extent of 10*l.* can vote (within the provision of the 27th section) for a borough. It is also clear, that the same meaning should be attached to the same words in the 25th section. The words "house or building" may apply to a part of a house. By sect. 19 of the Reform Act, "every male person seised at law or in equity of any lands or tene-

ments of copyhold or any other tenure whatsoever, except freehold, for his own life, &c. or for any larger estate, of the clear yearly value of not less than 10*l.* over and above all rents and charges payable thereon, shall be entitled to vote in the election of a knight or knights of the shire in which such lands or tenements shall be situated." But there is a case conclusive on the point (*Webb v. The Overseers of Birmingham*, 1 Lutw. 18), where it was held that "a lessee of houses situate within a borough, for the unexpired residue of a term originally created for not less than sixty years, is entitled to vote for the county in respect of such of the houses as are not individually of sufficient value to give a right of voting for the borough, but are collectively of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same; although one of the houses comprised in the lease is of sufficient value to confer the borough franchise." In *Welsby and Beavan's Chitty's Statutes*, in a note to the 25th section of the Reform Act, the effect of the clause is said to be this; that by it "the party is excluded from the county franchise if the property be of such a description and value, and so occupied, that it might be made use of for the purpose of acquiring a vote for the city or borough either by the claimant himself or any other person."

**Manisty** in reply.—The respondent would have the court read the 25th section as if at the end of it the words "and so occupy" as to give the qualification were introduced. As is pointed out in the note to Chitty's Statutes, there is a marked distinction between the language of the 24th and 25th sections; in the former section it turns on occupation; in the latter, on value. [WILLIAMS, J.—The question is, whether one house split into tenements is to be considered as several copyhold houses.] The statute says in effect this: "If you are the owner of a house in a borough of such a value as you might, if you choose, get a borough vote for it, you shall not have a vote for the county in respect of it." [WILLIAMS, J.—If this is to be looked at as a single house, you are right; if it is to be regarded as houses, you are wrong. It has been held, in *Webb v. The Overseers of Birmingham*, that the vote may be in respect of several houses.] The case speaks of the tenement as "a house," not "as houses." As the claim stands, it is in respect of a copyhold house in "tenements." Value, and that alone, is the test, not occupation. *Cur. adv. vult.*

**Davison**, at request of the Court, gave references to the following cases:—*Wright v. The Town Clerk of Stockport*, 1 Lutw. 32; *Scole v. Huggett*, 1 Lutw. 198; *Daniel v. Coulsting*, 1 Lutw. 230; *Toms v. Luckett*, 2 Lutw. 19; *Downing v. Luckett*, 2 Lutw. 33.

**Nov. 24.**—ERLE, C.J.—In this case the claimant is the owner of a copyhold house of such value as would confer on him the right of voting for the borough, and cause him therefore to be disqualified, according to the express words of sect. 25, for the county; but he has contended that the letting of the house to separate tenants in such a manner as would give to them a qualification for the borough as separate tenements, and if they were of sufficient value, makes the single house equivalent to separate houses during the time it is so occupied; and it is true that if the two tenements, instead of being in a vertical line under the same roof, had been in a horizontal line under separate roofs, the separate value of each being insufficient for the borough, but the aggregate value being sufficient for the county, that would have qualified for the county, as in *Webb v. The Overseers of Birmingham*. But, in the case supposed, they would be separate houses. Here it is found to be one house, and being so, it gives no qualification for the county. The clause at the end of the section expressly provides

[Ex.]

WHITE v. LEESON.

[Ex.]

that it is immaterial whether the owner or any other person shall have acquired the right to vote for the borough in respect of the same house or not. Therefore the judgment is for the appellant, and the decision of the revising barrister will be reversed.

*Appeal allowed.—Judgment for appellant with costs.*

### COURT OF EXCHEQUER

Reported by F. BAILEY and J. DUNBAR, Esqrs.,  
Barristers-at-Law.

Wednesday, Nov. 16.

WHITE v. LEESON.

*Private road :—Local private Act authorising tenant for life :o set out—Construction—Who to use such roadway.*

*A private local Act of Parliament, passed 21st June 1836, was intituled "An Act to enable the Rev. J. White, and those entitled to certain estates at Bonchurch, Isle of Wight, to grant building leases," and sect. 8 enacted, that it should be lawful for the persons for the time being empowered by that Act, "to grant leases to lay out and appropriate, &c., any part of the said land and hereditaments thereinbefore authorised to be laid out as, and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate, and the accommodation of the tenants and occupiers thereof."*

*The plaintiff, tenant for life, had granted certain building leases of, and laid out, a certain roadway on part of the said estate, and granted the use of the said roadway to A. B. and C. D., their respective executors, administrators and assigns, servants, tenants or occupiers, for the time being, of certain lands specified and leased to the said A. B. and C. D., having a covenant from C. D. to repair the said roadway, &c. The defendant, being a tenant of another part of the estate authorised to be leased by the Act of Parliament, used the said roadway, having no right or authority from or under the plaintiff or A. B. or C. D., but claiming to use such roadway, he being a tenant of a part of the estate so leased under the Act of Parliament :*

*Held, by the Court, that he was not authorised to do so, as the way was not public. There was no grant of way over it, nor licence to use it, to him or any one under whom he claimed.*

The declaration stated that the defendant heretofore, to wit, on the 20th Sept. 1858, with certain horses and carts broke and entered certain land of the plaintiff, to wit, a certain roadway of the plaintiff running through certain lands and premises called Horsehoe-bay, situate in the parish of Bonchurch, in the Isle of Wight, which had theretofore been demised to one Jonathan Joliffe down to the sea, and forming the eastern extremity of a certain private road from the village of Bonchurch to the sea; and the plaintiff claimed 50*l*.

Plea 2.—That long before and until and at the time of committing the said alleged trespass, one Rosa White, the wife of the plaintiff, was entitled for life, and the plaintiff during all the time aforesaid was entitled in her right, as the husband of the said Rosa, to the said land in which the said supposed trespass is alleged to have been committed; and also to divers lands and hereditaments partly abutting upon and contiguous to and partly in the neighbourhood of the said land, to wit, the said roadway, and lying in the parish of Bonchurch, in the Isle of Wight, in the county of Southampton, and they so being entitled heretofore and before the committing of the said supposed trespass, to wit, in the session of Parliament holden in the 6th year of his late Majesty King William the Fourth, a certain Act of Parliament was passed, intituled "An Act to

enable the Rev. James White and the persons for the time being entitled to certain estates situate in the parish of Bonchurch, in the Isle of Wight, in the county of Southampton, devised by the will of Charles Fitzmaurice Hill, Esq., deceased, to grant building leases;" and the defendant says that under and by virtue of the said Act the plaintiff (being the said Rev. James White therein mentioned) and his wife were enabled and empowered to grant leases of the said estates, being the said land and hereditaments hereinbefore mentioned, including the said land in which the said supposed trespass is alleged to have been committed, upon such terms and at such rents as in the said Act mentioned; and that since the passing thereof the plaintiff and his wife have, by virtue and in exercise of the powers so given to them, duly granted a great number of leases of different portions of the said estates, land and hereditaments, upon such terms and at such rents as by the said Act required; and that a great number of houses and other buildings have been erected thereon by the tenants and occupiers of the said leases, and that he, the defendant, before and at the time of the committing of the said alleged trespass and from thence hitherto, was and still is a tenant of divers lands and houses at a high rent under subsisting leases thereof duly granted by the plaintiff and his said wife by virtue of the said Act, being parcel of the said estates, lands and hereditaments thereby authorised to be leased; and the defendant says that by the said Act it is amongst other things enacted that it should and might be lawful to and for the person or persons for the time being empowered by that Act to grant leases as aforesaid to lay out and appropriate, or to concur in laying out and appropriating, any part of the said land and hereditaments thereinbefore authorised to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate, and the accommodation of the tenants and occupiers thereof. And the defendant says that, after the passing of the said Act, and many years before the committing of the said supposed trespass, the plaintiff and his said wife did, by virtue and in exercise of the powers so given to them by the said Act, duly lay out and appropriate the said land in the declaration mentioned, to wit, the said roadway (being parcel of the said lands and hereditaments by the said Act authorised to be laid out and appropriated) as and for a way for passing freely and at pleasure, at all times, as well on foot as with horses, carriages and carts for the accommodation of the tenants and occupiers of the said estates, lands and hereditaments, that is to say, for a way from and out of a certain common and public highway, in the said parish of Bonchurch, unto the seashore at Horsehoe-bay, in the said parish; and the defendant says that the said way was a general improvement to the said estate, and was a great convenience and accommodation to the tenants and occupiers thereof, to wit, of the lands and hereditaments so leased as aforesaid, in many respects, and among other things in that it afforded a convenient access to the seashore from their respective houses, both for the purposes of pleasure, and also for the purpose of fetching from the seashore sand and other things required by them in and about their houses, buildings, gardens and lands, without which access many of the said houses would be greatly depreciated in value and eligibility, and also the probability of letting many parts of the said lands and hereditaments which are still unlet would be diminished; and the defendant says that the said tenants and occupiers have, and that he himself has for many years, to wit, since that way was so laid out and appropriated, used the said way accordingly; and that the said alleged trespass was a use of the said way by the defendant.

Replication to the plea of the defendant above

[Ex.]

WHITE v. LEESON.

[Ex.]

pleaded, that the said Act of Parliament was and is an Act to enable the Rev. James White, and the persons for the time being entitled to certain estates situate in the parish of Bonchurch, in the Isle of Wight, in the county of Southampton, devised by the will of Charles Fitzmaurice Hill, Esq., deceased, to grant building leases; and that the said Act of Parliament, so far as it relates to the matters in dispute in this action, was and is in the words and figures following:—

[Here followed the recitals and other parts of the Act.]

The 8th section provides "that it shall and may be lawful to and for the person or persons for the time being empowered by this Act to grant leases as aforesaid, to lay out and appropriate, or to concur in laying out and appropriating, any part of the said land and hereditaments heretofore authorised to be leased, as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate, and the accommodation of the tenants and occupiers thereof." And the plaintiff further saith, that after the making and passing of the said Act of Parliament, on the 1st of April 1840, by a certain indenture then made between the plaintiff and Rosa, his wife, of the one part, and John Lucena Kettle of the other part, in pursuance of the powers of the said Act, the plaintiff and Rosa his wife did thereby demise to the said John Lucena Kettle, his executors, administrators and assigns, certain lands in the said indenture described as all that piece or parcel of land called Orchard Leigh, situate in the parish of Bonchurch, in the Isle of Wight, as the same was then staked or marked out, on which a dwelling-house was then being erected by the said John Lucena Kettle, and comprising a cottage, garden and premises, then in the occupation of James Jollin, and extending on the north side eighty-six feet, on the south side 225 feet, and bounded on the north side by the high road from Shanklin to Ventnor, and by certain hereditaments belonging to Charles Popham Hill, Esq., and on the east side by hereditaments belonging to the said Charles Popham Hill and the plaintiff, and on the west by a road then recently commenced, leading from the high road aforesaid, towards the seashore, and on the south by hereditaments belonging to the said plaintiff, the same containing by admeasurement two acres or thereabouts, were the same more or less, and described in the plan thereof drawn in the margin of the said indenture and being parcel of the estates in the said Act mentioned, with all and singular the rights, privileges, advantages and appurtenances whatsoever to the said piece of land and hereditaments appertaining, with full right and liberty for the said John Lucena Kettle, his executors, administrators and assigns, and his and their servants, or the tenants or occupiers for the time being of the hereditaments thereby demised, or any part thereof, or any person or persons duly authorised by him or them, to use and to pass and repass on foot or on horseback, or with carts, carriages or other vehicles, along a certain road leading to the seashore, being the private road in the said declaration and second plea mentioned. And the plaintiff further saith that, on the 19th Dec. 1842, by a certain indenture then made between the plaintiff and Rosa his wife of the one part, and Jonathan Joliffe, of Bonchurch, in the Isle of Wight, of the other part, in pursuance of the powers of the said Act of Parliament, the plaintiff and Rosa his wife did demise to the said Jonathan Joliffe, his executors, administrators and assigns, a certain piece of land, in the said indenture described as all that piece or parcel of land situate in the parish of Bonchurch, in the Isle of Wight, as the same was then staked or marked out for building, containing by estimation one acre and a half, and described in the plan thereof drawn in the margin of the said last-mentioned indenture, the same being parcel of the land and hereditaments com-

prised in the schedule annexed to the said Act of Parliament, which said piece or parcel of land is known by the name of Horseshoe-bay, together with all and singular the rights, members and appurtenances whatsoever to the said piece or parcel of land appertaining, except the said road in the said declaration and second plea mentioned, with a right for the said Jonathan Joliffe, his executors, administrators and assigns, and for his servants and others, by his permission from time to time, and at all times during the said demise, to pass and repass, with or without horses and loaded or empty carts or carriages, on and along the said road, for the purpose of going to and from the said demised premises and seashore at Horseshoe-bay aforesaid, and which right was reserved to him in consideration of a certain covenant on his part contained to repair and keep the said road in repair, and of the width of sixteen feet at the least; and, inasmuch as it was intended to give to the said Jonathan Joliffe, his executors, administrators and assigns, the exclusive benefit and advantage of any purposes of trade to be derived from the said piece of land called Horseshoe-bay, it was further agreed and declared that the said Jonathan Joliffe, his executors, administrators and assigns, should have full and absolute power from time to time, and at all times during the continuance of the said demise, of preventing and stopping any person or persons whomsoever, except the plaintiff and Rosa his wife, and the person or persons for the time being entitled in reversion as therein mentioned, and his and their servants and others authorised by them, and also John Lucena Kettle, Esq., his executors, administrators and assigns, his and their servants, or the tenants or occupiers for the time being of the messuage and premises called Orchard Leigh, from passing or repassing upon or along the said road so excepted from this demise as aforesaid, with carts, waggons, horses or other beasts of burden, trucks, barrows or otherwise, for the purpose of landing and conveying from the seashore any goods, coal, corn or other articles of merchandise or sale whatsoever. And it was provided that nothing therein contained shall extend to prevent any of the owners or occupiers for the time being of such of the messuages, lands, tenements and hereditaments, parcel of the estates in the said Act mentioned, as were situate on the north side of a certain road leading from Shanklin to Ventnor, in the parish of Bonchurch, held under the plaintiff and Rosa his wife, to use and enjoy at all times, at their own free will and pleasure, an uninterrupted right of carriage, bridle and foot way, on the road in the declaration and second plea mentioned, for all pleasure and private purposes, it being understood that the power thereby granted to Jonathan Joliffe, his executors, administrators and assigns, of restricting the free use of the said road, was expressly limited to such use as might be made thereof for the carriage of goods and merchandise thereon for the purpose of trade and business, and not further or otherwise. And the plaintiff further saith that the said road was not, except as aforesaid, appropriated as in the said plea is mentioned, for the accommodation of the tenants and occupiers of the said estates, lands or hereditaments, or of any of them, or of any part thereof, and that the defendant was not at the time of the committing of the said trespass in the declaration mentioned the tenant, owner or occupier of the lands, or of any of them, or of any part thereof, to the owners and occupiers of which any right of way was granted by the plaintiff and Rosa his wife in pursuance of the said Act, or otherwise howsoever; and that the defendant did not commit the said trespass by the licence or permission of the said John Lucena Kettle, his executors, administrators or assigns, or of the said Jonathan Joliffe, his executors, administrators or assigns, or of the plaintiff.

Rejoinder 2.—And for a second rejoinder to the said second replication to the said second plea the defendant says that, before the making of the indentures in the said replication mentioned, and when the said way in the said plea mentioned was first laid out and made, neither the said way nor the right to use the same was granted by any deed or instrument under seal to any person or persons whatsoever; but the said way was then so laid out and made by the plaintiff and his said wife in exercise of the powers conferred on them by the said Act; and they then duly laid out and appropriated the same for the general improvement of the estate and the accommodation of the tenants and occupiers thereof, and to the intent and purpose that the said tenants and occupiers might enjoy such appropriation and accommodation; and the defendant says that he, as one of such tenants and occupiers, and the said other tenants and occupiers, thereupon and thence hitherto have (without any grant thereof by deed), always used and enjoyed the same as in the said second plea particularly set forth and alleged.

Demurrer to the above rejoinder.

*M. Smith*, Q.C. (*Norman* with him) in support of the demurrer, argued that the intent of the plaintiff and his wife, in laying out the said road and the laying out and appropriation of the said road as a private road for the general improvement of the estate and the accommodation of the tenants, was without any grant of a right of way thereon to the defendant, and did not confer on the defendant any right of way over the said land, and that it appeared from the replication that the licence, if any ever existed, or was to be implied, was determined; that the Act of Parliament was in the nature of a conveyance to the tenant for life of the estate; that the general under-tenants were no parties to it: (*Ward v. Scott*, 3 Camp. 284, and *Leadford v. Barber*, 1 T. R. 93, were referred to.)

*Chas. Pollock* for defendant.—The rejoinder and plea are good. If any dedication could have been made, from the state of the record it would appear to have been made. The tenants for life have the power to dedicate by the terms of the 8th section of this local Act: not a dedication to each person having a house there, but generally to those using the roads. [*BRAMWELL*, B.—If the way is a public way, the parish must repair it]. Not always so. The words of the Act of Parliament are “for the general improvement of the estate, and the accommodation of the tenants and occupiers thereof;” which would imply that the roads so made should be used by those who were tenants of the estate, and the defendant being a tenant of the estate would have the right to use the road for his accommodation: (8 & 9 Vict. c. 20, s. 53; *Poole v. Huskisson*, 11 M. & W. 827; and *Owen v. Saunders*, 1 Ld. Raym. 158, were cited.)

*Smith*, in reply.

*Cur. adv. vult.*

Dec. 7.—*WATSON*, B. delivered judgment.—We are of opinion that the plaintiff is entitled to judgment. In right of his wife, tenant for life, he is possessed of the land in question. A private Act of Parliament enabled them to grant building leases, and contained a clause (as usual) that they might lay out and appropriate, or concur in laying out and appropriating, any part of the land authorised to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate, and the accommodation of the tenants and occupiers thereof. Land has been appropriated for a way, and a way has been laid out, which upon the pleadings must be taken to be not a public way, and not a way over which, at the time of its creation, a right of way was granted to any one by an instrument under seal; but, as alleged in the rejoinder, as a way laid out and made in exercise of the powers of the Act, and laid out and appropriated for the general im-

provement of the estate, and to the intent the tenants might enjoy it, whatever that may mean. Two private rights of way have since been granted to tenants over this road. This being so, the defendant, being a tenant of the estate under a lease in pursuance of the powers in the Act, contends that though the way is not public, and though there is no grant of way over it, nor licence to use it, he is nevertheless entitled, under the provisions of the statute, to use it. Whether he is was the question in the case, and it must be answered in favour of the plaintiffs. The defendant's contention is based on the words “for the general improvement of the estate,” and it is supposed that under this expression every road laid out must be a public road, or, at all events, a road for all the tenants of the estate. For this we think there is no foundation. The general improvement of the estate may be promoted by private roads. The statute must have intended that there might be private rights of way granted; even if not, the defendant would have no right, though the reversioner might avoid the Act as not within the power. It is clear land may be appropriated for the purpose and one or more private ways afterwards granted over it. The argument of the defendant would go to show that, if a square of large houses was set out with an inclosure, all the tenants of the estate must have a right to walk in it, though they live in cottages at a distance. It would also go to show that no sewers could be made unless they drained all the houses. The plaintiffs are entitled to judgment.

*Judgment for the plaintiffs.*

## V. C. STUART'S COURT

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's Inn, Barrister-at-Law.

Dec. 6 and 7.

THE ATTORNEY-GENERAL v. THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF SOUTHAMPTON.

*Local Act of Parliament—Construction—Holding a cattle-fair on a piece of land dedicated to purposes of recreation, and theretofore used as a cricket-ground.*

By a local Act of Parliament, passed for improving the marsh and other common lands, and extending rights of common and recreation within the town of S., reciting that a certain portion of the marsh lands consisting of four acres was better adapted for the purposes of recreation than the other portions of the marsh; it was enacted that rights of common and recreation should not be extinguished, and that the said four acres should for ever thereafter be subject to such rights of common and of recreation, and other public rights “as had theretofore been exercised and enjoyed thereon.” By the same Act it was provided that, “except as therein otherwise provided,” all the waste lands which were then vested in the corporation should remain subject to the existing rights of common and recreation, and such powers were given to the corporation to fence, drain and manage the said lands as they should think proper for the public advantage of the inhabitants. The corporation were also empowered to remove a fair to such parts of the waste lands as they should think fit. In the exercise of their discretion the corporation removed the fair to the four acres above mentioned, which were called “the Cricket-ground,” and had theretofore been used for the purpose of playing cricket:

*Held*, on the construction of the Act, that the corporation by so doing, had contravened the powers of the Act; and perpetual injunction to restrain them from holding the fair on the cricket-ground granted, with costs.

This was an information for the purpose of restrain-

ing the defendants, the corporation of Southampton, from removing a fair, called Above Bar Fair, at Southampton, to, or holding, or permitting the same to be holden upon a piece of ground now called or known as the Cricket-ground, or any part thereof, or upon a road called the Itchen Bridge-road, near the same town.

It appeared that before the passing of the Act below mentioned, the "Above Bar Fair" had, from time immemorial, been accustomed to be held on the 6th and 7th of May every year, on a piece of land in the parish of All Saints, Southampton, called "the Fair Field." At the time of passing the Act (4th July 1844) the "Fair Field" was in the tenure of John Watkins Drew, Esq., as lessee, and by the Act the corporation were empowered to purchase Mr. Drew's interest in the same for a sum of 740l.

The Act (7 & 8 Vict. c. liv.), which was for the purpose of "improving the marsh and other common lands, and extending rights of common and of recreation within the town of Southampton," recited that the inhabitants of the town claimed to be entitled to certain rights of common and other rights over the marsh at all times in the year, and that the marsh was completely detached from the other waste lands in Southampton.

By the 17th section of the Act, after reciting that the north-western portion of the marsh, containing 4a. 1r. 17p., or thereabouts (being, in fact, the cricket-ground), was better adapted and might be made more available for the purposes of recreation than the other portions of the marsh, it was enacted "that no notice (as in the Act mentioned) should be given by the mayor, aldermen, &c., to extinguish any right of command or of recreation or other public rights, over the said north-western portion of the marsh."

By the 18th section it was enacted as follows:—"The mayor, aldermen, &c., shall with all convenient speed after the passing of this Act cause the said north-western portion of the marsh to be drained and levelled, and to be put and kept in a proper condition for purposes of public recreation, and the same portion shall *for ever thereafter be subject to such rights of common and of recreation, and other public rights as have heretofore been exercised and enjoyed thereon.*"

By the 28th section it was enacted that it should not be lawful for the mayor, &c., to make any demise or lease of or including any part of the said portion of the Itchen Bridge-road, or to alter the course thereof, or to reduce the width thereof to a less width than sixty feet, *or otherwise to render the same less commodious for public traffic than it now is.*

By the 116th section it was provided that "except as therein otherwise provided, all the waste lands in Southampton, which are now vested in the mayor, aldermen, &c., and over which at all times of the year rights of common and of recreation and other public rights are now claimed, exercised and enjoyed, shall at all times for ever hereafter remain subject to the same or like rights."

By the 117th section the mayor, &c., were empowered to fence, drain and manage such of the said lands as for the time being should be vested in them, subject to rights of common or of recreation or other public rights, and to preserve and improve the sward thereon, and to make, fence, light and maintain public roads and walks, &c., and to appropriate and preserve such lands or such portions thereof as the mayor, &c., should from time to time think proper, exclusively for the recreation of the inhabitants of Southampton, or otherwise, as open spaces for the public advantage of the inhabitants of Southampton, as to the mayor, &c., should seem meet.

By sect. 118, after reciting that, by reason that the several powers and authorities thereby granted to the mayor, aldermen and burgesses had been so granted,

and that the several sums thereby authorised to be offered and paid and accepted as the compensation for the purchase of lands had been so authorised to be offered and paid and accepted for the sole purpose and in consideration and on the condition of the lands purchased and taken under the authority of that Act being devoted for ever thereafter, subject to the provisions of that Act exclusively, as open spaces for the general and public advantage of the inhabitants of Southampton, and of all other persons interested in the same being so devoted; and by reason also that the parties interested in resisting the passing of that Act had assented to the several provisions therein contained, in the full faith and confidence that such purpose should for ever be strictly observed, it was enacted, "that such parts of the said common fields, as for the time being should have been by the mayor, aldermen and burgesses purchased, taken or acquired for the purposes of that Act, should for ever after the same had been so purchased, taken or acquired, be devoted and kept, subject to the provisions of that Act exclusively, as open spaces for the general and public advantage of the inhabitants of Southampton, and of all other persons for the time being interested in the same being so devoted and kept."

The 139th section was as follows:—"And be it enacted that after the mayor, aldermen and burgesses shall, in pursuance of this Act, have purchased or taken for the purposes of this Act the leasehold or other interest of the said John Watkins Drew, his executors, administrators, or assigns, in the said Fair Field, it shall be lawful for the mayor, aldermen and burgesses, at such time as they shall think proper, to cause a notice to be affixed on the outer doors of the Guildhall of Southampton, and on or near the doors of all the churches and chapels in Southampton, and to be made public in such other way as the mayor, aldermen and burgesses shall think proper, declaring that the annual fair holden on or about the 6th and 7th days of May, in certain places in the parish of All Saints, in Southampton, shall from the time of affixing such notice cease to be holden in such places, and shall thenceforth be removed to, and for ever thereafter yearly, on the second Wednesday in May, and following day, be holden on such parts of the waste lands in Southampton for the time being vested in the mayor, aldermen, and burgesses, as they shall think fit; and the said fair shall for ever after the affixing of such notice be removed and holden according to the terms of such notice, and at no other place than shall be expressed in such notice, and on no other days than the second Wednesday in May and the day following."

After the passing of the Act the piece of ground in question was drained and levelled, and put into a proper condition for purposes of public recreation. It was called "the Cricket-ground," and the bill alleged that the inhabitants and the public generally had used it for purposes of public recreation.

The corporation purchased Mr. Drew's interest in the Fair Field, and in May last removed the fair to the four acres, called "the Cricket-ground," much to the annoyance, as the bill alleged, of the inhabitants.

In May last the present information was filed, praying for a declaration that, according to the true construction of the Act, the four acres, called "the Cricket-ground," ought to be used for the purposes of public recreation only, and that it was a breach of trust in the defendants to remove the fair to, or permit the same to be held upon, the said piece of ground, or upon the Itchen Bridge-road; and for an injunction in the terms above stated.

On the 10th May a motion was made for an injunction, but it was on that occasion arranged that the motion should stand over, the corporation undertaking to repair the damage, if any. The fair was held on



the Cricket-ground, and the cause now came on upon the hearing.

*Malins*, Q.C. and *Crackwill* appeared for the plaintiffs, and contended that, by the 17th and 18th sections of the Act, the land was dedicated to such purposes of recreation as it had hitherto been used for, and that the corporation had no power to devote it to any other purpose.

*Bacon*, Q.C. and *Shebbear*, for the defendants, argued, first, that the corporation had absolute discretion in dealing with the waste lands, and that the court could not interfere with that discretion. They contended, secondly, that, even supposing the land to have been dedicated to the purpose of recreation, it was no departure from that purpose to hold a fair upon it. Dugdale's *Warwickshire*, p. 514, was cited to show that a "fair" was originally a feast or festival:—"Touching the original occasion of which meetings called *Faires*, let us hear what the learned Spelman hath observed: 'Cum autem Christiani ad insignes aliquas celebritates, præsertim enœnia et dedicationes Ecclesiarum festa annua peragenda convenirent; adesse tunc mercatores solebant, sua mercimonia sub ipsis Ecclesiis atque in cœmeteriis distracturi.' And a little below he thus goes on: 'Pariter verò convenisse tunc ad merces vendendas tum ad emendas mercatores quamplurimos, atque ita festum cum nundinis, nundinas cum festo miscuisse;' and definitions of the word were taken from Johnson's Dictionary, citing Dryden, and from Richardson's Dictionary, with quotations from the works of Chaucer and Gower. Passages were also read in support of the same view from Gay's *Poems*, and from the prologue to Tennyson's "*Princess*," descriptive of country sports:—

... a herd of boys with clamour bowl'd  
And stump'd the wicket; babies roll'd about  
Like tumbled fruit in grass; and men and maids  
Arranged a country dance, and flew thro' light  
And shadow; while the twangling violin  
Struck up with "Soldier-laudie," and overhead  
The broad ambrosial aisles of lofty lime  
Made noise with bees and breeze from end to end.

It was urged that it was a fallacy to suppose that land devoted to the purposes of recreation was to be exclusively used for cricket; and that the corporation had the power to remove the fair to any part of the waste land they deemed most eligible for the purpose.

The VICE-CHANCELLOR (without calling for a reply).—This information is filed to protect a piece of land, which covers about four acres, and which in the bill is called "the Cricket-ground," from being used by the corporation of Southampton for the purpose of holding a fair. The corporation have very large powers, and the 139th section of their Act has express reference to the removal of the fair. Before this information was filed the fair had been held upon a piece of ground which seems to have been leased to a person of the name of Drew. The 49th section authorises the corporation to purchase Drew's interest, and the 139th section empowers them to remove the fair to "such parts of the waste lands in Southampton as they shall think fit." In this section the language is very wide, but it must be construed so as to make it consistent with the other provisions of the Act. The piece of ground which is now in question is the subject of two express clauses of the Act, which speak of it in very definite terms. The 17th section describes these four acres or thereabouts as "better adapted and more available for the purposes of recreation than the other portions of the marsh," and the 18th section directs that this same portion of the marsh shall be "put and kept in a proper condition for purposes of public recreation, and shall for ever thereafter be subject to such rights of common and of recreation and other public rights as have heretofore been exercised and enjoyed thereon." This language is so plain as to admit of no doubt. According to the plain

meaning of the language, if Mr. Bacon be right in the difficult argument he has had to maintain, that a cattle-market is a sort of recreation, he must show that it is such a recreation and such a right as has "heretofore" been exercised and enjoyed on this piece of land. It is quite plain that a cattle-fair cannot be brought within this view; and here the 117th section has a very important application. By the 117th section power is given to the corporation to appropriate such particular portions of the waste lands as they shall think proper "exclusively for the recreation of the inhabitants of Southampton, or otherwise, as open spaces for the public advantage of the inhabitants of Southampton, as to the corporation shall seem meet;" and by the 116th clause all the waste lands are to be subject to existing public rights, "except as herein otherwise provided." But it is quite plain that the Legislature did not intend to entrust the corporation with a discretion as to these four acres; and it is no longer in the power of the corporation to say that these four acres have been exclusively dedicated to the same rights of recreation as have "heretofore" been exercised and enjoyed thereon if they have been devoted to the purpose of holding a fair. Taking the 18th clause, and construing the 139th clause by the light of it, it is quite plain that the corporation must look for some other pieces of waste land than that included in the 17th and 18th sections for the purpose of holding this fair. The general words in sect. 139, which allow them to fix upon such parts of the waste lands as they may think fit, on which to hold the fair, must be read as controlled by the particular words of the 18th section. Therefore I think it is perfectly clear that, in fixing upon these lands as a place in which the fair is to be held, the corporation have contravened the Act of Parliament. Another provision is as to the Itchen Bridge-road. The Act says, with reference to the Itchen Bridge-road, that it shall not be lawful for the corporation so to deal with this road as to render the same "less commodious for public traffic than it now is." Now it is said by the relators that, for at least two days in the year, the road has been rendered much less commodious for public traffic by having the fair held on this piece of ground, and the evidence seems to justify that view. However, upon the construction of this clause there is this observation, that the main purpose of the clause is to prevent the narrowing of the road; and therefore it does not interfere with the construction of the clause to say that it was not in order to prevent any alteration in the adjoining waste lands which might interfere with the commodiousness of the road for public traffic that it was inserted. But what the Act says is, that it shall not be lawful "to alter the course of the road, or to reduce the width thereof to a less width than sixty feet, or otherwise to render the same less commodious for public traffic than it now is." Now, it can hardly be said that the road has not been rendered less commodious than it now is for at least two days in the year by holding this fair upon a portion of it; and these words are perfectly general. But I do not decide the case upon that ground. It seems to me that it must be governed by the construction of the 18th clause. I regret that this dispute has arisen. Something is due to the inhabitants of every town, so as to conciliate the peace and goodwill of all. The corporation have said, that by this decision they will be fettered in the exercise of their powers by a small section of the inhabitants. I certainly do not think that the powers of the corporation should be fettered by any small section of the town, because the powers of the corporation are given to them for the benefit of all; but in this case they are not fettered by any small portion of the town. They are fettered by the Act of Parliament, and I hope it will not be supposed that this restriction

Q. B.]

REG. v. JUSTICES OF GLOUCESTERSHIRE—REG. v. FOX.

[Ex. CH.]

has been imposed by any small portion of the inhabitants. I must make the injunction perpetual in the terms of the prayer of the bill; but at the same time I cannot refrain from expressing a hope that this dispute will be brought to a close by some arrangement.

Bacon, Q.C. asked for the costs, on the ground that the allegations of the bill were not borne out by the evidence; but

The VICE-CHANCELLOR said he did not think so; and that he could not depart from the usual rule, that the successful party should have their costs.

*Injunction made perpetual.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SANDERS, and C. J. B. HERTSLET, Esqrs., Barristers-at-Law.

Friday, Jan. 13.

REG. v. JUSTICES OF GLOUCESTERSHIRE.

*Justices—Summary Proceedings Act—Case.*

*Justices cannot be called on to grant a case on summary proceedings before them to enforce payment of a rate, where an appeal against the rate lies to the quarter sessions, and the only objection raised is as to the validity of the rate, on the ground that the party derives no benefit from the works for which it was made.*

Rule nisi, calling on certain justices of Gloucestershire to state a case under the 20 & 21 Vict. c. 43 (Summary Proceedings (Justices) Act.)

A party had been summoned by the commissioners, under the Cheltenham Improvement Act, before justices, to show cause why a distress warrant should not be issued to compel payment of 1s. 10d. rate, under the Act, in respect of certain sewerage works. Before the justices the party summoned contended that he was not liable, because he was not benefited by the works. The justices decided against him, and refused to grant a case, under the 20 & 21 Vict. c. 43, and gave a certificate that the application was a frivolous one: (sect. 4.)

*Phipson* showed cause.—The justices had no power to inquire into the validity of the rate: (*Birmingham v. Shaw*, 10 Q.B. 868; *R. v. Kingston*, 1 E. B. & E. 256; 27 L. J. 199, M.C. The party might have appealed against the rate, but he has allowed the time for appealing to elapse. If this rule were granted it would constitute the two justices a court of appeal against the validity of the rate: (11 & 12 Vict. c. 63, ss. 129, 135.)

*Powell*, in support of the rule, contended that, although there was an appeal to the quarter sessions given by the Act, still the validity of the rate could be contested before the justices in a proceeding of this kind.

By the COURT.—It is clear that there might have been an appeal against the validity of the rate, according to the statute. That being so, this case cannot be granted, as the only question is as to the validity of the rate, which should have been the subject of appeal.

*Rule discharged.*

### EXCHEQUER CHAMBER.

Reported by C. J. B. HERTSLET, Esq., Barrister-at-law.

Saturday, Nov. 26.

(Before POLLOCK, C.B., MARTIN, B., WILLIAMS, CROWDER and WILLES, JJ., WATSON and CHAMBERS, BB.)

REG. v. FOX.

*Indictment—Clerk to borough justices—Partner with clerk of the peace of the county—Interest in prosecutions—5 & 6 Will. 4, c. 76, s. 102.*

*A. and B. were in partnership as attorneys. A. was clerk to the borough magistrates of N., and B. was clerk of the peace for the county of M., to the [Mag. C.]*

*quarter sessions of which the borough justices of N. committed their prisoners for trial. A. and B. shared as partners the fees and emoluments of their respective offices; B., as clerk of the peace, was entitled to certain fees upon the arraignment and trial of prisoners. Certain persons were committed by the borough justices of N. to the quarter sessions of M.; and on their arraignment and trial B. received the said fees, in which A. participated as his partner. Upon an indictment against A. for an offence under sect. 102 of the 5 & 6 Will. 4, c. 76, in being interested in the prosecution of offenders committed for trial by the justices for whom he was clerk:*

*Held (affirming the judgment of the Court of Q.B.), that A. had committed an offence within the section.*

*The 5 & 6 Will. 4, c. 76, s. 102, provides that it shall not be lawful for the clerk to the justices of a borough to act in the prosecution of any offender committed for trial by the justices to whom he is clerk; "and any person being an alderman, or councillor, or clerk of the peace of any borough who shall act as clerk to such justices, or shall otherwise offend in the premises, shall forfeit 100l.:*

*Held (affirming Coe v. Lawrence, 1 E. & B. 531), that the penalty of 100l. did not attach to a clerk to the borough justices (not being an alderman, councillor, or clerk of the peace of the borough) who acted in the prosecution of the offenders committed for trial by the borough justices:*

*Held, nevertheless, that he was subject to an indictment for so acting contrary to the first proviso of the section.*

Error upon the judgment of the Court of Q.B. affirming a conviction upon the following indictment:—

Monmouthshire, to wit.—The jurors for our lady the Queen upon their oath present, that the borough of Newport, in the county of Monmouth, is one of the boroughs named in the schedule (A) to the Act passed in the sixth year of the reign of his late Majesty King William the Fourth, intitled "An Act to provide for the regulation of municipal corporations in England and Wales." And that heretofore, to wit, on the 17th day of Feb. in the year of our Lord 1836, a separate commission of the peace was granted to the said borough by his said late Majesty King William the Fourth pursuant to the said Act, and that no separate court of quarter sessions has at any time been granted to the said borough pursuant to the said Act. And the jurors aforesaid upon their oath aforesaid do further present, that heretofore, to wit, on the 30th day of June 1845, and thenceforth continually until the time of exhibiting this bill of indictment, Charles Burton Fox was, and still is, the clerk to the justices of the said borough of Newport (he the said Charles B. Fox having been theretofore appointed such clerk by the justices of the said borough for the time being pursuant to the said Act). And the jurors aforesaid upon their oath aforesaid do further present, that during all the time aforesaid the said Charles B. Fox was, and still is, an attorney-at-law and a solicitor, and during all the time aforesaid was, and still is, the partner of one Charles Prothero in the business and profession of attorneys and solicitors, and that during all the time aforesaid, he the said Charles Prothero was, and still is, the clerk of the peace of the county of Monmouth, and by reason thereof during all the time aforesaid was, and still is, interested and employed in the prosecution of divers offenders, who during the time aforesaid were committed by the justices of the said borough of Newport for trial at the court of general quarter sessions of the peace for the said county of Monmouth, and who during the time aforesaid, were tried at the said court, that is to say, by receiving as such clerk of the peace divers fees on the arraignment and trial of the said offenders at the

said court. And the jurors aforesaid upon their oath aforesaid, do further present, that during the time aforesaid, to wit, on the 1st day of July 1856, and on divers other days and times between that day and the time of exhibiting this bill of indictment, certain offenders were committed by the said justices of the said borough for trial at the said court of quarter sessions of the peace, and were tried at the said court, to wit, one Thomas Hunter, &c., &c. (naming them). And the jurors aforesaid upon their oath aforesaid do further present, that the said Charles Prothero, as such clerk of the peace as aforesaid, did receive and take certain fees on the arraignment and trial of the said several last-mentioned offenders respectively; and the jurors aforesaid upon their oath aforesaid further present, that the said Charles B. Fox, as such partner of the said Charles Prothero as aforesaid, unlawfully was, while he was such clerk of the said justices as aforesaid, interested by his said partner the said Charles Prothero in the prosecution of the said several last-mentioned offenders, that is to say, by then being, as such partner of the said Charles Prothero, entitled to share and sharing in the said fees so received and taken by him the said Charles Prothero as aforesaid, against the form of the statute in such case made and provided, &c.

Upon the trial of the indictment, a verdict was taken by consent for the Crown, subject to the opinion of the court upon the following case:—

The borough of Newport, in the county of Monmouth, is a corporate borough, having a separate commission of the peace, granted to it under the provisions of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, but having no grant of a separate quarter sessions. Parties charged with offences before the borough justices are committed for trial at the assizes held at Monmouth, or at the general quarter sessions held in and for the said county at Usk.

The defendant Mr. Fox is an attorney and solicitor, and has since the year 1845 carried on that profession at Newport in partnership with Mr. Charles Prothero. In June 1845 Mr. Fox was appointed clerk to the justices of the said borough of Newport, and has held and performed the duties of that office from that time to the present. In March 1848 Mr. Prothero was appointed clerk of the peace for the county of Monmouth, and he has held and performed the duties of that office from that time to the present. From the year 1851 Messrs. Prothero and Fox have shared between them the profits of the partnership business and the emoluments of the offices of clerk of the peace for the county of Monmouth, and clerk to the justices of the borough of Newport. Mr. Prothero, in the first instance, receiving the fees incident to the former, and Mr. Fox, in the first instance, receiving the fees incident to the latter office.

The fees payable to Mr. Prothero as clerk of the peace for the county are fixed by the justices under the provisions of the 57 Geo. 3, c. 91, and include, amongst others, a fee upon the arraignment and another fee upon the trial of each prisoner tried at the quarter sessions of the peace for the said county.

On the 14th Aug. 1855 the 18 & 19 Vict. c. 126, passed, and is intituled, "An Act for diminishing expense and delay in the administration of criminal justice." The 1st section of this Act empowers justices at petty sessions to punish summarily persons charged with certain offences, and the 3rd section authorises such justices to sentence forthwith persons charged at such petty sessions with certain offences, and pleading guilty to such charge.

The fees and emoluments of the said C. Prothero, as clerk of the peace for the said county of Monmouth, were seriously diminished by the operation and effect of the last-mentioned Act, immediately after the passing thereof, and have not since that time amounted during any year to the annual amount thereof computed upon

an average of five years immediately preceding the passing of that Act. In May 1857 Mr. Prothero, as clerk of the peace for the county of Monmouth, made under the provisions of the said Act, and upon the requisition of the Lords Commissioners of the Treasury, a return to the said commissioners (verified on oath) of the fees and emoluments in criminal prosecutions received by him as such clerk of the peace for each of the five years immediately preceding the said 14th Aug. 1855, the day of the passing of the said last-mentioned Act, and the annual amount of such fees, computed upon an average of the said five years, was 540*l.* 1*s.* 11*d.* At the same time Mr. Prothero, under the provisions of the said Act, and at the requisition of the said Lords Commissioners, made a return (similarly verified) of the fees and emoluments in criminal prosecutions received by him as such clerk of the peace as aforesaid during the year ending the 14th Aug. 1856, and these amounted to 357*l.* 15*s.* 2*d.*

In June 1857 the Commissioners of the Treasury paid to Mr. Prothero the sum of 182*l.* 6*s.* 9*d.*, the difference between the 357*l.* 15*s.* 2*d.* and the said annual average amount received by him during the five years next before the passing of the said last-mentioned Act.

In Nov. 1857 Mr. Prothero made a return in the same manner of the fees and emoluments in criminal prosecutions received by him as such clerk of the peace as aforesaid for the year ending the 14th Aug. 1857, which amounted to 446*l.* 15*s.* 2*d.*; and in Jan. 1858 the Commissioners of the Treasury paid to Mr. Prothero 93*l.* 6*s.* 9*d.*, the difference between 446*l.* 15*s.* 2*d.* and the said annual average amount received by him during the five years next before the passing of the said Act of Parliament.

At the trial of the above indictment it was proved that between Michaelmas 1856 and the Epiphany sessions held at Usk, in the county of Monmouth, in Jan. 1857, persons, five in number, respectively charged with larceny, were committed by the borough justices of Newport for trial at the last-mentioned sessions upon four separate and distinct charges, and that upon the arraignment and trial of each of those persons at the said sessions certain fees were payable and were paid to the said C. Prothero as clerk of the peace of the county of Monmouth. The fees were the ordinary fees payable to the clerk of the peace according to the table of fees fixed by the justices as thereinbefore mentioned, and amounted in all the cases to the sum of 7*l.* 1*s.* 8*d.*

It was further proved that between January and March 1857 a certain other person, charged with larceny, was committed by the borough justices of Newport for trial at the Easter sessions of the peace, held at Usk aforesaid, in 1857; and that on the arraignment and trial of such last-mentioned person at those sessions, similar fees were payable and paid to the said C. Prothero, as clerk of the peace for the said county, amounting to the sum of 1*l.* 10*s.* 8*d.* The whole of the above fees were included in the return made by the said C. Prothero to the Commissioners of the Treasury in Nov. 1857, as above mentioned. It did not appear that the said Charles Prothero, or the said defendant Charles Burton Fox, was ever concerned or employed, directly or indirectly, as an attorney in conducting any prosecution at any quarter sessions held for the county of Monmouth.

The question for the opinion of the court was, whether in substance the facts above stated showed any offence under the 102nd section of the 5 & 6 Will. 4, c. 76.

If the court should be of opinion that they did not show such an offence, the verdict already entered was to stand. If the court should be of a contrary opinion, a verdict of not guilty was to be entered.

The Court of Queen's Bench held (Crompton, J. dissentiente), that the facts did show such an offence,

EX. CH.]

REG. v. FOX.

[EX. CH.]

and directed the verdict to stand, and inflicted a fine of 1*l.* upon Mr. Fox. (See the report, 33 L. T. 90; 28 L. J. 157, M.C.)

Upon this judgment the defendant brought a writ of error.

*Pigot*, Serjt. (Sir *Thomas Phillips* with him) in support of the writ of error.—This is an indictment against Mr. Fox, for an offence against the 5 & 6 Will. 4, c. 76, s. 102. The 102nd section empowers the justices of a borough having a separate commission of the peace to appoint a clerk; and then it contains two provisos as to the persons who shall not be appointed such clerks: "And be it enacted that it shall be lawful for the justices of every borough to which a separate commission of the peace shall be granted as aforesaid, at their first or any other meeting, and they are hereby respectively required to appoint a fit person to be the clerk of the justices of such borough, to be removable at their pleasure, and so often as there shall be a vacancy in the said office of clerk to the justices, by death, resignation, removal, or otherwise." Now come the provisos: "Provided it shall not be lawful for the said justices to appoint or continue as such clerk to the justices any alderman or councillor of such borough, or clerk of the peace of such borough, or the partner of such clerk of the peace, or any person or clerk in the employ of such clerk of the peace." Then comes another proviso: "Provided also, that it shall not be lawful for the said clerk to the justices, by himself or his partner, to be directly or indirectly interested or employed in the prosecution of any offenders committed for trial by the justices of whom he shall be such clerk as aforesaid, or any of them, at any court of gaol delivery, or general or quarter sessions." Those are the provisos; and then it goes on to affix the penalty in these terms: "That any person being an alderman, or councillor, or clerk of the peace of any borough, or the partner or clerk, or in the employ of such clerk of the peace, who shall act as clerk to the justices of such borough, or shall otherwise offend in the premises, shall, for every such offence, forfeit and pay the sum of 100*l.*, one moiety thereof to the treasurer of such borough, to be paid over to the credit and account of the borough fund," &c. This indictment is framed upon that section against Mr. Fox, and charges that he is the partner of Mr. Prothero, and that Prothero is the clerk of the peace for the county in which the borough of Newport is situate, and that Prothero is in fact interested in prosecutions coming from that borough, because he is entitled to a fee upon the arraignment of prisoners committed for trial for that borough; and that Mr. Fox being the partner of Prothero shared in such fees. The question is, whether this indictment is maintainable or not? In the Court of Q. B. the judges differed in opinion, Lord Campbell, C.J. and Erie, J. holding that it was maintainable, and Crompton, J. dissenting from that opinion. It is now submitted that Mr. Fox has committed no offence whatever against the Act of Parliament, and that he is not a person interested in the prosecutions within its meaning, merely because he happens to be the partner of Mr. Prothero, who is the clerk of the peace for the county, for there may be a state of things in which no fee is payable to the clerk of the peace, because he does not get a fee unless the prisoner is arraigned. Looking carefully at the language of the section, the justices are first empowered to appoint any fit person as their clerk; then the first proviso is, that they shall not appoint any alderman or councillor of the borough, nor the clerk of the peace of the borough, or the partner of such clerk of the peace. As far as that proviso is concerned, Mr. Fox is eligible to be clerk to the justices. The Legislature must have had in view the fact that, where there is no separate quarter sessions in a borough, prisoners committed from the

borough are tried at the county quarter sessions; and therefore, if it had been intended to exclude the partner of the clerk of the peace for the county, the section would have named the clerk of the peace for the county, just as it names the clerk of the peace for the borough, and the partner and clerk of that clerk. The maxim, *Expressio unius est exclusio alterius*, applies therefore. [CROWDER, J.—You have to put a construction upon the word "interested." The other side say that the words "interested and employed" do not mean the same thing.] It is submitted that they are connected, and the substance of the offence is, interested in some way in carrying on the prosecution. There is no doubt as to what the statute was directed when it passed—viz. to prevent persons holding two offices in the borough, the duties of which might conflict; but it does not mention any officers of the county as being ineligible. When the Act passed it was the custom of the clerk of the peace for the county to take part in the prosecution of offenders committed by their justices—such clerks, in fact, advising the justices as to the committals; and the object of the Act was to prevent the clerks from carrying on the prosecutions in such cases. The second proviso is that under which it is said that this case comes; the proviso is a penal one, and should be construed with precision, and not be extended beyond its strict meaning. The words "interested or employed" must be construed together and according to the rule *noscitur a sociis*; and the words "in the prosecution of any offender," mean "shall not have to do with the prosecution of any offender." [POLLOCK, C.B.—Was the partner, Mr. Prothero, interested in the prosecution of offenders?] It is contended that he was not. [POLLOCK, C.B.—Before the judges were paid by salary, and when fees constituted a part of their emolument, was a judge interested in a cause because he had a fee at certain stages of it?] There is a material difference between a person being interested in a certain stage of the proceedings and his being interested in the prosecution of those proceedings. To test that, when was Mr. Fox's offence against this Act complete? Up to the time of the arraignment of offenders, he clearly is guilty of no violation of the Act of Parliament. The prisoner may never be arraigned, or he may die before the arraignment. Does Mr. Fox then become guilty of an offence because, if the prisoner be arraigned, his partner as clerk of the peace happens to be entitled to a fee on such arraignment? It is very difficult to determine the exact time when Mr. Fox's offence is complete. There is another mode of testing it, and it is this. Supposing that Mr. Prothero had obtained the clerkship of the peace of the county after Mr. Fox's appointment as clerk to the justices of the borough, and after they had entered into partnership, does the obtaining of that appointment by Mr. Prothero make Mr. Fox indictable upon this section as soon as any fee is payable to him upon the arraignment of any prisoner committed by the borough justices? If it does, he is an involuntary culprit, because his partnership may have been for a period of years, and he may have taken his office of clerk to the justices, not anticipating that his partner would ever receive the appointment of clerk of the peace of the county. [CROWDER, J.—There is in law no distinction between Prothero and Fox; they are the same. It is clear that they divide the fees in the ordinary way. It is, therefore, as if Prothero, being clerk of the peace for the county, was clerk to the justices of the borough. Then is he or is he not interested in the prosecutions? In one sense he is interested in all the prosecutions. POLLOCK, C.B.—He is interested in multiplying prosecutions. MARTIN, B.—It was the evil against which the Legislature intended to provide.] "Interested, said Mr. Justice Crompton in the court below, is a very large word, but I think it does not bear the meaning which they have put on it." "I think that it was not intended that the

word 'interested' should extend the meaning of the word 'employed,' but that the intention was to prevent the clerk to the justices being employed by himself or other parties in the conduct of prosecutions." If the intention of the Legislature had been to bring the case within the proviso, the language it would have used would have been not "interested or employed in the prosecution," but "interested in any stage of a prosecution, to wit the arraignment," or "employed in a prosecution." Supposed Mr. Fox had been robbed, for instance, of a horse, and the thief brought before the borough justices to whom he was clerk, the conviction of the thief being a stage to entitle him to the return of the horse, could it be said, if he sat and advised the justices in the committal of the prisoner, that he became thereby interested or employed in the prosecution? The section goes on to say afterwards, "at any court of gaol delivery or general or quarter sessions," which looks like taking a part in a prosecution to be carried on in a court of general or quarter sessions. There is a second question in the case, that is, whether, supposing this to be an offence, an indictment is the proper form of proceeding. [POLLOCK, C.B.—Where an Act of Parliament says that if any person shall do so and so he shall be liable to a penalty, you cannot indict; but if the Act says it shall be unlawful to do so and so, and if any one does it he shall be liable to punishment, then he may be indicted. *Welsby* referred to *Coe v. Lawrence*, 1 E. & B. 531, where it was held that the penalty of 100*l.* in sect. 102 did not attach to a clerk to the borough justices acting in the prosecution of offenders committed for trial by the borough justices.] In that case it is submitted that the Court of Q.B. did not sufficiently regard the words "or otherwise offend in the premises." No one can doubt it was intended to make every one who offended against the section liable to the 100*l.* penalty, and the question is whether, in order to carry out the intention of the Legislature and to give a meaning to the whole enactment, the court will not construe the second proviso as if the officers mentioned in the first proviso were repeated in the second.

*Welsby* (*Scotland* with him), *contra*, was not called upon to argue.

POLLOCK, C.B.—We need not trouble Mr. Welsby on the other side. I believe we are all of opinion that the judgment of the Court of Q.B. ought to be affirmed. With respect to the object of the Legislature, I own I entertain no doubt that they intended not merely that the clerk to the justices should not be employed in the prosecution, but that he should have no interest in it, and that it should not be an object with him to multiply prosecutions, and to get arraignments, on account of the interest between himself and his partner in a particular fee, or to have any bias to advise the justices to commit a person to take his trial. That being the object of the Legislature, I do not think that we ought to adopt a strained construction of the statute. In reality, in all cases the object of the court should be to learn what is the true construction, and not what is a strict construction on the one hand, or a loose construction on the other; the object should be to get at what is the true construction; and for some time I have discarded any such notion as that there are two constructions of the same words, one to be adopted if it is a remedial statute, and the other if it is a penal one. I think you ought to get the true construction, and apply it to both cases. I think that the judgment of the Court of Q.B. is right. I think that the meaning of the word "interested" cannot be confined in the way in which my brother Pigott invites us to confine it, and therefore that the objection founded on the meaning of the word "interested" cannot be sustained. With respect to the other objection I quite agree with the rest of the

court in thinking that the objection (which was not taken in the court below), that this is an indictment, and not a proceeding for the penalty, cannot be sustained, inasmuch as, when you come to look at the section, you find that the present defendant is not within that part of the clause which imposes a penalty of 100*l.* As to the *obiter dictum* of my brother Wightman, that the defendant's being interested would not disqualify him, but only subject him to a penalty, what he meant probably was, that it would make him liable to the provisions of the Act of Parliament. It turns out that it would not subject him to a penalty, but would make him liable to an indictment. I own I had thought that wherever an act was declared to be in itself unlawful, it was understood that, although the mere creating a penalty which imported that the Legislature did not approve of the act, would not subject a man to a prosecution; yet when the act was declared to be unlawful, and the liability to a penalty was something added to that, the party was liable to an indictment; and I had thought that that was the view taken by the courts. I do not, however, found my judgment on that view of the matter, but upon this—in reality the present defendant is not within the clause. For these reasons it appears to me and to the rest of the court, that the judgment of the Court of Q.B. must be affirmed.

MARTIN, B.—It seems to me that this case comes directly within the words of the Act of Parliament. I cannot conceive how any language could express more clearly than this does what was intended. If I were to speculate on what the Legislature had in view, I should not doubt that this was the very thing they intended to prevent. As to the second question, the answer is, that the defendant is not liable to the penalty, because he is not one of the persons enumerated, for he is neither an alderman, a councillor, a clerk of the peace of the borough, or the partner, or the clerk in the employment of such clerk of the peace.

CROWDER, J.—I am of the same opinion. These words are very large, and I think they are properly large, with a view to bring a case of this sort within the scope of what I think must have been the intention of the Legislature, that persons who are called on to advise magistrates should not have a pecuniary interest in prosecutions. It is said there is no individual prosecution in which he is interested and employed. The fact is, that Mr. Fox is interested in getting as many prosecutions as possible (I am speaking, of course, not against Mr. Fox personally, but a person so acting would have a pecuniary interest in increasing the number of prosecutions), in order that his partner the clerk of the peace may obtain fees which he would divide with him. Certainly, as far as pecuniary interest is concerned, this is one of the strongest cases that could be put. I do not at all agree with what has been suggested by my brother Pigott, that "interested" must mean interested in a particular prosecution. If the party derives any pecuniary interest, that is sufficient. Upon the other point I am also of the same opinion as that which has been expressed by the other members of the Court. I think that the case was rightly decided by the Court of Q.B., and that the judgment of that court ought to be affirmed.

WILLES, J.—I am of the same opinion.

WATSON, B.—I am of the same opinion.

CHANNELL, B.—I am of the same opinion.

*Judgment affirmed.*

ERROR FROM THE QUEEN'S BENCH.

*Monday, Nov. 28.*

(Before WILLIAMS, J., MARTIN, B., CROWDER and WILLES, JJ., CHANNELL, B. and BYLES, J.)

WARD AND ANOTHER v. LOWNDES.

*Pleading—Public Health Act—Mandamus to local*

[EX. CH.]

WARD AND ANOTHER v. LOWNDEN.

[EX. CH.]

board to levy rate—17 & 18 Vict. c. 125, ss. 68, 71—11 & 12 Vict. 63, s. 89—"Charge incurred."

In an action against the clerk of a local board of health, the declaration alleged a contract out of which the claim accrued and the circumstances under which the liability of the defendant arose, and concluded by claiming 500*l*. The second count incorporated by reference the allegations in the first and following, the form required by the C.L.P.A. 1854, s. 69, and concluded by claiming a writ of mandamus, commanding the defendant to levy a rate "for the payment of the said debts and moneys so due and owing to the plaintiffs as aforesaid."

Held (affirming the judgment of the court below), that after a verdict for the plaintiff, the omission in the second count of any specific sum as claimed was immaterial, and that the claim for the mandamus was sufficiently stated.

Commissioners under the Tunstall Improvement Act became indebted to plaintiffs for work, labour, &c., between 1848 and 1853. Whilst the debt was owing the General Board of Health published a provisional order, which was confirmed by the Public Health Supplemental Act 1855, by which order the Public Health Act 1848 was applied to Tunstall, the powers of the improvement commissioners ceased, and their property, &c., was transferred to the Tunstall Local Board of Health; and it was ordered that debts contracted by the commissioners should be satisfied by the local board out of such parts of the transferred property as would have been chargeable therewith if such order had not been made, and should be paid by the local board as by the commissioners, provided that if such property was insufficient, the deficiency should be charged upon the rates leviable under the Public Health Act 1848. Plaintiffs brought this action more than six years after the debt accrued, and claimed a writ of mandamus to levy a rate for the payment of the debt:

Held (affirming the judgment of the court below), that a plea of the Statute of Limitations was bad, as being no bar to the claim for a mandamus:

Held, also (affirming the judgment of the court below), that a plea, founded on the 89th section of the Public Health Act 1848, which stated that "the cause of claim for such writ did not accrue within six months before action brought, and that the said debts were not nor are a charge or expense incurred by the said local board within six months before writ, or within six months before demand of the said rate," was bad; that the 89th section does not apply to charges and expenses incurred by the commissioners and transferred by them to the local board of health, which were made a charge upon the rates, but that it was intended solely to prohibit retrospective rates for charges and expenses incurred by the local board more than six months before the rate.

Held further (affirming the judgment of the court below), that the amount of the debt might be ascertained by the verdict of a jury in an action in which the writ of mandamus was claimed.

Declaration.—Henry Ward and Henry Ward the younger sue Joseph Lowndes as, and who at the commencement of the suit was, the clerk to the Local Board of Health for the township of Tunstall, duly appointed under the provisions and for the purposes of the Public Health Act 1848, for that after the making and passing of the Tunstall Improvement Act 1847, and before the making the provisional order hereinafter mentioned, the Tunstall Improvement Commissioners in the last-mentioned Act mentioned, in pursuance of its provisions, published an advertisement, offering a premium of 20*l*. to the architect who should produce the best plan for a covered market-house and hotel, provided that the person furnishing the selected plans

should not afterwards be employed as architect for the said buildings, and the plaintiffs say they being architects, produced a plan which was the best and most approved for the said covered market-house and hotel, and thereby became entitled to receive from the said commissioners the said premium of 20*l*., and the plaintiffs were not, nor was either of them, employed as architects for the said buildings, yet the commissioners did not pay the said premium, which at the time of the making the provisional order hereinafter mentioned was wholly due to the plaintiffs. And the plaintiffs further say that after the passing of the said Tunstall Improvement Act, and before and at the time of the making of the provisional order hereinafter mentioned, the said commissioners became and were indebted to the plaintiffs for work done and materials provided by the plaintiffs for the said commissioners, at their request, in preparing and altering certain plans and estimates for a new market place and buildings, then proposed to be erected by the said commissioners under and in pursuance of the powers and provisions of the last-mentioned Act. And the plaintiffs further say that afterwards, and whilst all the said moneys in the declaration mentioned were due and owing to the plaintiffs, the General Board of Health, in the Public Health Act 1848 mentioned, duly and in pursuance of the powers and provisions of the last-mentioned Act, made a certain provisional order under their hands and seal of office, and duly published and deposited the same as by the last-mentioned Act is directed, and that afterwards by the Public Health Supplemental Act 1855 it was enacted that the said provisional order should be, and the same was thereby confirmed and made absolute. And the plaintiffs further say that in and by the said order it was, and is amongst other things, ordered and directed that the Public Health Act 1848, should apply to and be in force within and throughout the entire area, places and parts of places comprised within the boundaries of the said township of Tunstall, and that the said township should be and constitute a district for the purpose of the said Public Health Act accordingly; that the local board of health to be elected for the said township should consist of twenty-four persons; that such parts of the said Tunstall Improvement Act 1847 as were specified in the schedule to the said order should be repealed, except as in the said order is excepted; that the powers, authorities and duties of the commissioners for the time being acting in the execution of the Tunstall Improvement Act 1847 should cease; that all the property and estate of the said commissioners acting in execution of the Tunstall Improvement Act 1847 should be transferred to the Tunstall board of health, and should, as near as circumstances would permit, be held by the said local board of health upon the same trusts and for the same purposes as by the said commissioners; that all debts, moneys and securities for money contracted or payable by the commissioners should be satisfied by the said local board out of such parts of the said transferred property and estate as would have been chargeable therewith if the said order had not been made, and should be paid and satisfied by the said local board as by the said commissioners, provided always that if such property and estate were insufficient for that purpose, the deficiency should be charged upon the rates leviable under the said Public Health Act 1848, in the parts only which would have been chargeable with such deficiency if the said order had not been made. And the plaintiffs further say that by the said order, so confirmed as aforesaid, certain property and estate of the said Tunstall Improvement Commissioners became and was before this suit transferred to the said local board of health, which last-mentioned property and estate would, if the said order had not been made, have been

EX. CH.]

WARD AND ANOTHER v. LOWNDES.

[EX. CH.]

chargeable with the said debts and moneys so due and owing by the said commissioners to the plaintiffs as aforesaid, and which at the commencement of this suit were in the hands of the said local board of health, and sufficient to satisfy and applicable to the satisfaction and payment of the said debts and moneys so due and owing to the plaintiffs, and out of which the said local board of health ought to have paid and satisfied the same; and though everything has been done by the plaintiffs on their parts, and everything has happened necessary to entitle them to be satisfied their said debts and moneys out of the last-mentioned property and estate, yet the said local board of health have not paid or satisfied the same or any part thereof. And the plaintiffs further say, that after the making of the said order, and after the said property and estate of the said commissioners were so transferred as aforesaid, the said property and estate so transferred were insufficient for the purpose of satisfying certain of the debts and moneys theretofore contracted and payable by the said commissioners, and which said property and estate would have been chargeable therewith if the said order had not been made; and thereupon the said local board of health, in pursuance of the said order, levied certain rates under the said Public Health Act 1848, for the purpose of satisfying the said deficiency in the parts only which would have been chargeable with such deficiency if the said order had not been made, and thereupon the said sums so due and owing to the plaintiffs as aforesaid, and being and forming part of such last-mentioned debts and moneys, became and were, under and by virtue of the order, chargeable and charged upon the said rates so levied as aforesaid. And the plaintiffs further say that, although at the commencement of this suit there was in the hands of the local board of health sufficient of the rates so levied as last aforesaid to satisfy the said debts and moneys so due and owing to the plaintiffs as aforesaid; and though everything has been done by them on their parts, and everything has happened necessary to entitle them to be paid and satisfied their said debts and moneys out of the said rates so then in the hands of the said local board of health as aforesaid, yet the said local board have not paid or satisfied the same or any part thereof, and the plaintiffs claim 500*l*.

Second count.—And the plaintiffs further say that the Tunstall Improvement Commissioners, in the said declaration hereinbefore mentioned, and for the purpose therein mentioned, published the advertisement therein mentioned, and the plaintiffs became entitled to receive payment from the said commissioners of the said sum of 20*l*. as therein mentioned; and the said commissioners became and were indebted to the plaintiffs in manner and form as therein alleged; and that whilst the said moneys were due and owing to the plaintiffs from the said commissioners as therein alleged, the General Board of Health therein mentioned made, published and deposited the said provisional order as therein alleged, and the said order was confirmed and made absolute as therein alleged, and that in and by the said order it was, amongst other things, ordered and directed as hereinbefore alleged and set forth, and that the said property and estate of the said Tunstall Improvement Commissioners became and were transferred to the said local board of health as therein alleged, and that the said property and estate of the said Tunstall Improvement Commissioners so transferred were insufficient to satisfy the said debts and moneys so due and payable to the plaintiffs as aforesaid, and which would have been chargeable therewith if the said order had not been made; and the said debts and moneys became and were a deficiency chargeable and to be charged upon a rate leviable and to be levied by the local board of health under the Public Health Act, in pursuance of the said provisional order, and by reason of the said debts and

moneys being still owing, and of there becoming and being such deficiency as aforesaid, the plaintiffs became and were and are personally interested in the levying a rate to be charged and chargeable with such last-mentioned deficiency, within the meaning of the last Common Law Procedure Act 1854, to wit, to the amount of all the said debts and moneys so aforesaid due and owing to them as aforesaid; and the plaintiffs being so interested, afterwards and at a reasonable time before the commencement of this suit, demanded of and required the said local board of health to levy, in pursuance of the said provisional order, a rate, under the said Public Health Act, for the payment of such debts and moneys, but the said local board of health wholly neglected and refused so to do; and the plaintiffs have thereby, and by reason of the non-performance by the said local board of health of their duty in that behalf, sustained damage to the amount of all the debts and moneys so due and owing to them as in the first count mentioned; and therefore the plaintiffs claim a writ of *mandamus* commanding the defendant to levy, in pursuance of the said provisional order, a rate, under the Public Health Act 1848, for the payment of the said debts and moneys so due and owing to the plaintiffs as aforesaid.

The defendant pleaded sixteen pleas, of which the fifteenth and sixteenth only were material to the present question.

Plea 15.—That the alleged causes of action did not accrue within six years from the commencement of the suit.

Plea 16.—The same, being to so much of the declaration as claims a writ of *mandamus* commanding the defendant to levy, in pursuance of the said provisional order, a rate under the Public Health Act, 1848, for payment of the debts and moneys so alleged to be due and owing to the plaintiffs. The defendant says that the alleged cause of claim for such writ, exclusive of the demand for a rate in the declaration mentioned, did not accrue within six calendar months before this suit, and that the said alleged debts and moneys, or any part thereof, were not, nor are, a charge or expense incurred by the local board of health, at any time within six calendar months before the suit, or within six calendar months before the said demand for the said rate, wherefore the said defendant, or the said local board of health, cannot therefore by law now make or levy a rate for the payment thereof, or any part thereof, or any such rate as the plaintiffs claim that the defendant should be commanded to make as aforesaid.

Issue was joined on all the pleas excepting the sixteenth. Demurrers to the fifteenth and sixteenth pleas, and joinder therein.

The plaintiffs entered a *nolle prosequi* as to the whole of their claim against the defendant, excepting as to their claim for a writ of *mandamus*.

The cause was tried before Channell, B. at the last spring assizes at Gloucester, when the defendant had a verdict on the fifteenth plea, as to the sum of 20*l*., and the plaintiffs on the other issues, with 35*l*. 10*s*. damages. A rule having been subsequently obtained in arrest of judgment, the Court of Q.B., after argument, gave judgment upon the demurrers, and upon the rule in favour of the plaintiff. Against this decision the defendant now brought his writ of error.

*M. Smith, Q.C. (M'Mahon with him)* for the defendant.—As to the demurrer to the sixteenth plea, that plea is good. That plea is founded on the 89th section of the Public Health Act 1848, which enacts "that the local board of health may make and levy the said special and general district rates, or any or either of them, prospectively, in order to raise money for the payment of future charges and expenses; or retrospectively, in order to raise money for the payment of charges and expenses which may have been

incurred at any time within six months before the making of the rate." The debt claimed was due from the commissioners to the plaintiffs before the provisional order mentioned in the declaration was made; and by that provisional order, which has the force of an Act of Parliament, the commissioners were abolished, and their property transferred to the local board of health. The demand should have been made within six months from such transfer, but here there was no duty upon the defendant to make the rate, for the charge was not incurred within six months of the demand, and the six months began to run directly the deficiency in the chargeable property transferred by the commissioners was ascertained; after the six months the remedy is lost, and the effect of a *mandamus* would be to charge parties not legally liable. The debt of the plaintiff was an ordinary simple contract debt; 20*l.* is for the premium for the plan, and the larger part of the claim is for work and labour done. The debt was due at the time the powers of the commissioners were transferred to the local board; the order was made in 1855, and confirmed by Act of Parliament, 18 & 19 Vict. c. 125. This debt became a charge upon the rate as soon as the order was published and confirmed. [MARTIN, B.—Is not the six months confined to rates which they are willing to make? In the judgment of Erle, C. J., with reference to the case of *Waddington v. The City of London Union*, 28 L. J. 113, M. C., heard before him and the other judges of the Court of Q.B., when he sat there, and communicated by him to me, there is a distinction between rates made for the poor generally, and rates made under an Act of Parliament.] Lord Campbell, C.J. in his judgment in the court below says: "The 89th section applies only to rates to be made to defray expenses incurred by the board, and not to cases like the present, where the charge is cast upon the rates. When by Act of Parliament it is provided that a debt shall be a charge upon the rates, that impliedly gives a power to raise a rate to answer the charge." The six months began to run as soon as the claim became a charge, and it became a charge as soon as there was a deficiency. [WILLIAMS, J.—The insufficiency of the fund is a fact which exists, although it may not be ascertained.] Lord Campbell seems to have thought that a special rate might have been made to satisfy this demand; but that is not so. The order says that if the property and estate is insufficient, the insufficiency should be charged upon rates leviable under the Public Health Act; this was a charge incurred after and by reason of the transfer. [BYLES, J.—Do you maintain that if there had been no other demand and no other claim, a rate could have been made?] Yes; a general rate ought to have been made as soon as the debt accrued, and within six months after. [MARTIN, B.—Suppose they deny their liability and so postpone it for more than six months.] That supposition is explained away in *Reg. v. Local Board of Rotherham*, 8 E. & B. 906. The judgment would be a fresh charge, for which a rate might be made. Why should persons coming into the parish five or six years after be rated for these expenses? [MARTIN, B.—Because they had the misfortune to have had commissioners.] All the cases were fully considered by this court in the case of *Waddington v. City of London*, 28 L. J. 113, M. C.; and there it was held by this court, reversing the judgment of the Q. B., that the contribution order made by the guardians was wholly invalid, as being made in part to pay old debts; that the guardians had no power by law to make a retrospective order, nor overseers to make a retrospective poor-rate. The statute was intended to make a limitation, and the Legislature thought six months a reasonable time. The decision of the court below was wrong, for according to it there would be no limit.

Then, as to the fifteenth plea. That plea is a good answer to the *mandamus*. [WILLES, J.—The jury have found, as to the 20*l.*, for the defendant; the Statute of Limitations does not apply to such a proceeding as this.] Then I am entitled to arrest the judgment. You can only proceed by *mandamus* in cases where you could proceed by action against a private individual. This is an ordinary debt for work and labour. *Kendall v. King*, 17 C.B. 483, shows an action may be brought against the committee of a lunatic asylum on a contract entered into by them for plans, though the judgment could not be enforced. The writ of *mandamus* is a sort of statutable execution given by the C.L.P.A. 1854, but the Statute of Limitations is a good bar. This is neither a specialty debt nor a statutory debt, and the fifteenth plea is a good bar, and the judgment of the court on that plea ought to be for the defendant. The count in the declaration praying a *mandamus* is bad in arrest of judgment. The point taken in the court below was that you could not have a prayer for a *mandamus* for unliquidated damages. What is there that gives the jury the right to ascertain an amount? The first count was abandoned, but the second refers to the first, and for the purpose of ascertaining what are the allegations referred to we must look to it. The first count then alleges a contract out of which the claim had accrued and the circumstances under which the defendant's liability arose, and it concludes with claiming 500*l.*; then the second count incorporates by reference the allegations in the first, and following the form required by the C. L. P. A. 1854, concludes by claiming a writ of *mandamus* commanding the defendant to levy a rate for the payment of the said debts and moneys so due and owing to the plaintiffs; but the amount is unascertained, and the defect is not supplied by the claim for 500*l.* in the first count. There must be an action in which the amount may be ascertained, and the question of right be established. No new obligation was created by the C. L. P. A., but only a more convenient mode of procedure. [CHANNELL, B.—Must we not take it upon this record that there is a sufficient debt alleged?] There is no amount stated; the amount must be known and demanded, and payment refused. How can a jury assess and fix a proper amount? [CHOWDER, J.—They have done so.] Yes; but they were not warranted in so doing by the record. [BYLES, J.—The record says that the commissioners owed the plaintiffs then a large sum of money for work and labour.] Yes; but the amount is not stated; no specific amount is claimed. [WILLES, J.—I believe in the old books it would not be difficult to find cases in which plaintiffs had failed in actions of debt for want of proof of the amount alleged to a farthing; then, to remedy that, the action of *indebitatus assumpsit* was introduced; and in course of time the judges became accustomed to that, and their minds being softened, they applied the same practice to actions of debt; and then the C. L. P. A. altered that, and said that it should not be necessary to state an amount in any case. Can we hold that in this case it was intended by the Legislature that the courts should act differently to what they do in other cases?]

*Dowdeswell (Pigott, Serjt. with him) contra.*—The limitation of six months for making retrospective rates points to debts incurred by the local boards themselves, and not to such as this, which is imposed by statute: (see 2 Chitt. Stats. 370, note C.) The subsequent Act (18 & 19 Vict. c. 125, ss. 10, 11), confirming the provisional order, makes that clear. That order, when so confirmed, acquired the force of an Act of Parliament. Considerable property was vested in the board of health, and in consideration they took upon themselves the debts and liabilities of the commissioners, and they were to pay and satisfy them out of the property and estate, and if



they were insufficient for that purpose, the deficiency was to be charged upon the rates leviable under the Public Health Act 1848. Not only were debts to be satisfied, but securities also; could it therefore be held that a man holding a bond must come and claim it within six months? Is it to be supposed that the Act should intend to impose on a person who had the security not only of the rates, but also of the property, a condition that if he did not come in within six months he should lose all right? Then it is said that an action should be brought and judgment recovered; but the Act is not to be so construed. [BYLES, J.—Would an action lie by the present plaintiffs against the local board under the words of the order?] Not unless they had funds; it would be necessary to aver that defendants had funds. How could the plaintiffs know anything of the affairs of the local board of health? It would be the greatest injustice to creditors, and it cannot be supposed that the statute intended to impose on creditors the necessity of immediately rushing into litigation. The words of the statute and order are clear; the one imposes a limit, the other none.

The COURT intimated that they were all of opinion that the statute of James was no bar.

*M. Smith, Q.C. in reply.*—The current of the cases and of legislation has been to prevent those who do not incur liabilities from being saddled with them. The 89th section says that "the local board of health may make and levy the said special and general district rates, or any or either of them, prospectively, in order to raise money for the payment of future charges and expenses; or retrospectively, in order to raise money for the payment of charges and expenses which may have been incurred at any time within six months from the making of the rate." The local board are placed in the position of the commissioners. How is an amount of unliquidated damages to be ascertained? The work might be badly done, or there might be other circumstances constituting a good defence. The new body are placed in the position of the old, with all their rights and liabilities, and the right of action is transferred with other things. The maxim *exigantibus et non dormientibus jura subveniunt* applies; here the plaintiffs have slept upon their rights, which is not permitted; whereas in the present case the body upon whom the burden is to fall is a fluctuating one. In 1855 this claim became a charge upon the rates, and an action might then have been brought against the commissioners, and the judgment would have been a new charge. The expression "charges and expenses incurred" cannot mean voluntary charges. The case of bonds, put by the other side, is not applicable. This is an implied contract, but every instalment on a bond would become a fresh charge. The case does not come within the Act, and no rate can lawfully be made to pay this debt. *Southampton Bridge Company v. Local Board of Southampton*, 8 E. & B. 801, was cited.

*WILLIAMS, J.*—I am of opinion that the judgment of the Q.B. must be affirmed. The first question is, whether the sixteenth plea is a good answer, and whether the provision contained in the 89th section of the Public Health Act 1848 applies to such a charge as this. I am of opinion that it does not. The 16th plea says that the alleged cause of claim of the writ of *mandamus* did not accrue within six calendar months before the suit, and that the alleged debts and moneys, or any part thereof, were not, nor are, a charge or expense incurred by the local board of health at any time within six calendar months before the suit, or within six calendar months before the demand for the rate; wherefore the defendant, or the local board, cannot lawfully make a rate for payment thereof. Looking at the language of the Act, I do not think that the present demand is such a charge incurred by them within the meaning of that section. The

debt cannot be said to have been incurred by them; it was incurred by the commissioners, and was transferred to them; and it is not therefore within the language employed in the Act, namely, a charge incurred by them. To hold the contrary would be putting a harsh construction upon the words of the section, and lead to injustice to the plaintiffs. Are the six months, beyond which the defendant says the rate cannot be levied, to begin to run from the date of the order of transfer to the local board, or from the time of ascertaining the deficiency in the property? But in either way, to put the construction for which Mr. Smith contended would be to perpetrate an injustice that the Act could never have contemplated. Six months might not be sufficient time for ascertaining whether there were assets to meet the claim; then, inasmuch as it is plain that this proceeding cannot be sustained unless there is an ascertained deficiency, it would be driving the plaintiffs to proceed at their peril, and hard indeed to make them ascertain within six months and might be utterly impossible. On the whole, I think that plea is bad. Then as to the fifteenth plea, is the plea of the Statute of Limitations an answer to this demand? The plea is general; it says that the alleged causes of action did not accrue within six years from the commencement of the suit; but there is no statute which limits the time within which a party may seek his remedy by *mandamus*. Then as to the declaration, I think the plaintiff has averred everything necessary to enable him to obtain this remedy, and has shown sufficient to entitle him to a *mandamus*.

*MARTIN, B.*—I am of the same opinion, and I think that to yield to Mr. Smith's argument would be to give a strained construction, and unsettle the natural meaning of the words used; and as to the sixteenth plea, I think it is bad. With respect to the fifteenth plea, the Statute of Limitations, I am not aware that there is any limitation of six years to a claim for the writ of *mandamus*. I must not be understood to say that if the debt had been barred, and that had been properly pleaded, that it would not be a good plea; but here it is not so pleaded, but only to the claim for the *mandamus*. I think the judgment should be affirmed.

*CROWDER, J.*—I am of the same opinion. [His Lordship read the 89th section of the Act and the sixteenth plea.] The Court of Q.B. held that the plaintiffs' claim was not a charge incurred by the local board, and it seems to me that it would be difficult to say when it could be a charge incurred by them within the meaning of the 89th section. Here, beyond all doubt, the charge was incurred by the commissioners under the local Act, and that charge was transferred to the local board. But when was it incurred? It cannot be at the time of transfer, and can we say this is such a charge as is to be levied under the 89th section? No rate could be levied until a deficiency was ascertained. After the transfer of the debt to the local board, some period of time must elapse before the deficiency was ascertained. It must be either for the plaintiffs or for the defendant to ascertain it; but in either case the six months might elapse before it was ascertained. The contention that the statute could have intended such injustice cannot be supported. The sixteenth plea, therefore, is no answer. As to the fifteenth plea, looking at the pleadings, and that it is pleaded to the *mandamus*, I think it does not apply; and as to the point in arrest of judgment, I think that the declaration sets out all that is necessary to entitle the plaintiff to a *mandamus*, and that therefore the judgment of the court below ought to be affirmed.

*WILLES, J.* concurred.

*CHANNELL, B.*—I am of the same opinion. I adopt the arguments of the plaintiffs and the judgments of my learned brothers as to the fifteenth plea, and I think the construction put by Mr. Dowdeswell upon the 89th

Q. B.]

LADD v. GOULD.

[Q. B.]

section was the correct one, and I think the judgment of the court below should be affirmed.

BYLES, J.—I think that this declaration is good, and that the fifteenth plea is no answer to the claim for the *mandamus*. The 68th section of the C.L.P.A. 1854 provides a mode for enforcing a duty by *mandamus* and applies to all cases where a man has a duty to discharge; but that is not a proceeding to which the statute of James is applicable. On the whole, I am inclined to agree with the rest of the court, that the judgment of the court below should be affirmed.

*Judgment affirmed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HARTLEY, Esqrs., Barristers-at-Law.

Saturday, Jan. 21.

LADD (appellant) v. GOULD (respondent).

*Summary Proceedings (Justices) Act—Case—Matter of fact—Medical Practitioners Act.*

*The Medical Practitioners Act (21 & 22 Vict. c. 90, s. 40) enacts that any person who shall wilfully and falsely pretend to be or take or use the name or title of (inter alia) surgeon, or any name, title, addition or description, implying that he is registered under the Act, or that he is recognised by law as (inter alia) a licentiate in medicine and surgery shall, upon a summary conviction, pay a sum not exceeding 20l. It is a question of fact for magistrates to decide, and not one of law to be reserved for the opinion of this court, whether, by the use of the word "surgeon," coupled with "dentist," or "mechanical dentist," or "chiroprodist," or such like titles, and the other facts in each case, the party proceeded against is guilty of the offence created by the above enactment.*

Case stated by the magistrates at Kingston-upon-Thames for the opinion of this court.

On the 11th Oct. last an information was laid before the magistrates at Kingston-upon-Thames against Frederick Gould, under the 40th section of the Medical Act (21 & 22 Vict. c. 90), for that he did, at his residence in Eden-street, Kingston, take and use the title of surgeon without legal qualification, he not being registered under the Medical Act; and that in that capacity he treated one Charlotte Tenniswood for a surgical complaint, and supplied her with medicine for the same, contrary to the form of the statute, for which said medicine he was paid, and for which said offence he had forfeited a sum not exceeding 20l.

When the information was heard the prosecution was conducted by Mr. Ladd, the secretary of the London Medical Registration Society; and it was proved by the informant Charlotte Tenniswood, that on the 5th Aug. last she went to Gould's shop, and told him she had knocked her elbow, and that it caused a great numbness in her arm and fingers. Gould examined her arm, and said she had undoubtedly jarred the marrow of the bone, and gave her a liniment, for which she paid him 1s. She said she noticed that he had "surgeon" on the side of his door, and she believed him to be a surgeon, or she would not have gone to him; but she afterwards said that the word "surgeon" was followed by the words "and mechanical dentist." It was also proved that Gould's name, with the words "chemist and druggist," was on his shop front, and that the woman went to his shop, which was also a chemist's and druggist's, because, she said, she thought he would supply her with something cheaper than by going to a doctor's. She also stated that she had made no complaint to the registration society, but that, on the day after she had got the liniment, she consulted a surgeon, Mr. Ellis, and that he gave her a lotion and told her not to use the liniment. Mr. Ellis afterwards called upon her with a gentleman, and asked her name, and said they should want her as a witness.

The magistrates were of opinion that Gould had used

the word "surgeon" simply to show what branches of the business of a dentist he carried on, and not to represent himself as a surgeon within the meaning of the Act; and, at all events, there was not sufficient evidence that he wilfully (as well as falsely) pretended to, or took, or used the name of a surgeon or other title implying that he was recognised by law as a surgeon.

They thereupon dismissed the information, but, at the request of the appellant (Mr. Ladd), stated this case, and submitted three questions for the opinion of this court, which may be summed up in one—viz., whether, upon the evidence, Mr. Gould was guilty of the offence contemplated by the Act.

LUSH, Q.C. for the appellant.—This case raises the question whether the use of the word "surgeon" in connection with the words "and mechanical dentist," was a using of the title of a surgeon within the 40th section of the Medical Act. The question was whether on the evidence the party was guilty.

CROMPTON, J.—That is a question on which the magistrates were bound to draw their own conclusion from the facts.

COCKBURN, C. J.—I do not think there was any false pretence in using the name of a surgeon.

CROMPTON, J.—The respondent has called himself "surgeon and mechanical dentist," which he thought meant much the same as "surgeon-dentist."

COCKBURN, C. J.—The magistrates were of opinion that the case was not within the Act, and I should have come to the same conclusion.

CROMPTON, J.—I think there was evidence upon which the magistrates might have found either way, but the court will not find for them.

LUSH, Q.C.—The magistrates meant to leave to the court whether the evidence brought the party within the meaning of the Act.

COCKBURN, C. J.—I do not think it does, but this is a question of fact. It is like the case of persons who call themselves "surgeon-dentists," who are known generally not to be surgeons, though some of them are.

CROMPTON, J.—It is like the case of the "surgeon-chiroprodists." But it is a matter of fact for the magistrates. The statute gives power to put questions of law only to this court, not questions of fact.

COCKBURN, C. J.—I do not think there was any falsehood, or any intention to deceive, which was necessary in order to bring the case within the Act. That was also the opinion of the magistrates, though they might have come to a different opinion.

CROMPTON, J., said he thought there was evidence upon which the magistrates might have come to either conclusion, but he could not say they were bound to convict. (a)

*Judgment for respondent.*

Wednesday, Jan. 25.

THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF LLANLECHID (respondents) AND THE PARISH OFFICERS OF PISTYLL (appellants).

*Poor-law—Order of removal—Suspension—When to be made.*

*The suspension of an order of removal must be made by the justices at the time they make the order of removal itself. Where, therefore, an order of removal was made on the 28th Sept., and the indorsement of suspension was not made until the 26th Oct. following: Held (Wightman, J. dissentiente) that the suspension was bad, and that the costs of maintenance could not be recovered.*

(a) This case must be understood as not deciding the question whether the use of the title of surgeon, &c. is prohibited, but only that it was a question of fact for the justices, whether the title "surgeon" separated from the title "dentist," by the word "mechanical" was a using of the title "surgeon" or a distinct title constituted of the whole description together. It appears to me that the justices were wrong in their interpretation of the term, but it was clearly a question of fact and not of law, and therefore not the subject of appeal.

Q. B.] THE CHURCHWARDENS, &amp; C. OF LLANLLECHID v. THE PARISH OFFICERS OF PISTYLL. [Q. B.]

This was a case stated by the sessions for the opinion of this court upon an appeal. It appeared that on the 28th Sept. 1849 an order was made by justices for the removal of one Jane Jones. On the 26th Oct. following this order was suspended by reason of the pauper's sickness. On the 2nd Nov. 1858 an order was made for the payment of the expenses of the maintenance of the pauper under such suspended order. The appellants appealed against this order, and the sessions quashed it, subject to the present case.

By sect. 2 of the 35 Geo. 3, c. 101, after reciting that, "whereas poor persons are often removed or passed to the place of their settlement during the time of their sickness, to the great danger of their lives," enacts, "that in case any poor person shall from henceforth be brought before any justice or justices of the peace for the purpose of being removed from the place where he or she is inhabiting or sojourning, by virtue of any order of removal, and it shall appear to the said justice or justices that such poor person is unable to travel by reason of sickness or other infirmity or that it would be dangerous for him or her so to do, the justice or justices making such order of removal are hereby authorised to suspend the execution of the same until they are satisfied that it may safely be executed without danger to any person who is the subject thereof, which suspension shall be indorsed on the said order of removal and signed by such justice or justices."

*Beavan* appeared in support of the order of sessions, and argued that the sessions were right, for that the suspension of the order of removal was bad inasmuch as it was not made at the same time as the order of removal, which the 35 Geo. 3, c. 101, s. 2, requires; for although it is not absolutely necessary that the pauper should be present at the time when the order of removal is made, the suspension of it must take place at the time when the order of removal itself is made: (*R. v. Everdon*, 9 East, 101; 49 Geo. 3, c. 124, s. 1.)

*B. C. Robinson*, contra, contended that the suspension of the order need not be made at the time of the making of the order of removal, and that the 35 Geo. 3, c. 101, s. 2, should have a liberal construction so as to meet such a case as the present, it being immaterial to the merits of the case whether the suspension takes place at the exact time of the making of the order of removal or some days after, and that it had already been held under this statute that the pauper need not be actually present when the order of removal is made, though the section in terms says, "in case any poor person shall from henceforth be brought before any justice," &c.: (*Reg. v. Everdon*, supra; *Reg. v. Llanwinio*, 4 T. R. 473.)

*Cockburn*, C. J.—I agree of opinion that the order of sessions quashing the order for costs of maintenance is good. I am very desirous, if possible, by giving a liberal construction to this statute, to remedy the mischief which has arisen; but upon looking to the statute I think the second section applies to cases only where sickness is brought to the attention of the justices at the time of the making of the order of removal. [His Lordship here read the words of the second section.] I think, if the meaning of the Legislature was that such an order of suspension might be made at a subsequent time, it would have spoken of the order of removal in the past, and not alone in the present tense, and would not merely have referred to sickness at the time of the making of the order, but of any subsequent sickness. The Legislature has not done so. I quite agree that the mischief in the one case may be quite as great as in the other, but we shall be straining the meaning of words, which acting judicially we ought not to do, it being for the Legislature alone to remedy the evil if it thinks fit.

*WIGHTMAN*, J. thought that the court was at liberty to put a more liberal construction upon the section, and that, under the circumstances, the suspension of the order of removal was not illegal.

*CROMPTON*, J.—I have looked anxiously to see if

the Act could be so construed as to support this order of suspension; but, as I read the Act of Parliament, it seems to me that it only gives the justices the power of suspending the order if it appears to them, at the time of making the order of removal, that the party is too ill to be removed. I find no machinery giving the justices a new jurisdiction to make an order of suspension after the time of making the order of removal. *Reg. v. Everdon* shows that we have a judicial power under the section; and Lord Ellenborough put a judicial exposition upon such a case, and held that it was sufficient if the case of the pauper was brought judicially before the magistrates for the purpose of his removal, without his being actually present. I cannot see my way to say that the jurisdiction contended for is given by the statute. We must be careful not ourselves to legislate to remedy an evil.

*HILL*, J.—I agree with my Lord and my brother *Crompton* that this order was bad. It is impossible, I think, to escape from the words of the statute, that the suspension must be made whilst the case of the pauper is before the justices. If there is any inconvenience in this, it is not for the court to supply the remedy. (a)

Order of sessions confirmed.

#### REG. v. FITCH.

*Metropolis Local Management Act*, 18 & 19 Vict. c. 120 — *Lighting rate*—*Scale of rate*—3 & 4 Will. 4, c. 90. By the *Metropolis Local Management Act*, 18 & 19 Vict. c. 120, the district board are directed, in their orders to the overseers to levy rates, to distinguish in cases where the 3 & 4 Will. 4, c. 90 (*Lighting Act*) has been in force, and under which land is rated in respect of lighting at a less amount than houses; and by sect. 165 it is enacted that in any parish in which at the time of the passing of the 18 & 19 Vict. c. 120, the Act of the 3 & 4 Will. 4, c. 90, is in force, "the owners and occupiers of houses, buildings and property other than land shall be rated by every lighting rate made under this Act at a rate in the pound three times greater than that at which the occupiers of land shall be rated in such lighting rate." Before the coming into operation of the 18 & 19 Vict. c. 120, part only of the parish of Fulham was under the operation of the 3 & 4 Will. 4, c. 90. After the passing of the said 18 & 19 Vict. c. 120, the whole of the parish of Fulham was (with another parish) formed in a district, and that part of the parish of Fulham not before under the 3 & 4 Will. 4, c. 90, was assessed to a lighting-rate: Held, that such part was not entitled to have its land assessed at a lower rate than its houses; but that all the assessable property should be assessed at one rate, and that the higher rate.

This was a case stated by consent under the 12 & 13 Vict. c. 45, s. 11, upon two appeals against a rate made under the *Metropolis Local Management Act* (18 & 19 Vict. c. 120), for lighting the parish of Fulham, and another rate, being a general rate made by the same authority.

It appeared that, before the coming into operation of the above Act, a portion of the parish of Fulham had been under the operation of the *Lighting and Watching Act* (3 & 4 Will. 4, c. 90). Under that statute there is a power to levy and collect rates in the same manner as poor-rates, the 33rd section providing, "that the owners and occupiers of houses, buildings and property (other than land) rateable to the relief of the poor in any such parish, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act."

(a) This case is important, and should cause the justices to be very careful to make the suspended order of removal at the same time as they make the removal itself.

Q. B.] REG. v. FITCH—REG. v. THE INHABITANTS OF AYLESFORD—CATES v. SOUTH. [Q. B.]

Under the Metropolis Local Management Act the parish of Fulham and the parish of St. Peter and St. Paul, Hammersmith, were formed into a district called the "Fulham District."

Under that statute the powers of the inspectors under the 3 & 4 Will. 4, c. 90, ceased. And by sect. 158 of the 18 & 19 Vict. c. 120, powers are given to the district board to levy rates for the purposes of the Act. That section enacts, "that the district board shall from time to time require the overseers of the several parishes in their district to levy the sums which the board may require for defraying the expenses of the execution of the Act, and the board are to distinguish in their orders sums required for sewers, and also where the 3 & 4 Will. 4, c. 90, or any other Act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the annual value thereof than houses, or is wholly exempted from being rated to such expenses, is in force in any parish or any part of any parish at the time of the passing of this Act, distinguish, as regards such parish or part, the sum required for defraying expenses of lighting their parish or district from sums required for defraying other expenses of executing this Act."

By the 165th section it is provided that in every parish or part of a parish in which at the time of the passing of this Act the Act of the 3 & 4 Will. 4, c. 90, is in force, "the owners and occupiers of houses, buildings and property other than land shall be rated to every lighting-rate made under this Act at a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated in such lighting-rate," &c.

It appeared that the board had duly rated the part of Fulham parish which had formerly been under the 3 & 4 Will. 4, c. 90, but that now that they had assessed the remainder of the parish to the lighting-rate they were in doubt as to the principle to be adopted, and it appeared that in fact they had assessed the whole of such part upon the lower scale, irrespective of its consisting of houses or land. This was now admitted to be erroneous, and that the rate must be amended; but it was contended, on the part of the occupiers of land only in that part of the parish not before under the operation of the 3 & 4 Will. 4, c. 90, that the occupiers of land only were entitled to be rated at one-third only the amount at which the occupiers of houses were rated, and that they were entitled to the advantage of this lower rating under the provisions of sect. 165 of the 18 & 19 Vict. c. 120, in the same way as though they had before been under the operation of the 3 & 4 Will. 4, c. 90.

*Lush*, Q.C. (*Hunee* with him) for the district board. —Whilst he admitted that the present rate was erroneous in being made upon the lower scale and must be amended, he contended that, as the part of Fulham parish now first assessed to a lighting-rate was not before the coming into operation of the 18 & 19 Vict. c. 120, under the 3 & 4 Will. c. 90, it was not within the operation of sect. 165 of the former Act, and therefore that land had no exemption to be rated to the lighting-rate at a less rate than houses: (*West Midlands Waterworks Company v. The Wandsworth District Board of Works*, 31 L. T. Rep. 162.

*Hawkins*, Q.C. (*Cleasby* with him), contra, contended that the whole parish was now entitled to be rated to the lighting-rate upon the same principle, namely, that laid down in sect. 165 of the 18 & 19 Vict. c. 120, as though the whole parish had formerly been lighted under the 3 & 4 Will. c. 90, and that land should be rated at three times less than houses.

The Court, however, were clearly of opinion that the exemption in the 3 & 4 Will. 4, c. 90, is kept alive only in those parts of the parish of Fulham to which it was formerly applied, and that the rest of the parish does not derive the same exemption under the pro-

visions of the 18 & 19 Vict. c. 120, and that the rate in respect of such other part of the parish should be uniform and upon the higher scale.

The lighting-rate to be amended accordingly.

Other points were argued which it is unnecessary to notice.

#### REG. v. THE INHABITANTS OF AYLESFORD.

*Police-rate—Lands held in ancient demesne.*

*Lands held by tenants in ancient demesne are not exempt from being assessed to the county and police-rates.*

This was an appeal by the parish of Aylesford, Kent, against an assessment to the county police-rate. The sessions confirmed the rate, subject to a case.

It appeared that all the lands in the parish of Aylesford were, in the time of William the First, ancient demesne, and were so entered in Domesday, under the title of "Terra regia." They were afterwards granted by the Crown to private individuals, and have remained in such possession since the reign of Queen Mary. The possessors have always paid poor-rates, but by virtue of the tenure of the lands have enjoyed certain privileges, such as being exempt from serving upon juries at the assizes and sessions.

By the 3 & 4 Vict. c. 88, s. 2, the justices are, for the purpose of defraying the expenses of the county police, to make a fair and equal police-rate, assessable on all messuages, lands, &c., liable to the county rate; and by the 15 & 16 Vict. c. 81, s. 2 (the County Rate Act), the justices are to appoint a committee for preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property rateable to the relief of the poor in every parish, &c.

*M. Smith*, Q.C. (*Deeds* with him) appeared in support of the order of sessions, but the court called upon

*Pickering*, Q.C. (*Denman* with him) who argued that tenants in ancient demesne were, amongst other privileges, free from all taxes and tallage imposed by Parliament except expressly exempt: (12 Geo. 2, c. 39; 4 Mau. & Sel. 437; Scriven, 2 vol. 582; Comyn's Dig. tit. "Ancient Demesne," let. K; 1 Salk. 57; Fitz. Nat. Bra. Bridgman, 277; 4 Inst.)

The Court were of opinion that the claim to the exemption was unsupported, and that tenants in ancient demesne were liable to be rated. *Order affirmed.*

Saturday, Nov. 12.

CATES (appellant) v. SOUTH (respondent).

Beerhouse—Saturday night—Sunday—11 & 12 Vict. c. 49.

On an information for opening a public-house for the sale of spirits before half-past twelve p.m. on Sunday, it appeared that the front door was open at twenty-two minutes past twelve on Sunday morning, and a policeman found in the commercial room four persons, one of whom was a traveller; there was a small quantity of spirits and water in a glass, from which one of the persons had been drinking. The landlady was sitting in the parlour. No spirits had been sold after twenty minutes before twelve o'clock on Saturday night:

Held, that the fact of the house being open at twenty-two minutes past twelve on Sunday morning was no proof that it was open for the sale of beer, &c., before half-past twelve on Sunday afternoon, within 11 & 12 Vict. c. 49, and that the above stated facts did not warrant a conviction.

This was a case stated under the 20 & 21 Vict. c. 43.

At a petty sessions of her Majesty's justices of the peace for the county of Essex, held at Great Dunmow in the said county, on the 4th July 1859, before us the Rev. Vicessimus Knox Child, clerk, and the Rev. Edward Francis Gepp, clerk.

An information by Daniel South, a police-constable,

was heard against Francis Cates, an innkeeper and victualler at Great Dunmow aforesaid, under the 11 & 12 Vict. c. 49, s. 1, charging that the said Francis Cates, being an innkeeper and victualler, on Sunday the 12th June 1859, at the Saracen's Head Inn, in the parish of Great Dunmow, in the said county of Essex, did unlawfully open his said house for the sale of spirits before half-past twelve o'clock in the afternoon of the same day, such spirits not being for the refreshment of travellers only.

From the evidence of Daniel South, John Langworthy and William Scott, three of the inhabitants of Dunmow, and of Susannah Polley, a servant of the appellant, it was proved that the front door of the appellant's inn was open at twenty-two minutes past twelve on Sunday morning, the 12th June last; that police-constable South went into the house and entered one of the rooms used for the reception of commercial travellers; that there were three persons in the room, namely, John Langworthy, William Scott and a traveller. There was a small quantity of whisky and water in one of the glasses, which the said John Langworthy had been drinking from. There was a mug and several other glasses on the table, which did not appear to have anything in them, but had been used that evening, and some of the persons were smoking. The landlady, the wife of the appellant, was in a parlour which adjoined and opened into the bar, when Daniel South, the policeman, entered.

It was proved that no spirits were brought into the room or paid for after twelve o'clock on Saturday night, and that the last spirits that were brought into the room were brought in and paid for at twenty minutes before twelve o'clock on Saturday night. The appellant proved that there were no other customers in the house except in the commercial room.

It was objected by the appellant's solicitor that there was no evidence of an actual sale of spirits after twelve o'clock on the Saturday night, and he contended the appellant was justified in keeping his house open for the accommodation of travellers and of his customers, if the liquor drunk by them was brought into the room and paid for before twelve o'clock on the Saturday night, whatever the quantity might be; and the fact of the street-door being open was not sufficient evidence that appellant opened his house for the sale of spirits.

We, the justices, considered the evidence supported the information, and the appellant was convicted and adjudged to pay a penalty of 20s. and costs.

The appellant being dissatisfied with such conviction, as being erroneous in point of law, demanded a case to be stated and signed for the opinion of her Majesty's judges of the Court of Q. B., which we hereby state and sign accordingly.

VICKE KNOX CHILD.

E. F. GEPP.

The stat. 11 & 12 Vict. c. 49, s. 1, enacts that no licensed victualler or person licensed, &c. shall open his house for the sale of wine, spirits, beer or other fermented or distilled liquors, or sell the same on Sundays before half-past twelve in the afternoon, &c. By sect. 2 it shall not be lawful for any licensed victualler, &c. to open his house for the sale of any other articles whatever within the respective times during which the sale of wine, spirits, beer, or other fermented or distilled liquor is thereinbefore prohibited, except as refreshment to travellers.

*Lush, Q.C.* for the appellant.—To support this conviction it must be held that if a man do not close his house before twelve o'clock on Saturday night, he opens it before half-past twelve on Sunday morning. There is nothing to show that the house was open for the sale of beer, &c.; customers were in the house, and the house was used by travellers; and a landlord is not bound to turn every customer out of his house at twelve o'clock; he is only bound to cease supplying them. [WIGHTMAN, J.—He must not supply them

after that time; but the landlady may surely sit in her bar till they have gone.]

COCKBURN, C.J.—It is not found as a fact in the case that the house was kept open for the sale of beer and spirits; and I do not think we can draw that conclusion from the evidence. On the contrary, it is found that no liquor was supplied after twenty minutes to twelve on Saturday night. The conviction must therefore be quashed.

WIGHTMAN, HILL and BLACKBURN, JJ. concurred.  
— Conviction quashed.

Wednesday, Nov. 16.

OVERTON (appellant) v. HUNTER (respondent).

*Alchouse—Innkeeper entertaining his guests with spirits—Prohibited hours—18 & 19 Vict. c. 118, s. 2. The 18 & 19 Vict. c. 118, s. 2, which prohibits licensed victuallers from opening or keeping open their houses for the sale of, or selling beer, wine, spirits, &c., after certain hours, does not apply to an innkeeper who, during the prohibited hours, is found gratuitously entertaining his guests with wine, beer, spirits, &c., though such guests are not travellers nor lodgers.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction of the appellant at the petty sessions for Chesterfield, for an offence under sect. 2 of the 18 & 19 Vict. c. 118, which enacts that "It shall not be lawful for any licensed victualler or person licensed to sell beer by retail to be drunk on the premises . . . to open or keep open his house for the sale of, or to sell beer, wine, spirits, or any other fermented or distilled liquor between the hours of three and five o'clock in the afternoon and after eleven o'clock in the afternoon on Sunday, or on Christmas-day or Good Friday, or any day appointed for a public fast or thanksgiving, or before four o'clock in the morning of the day following such Sunday, Christmas-day, Good Friday, or such days of public fast or thanksgiving, except to a traveller or to a lodger therein."

The information against the appellant was, for that he the said appellant, on the 14th Aug. 1859, at Hardwick, in the parish of Ant Hucknall, in the county of Derby, being then an alchouse-keeper, and duly licensed to sell exciseable liquors by retail in his house or premises there situate, and the said day being Sunday, did unlawfully open his said house for the sale of beer after eleven o'clock in the afternoon, otherwise than to a traveller or to a lodger in the said house or premises, contrary to the form of the statute in that case made and provided. The facts as stated in the case were the following:—

The appellant is a licensed victualler and alchouse-keeper within the meaning and provisions of the several statutes relating to the sale of wine, spirits and beer by retail in inns or public-houses, and he is duly licensed to sell wine, spirits and beer by retail at his the appellant's inn or public-house, at Hardwick Inn, in Derbyshire. The annual local feast was held on Sunday, the 14th Aug. 1859, and the Hardwick Inn was frequented by more people than usual on that day; at ten minutes before eleven o'clock on the evening of the same day, the appellant caused all persons to leave his inn, except those hereinafter mentioned, and he closed the outer doors of his inn and did not afterwards open them for the admission of customers. As soon as the outer doors were closed, a party consisting of the appellant and his wife, the appellant's brother-in-law and a young lady, both on a visit to the appellant, two persons who had assisted the appellant as additional waiters during the day, the Duke of Devonshire's farm-bailiff and the Marquis of Hartington's groom (the two last persons having been in the inn from nine o'clock in the afternoon), sat down, on the appellant's invitation, to a supper provided for them by the appel-

Q. B.]

REG. v ST. ANNE'S, WESTMINSTER.

[Q. B.]

lant at his expense in one of the rooms of the appellant's inn. During and after supper the party had spirits and water provided for them by the appellant at his expense. At ten minutes past eleven o'clock on the same evening a policeman entered the appellant's inn and found the same party in the room, and on the last occasion with a decanter of spirits and tumblers before them. On each occasion the appellant told the policeman that the party were his, the appellant's guests, and he was entertaining them. The policeman on this caused the above information to be laid against the appellant. There was no proof that the appellant had sold any spirits, wine or beer, or allowed any customer to enter his inn after eleven o'clock on the evening in question. The only persons joining the supper party who were inmates of the appellant's house were the appellant, his wife, the appellant's brother-in-law, and the young lady visiting the appellant. None of the other persons forming the party were travellers, or inmates of, or lodgers in the appellant's house or premises.

The justices stated in the case that they decided against the appellant, and convicted him for the alleged offence in the penalty of 40s. and costs; and that the grounds of their decision were, that they considered, under the statute 18 & 19 Vict. c. 118, s. 2, that the appellant was not entitled, even at his own expense, to suffer beer or spirituous liquors to be drunk or consumed in his house or premises by persons not being travellers, or inmates of or lodgers in his house or premises after the hour of eleven o'clock in the afternoon of any Sunday.

No one appeared in support of the conviction.

*Raymond* appeared for the appellant, and contended that, as the appellant was entertaining his friends at his own expense, he was not within the terms of the Act. (He was stopped by the court.)

*COCKBURN, C. J.*—It is quite unnecessary to argue this case further. The conviction cannot by any possibility be supported. Here is a publican who is found on a Sunday evening entertaining at supper a few of his friends who had been attending a feast in the neighbourhood, and at the supper those friends had some spirits and water. The justices have found, as a fact in the case, that there was no sale of spirits. The case then is really at an end; and I must say that it is a case in which there was not the slightest shadow of a pretence for such a conviction. The innkeeper was giving a private entertainment to his own guests, which he had a perfect right to do.

*HILL and BLACKBURN, JJ.* concurred.

*Conviction quashed with costs.*

*Saturday, Jan. 21.*

REG. on the prosecution of THE GUARDIANS OF BIRMINGHAM v. ST. ANNE'S, WESTMINSTER.

*Poor—Settlement by payment of rates—Rating of wife living apart from her husband.*

*The pauper P. married in 1825 at M., and he and his wife went to live in London, where they lived together till 1833, when the pauper refusing to support his wife, she went back to her mother's at M. and lived with her till her death in 1841. From that time down to the present she resided in the house she lived in with her mother (having an interest in it under her father's will), and was rated for it, and described in the rate-books as "Mrs. P.," or "Eliz. P." About four months in 1842 the pauper lived with his wife at M., when he went away, and his wife never saw him down to the present time, nor did he return to M.:*

*Held, that the pauper did not acquire a settlement in M. by payment of rates.*

Case stated upon appeal by St. Anne's, Westminster, to the Warwickshire quarter sessions, against an order of two justices of the borough of Birmingham under the

16 & 17 Vict. c. 97, s. 97, adjudging the settlement of Alfred John Potter, a pauper lunatic, and ordering the parish of St. Anne's, Westminster, to pay to the parish of Birmingham certain expenses of keeping and maintaining the said pauper in the lunatic asylum.

The pauper was about sixty years of age, and was settled in the appellant parish, and the order was properly made unless the pauper gained a settlement by rating in the parish of Merthyr Tydvil by reason of the following circumstances:—

He was married (26th April 1825) at the pariah church of Merthyr Tydvil to Elizabeth, the daughter of Jno. and Jane Williams, both of that parish.

Jno. Williams died 16th July 1810, leaving his widow and two daughters him surviving. At the time of his death he was seised in fee of two houses and a close in the said parish. By his will he devised this estate to trustees, upon trust to permit his wife and two daughters, and their several assigns, to receive and take rents, issues and profits thereof respectively, as tenants in common during the life of the wife, and after the decease of the wife to the two daughters and their heirs, executors, &c., as tenants in common. Jane Williams, the widow, died in 1841.

Immediately after the pauper's marriage in 1825 he and his wife came to reside in London and lived there till 1833, when the pauper's wife left him in consequence of his refusing to support her. She then went to her mother at Merthyr Tydvil, where she has since resided, supporting herself by keeping a school, with the assistance she derived from her interest in her father's property. With the exception hereinafter stated the pauper has lived entirely away from his wife.

Jane Williams, the mother, resided in and was rated for one of the houses above mentioned until her death. From her death up to the present time the pauper's wife had resided in the same house, except from the year 1852 to the year 1855, during which period she let the house and resided herself in another house in Merthyr Tydvil. Since the mother's death the rest of the property devised as above by John Williams has been let to various tenants, and the rents paid to the pauper's wife.

The name of the pauper's wife first appeared in the rate-books of Merthyr Tydvil in the year 1842, where she is assessed for the house above mentioned, in which assessment she is described as "the party rated" and as "the owner," and she continued to be rated in a similar manner for the same property down to the month of Nov. 1851. There was then a break during the period for which the house was let as above mentioned. From the termination of the tenancy to the present time the pauper's wife has been rated as before.

In the above rates the pauper's wife was described invariably either as "Mrs. Potter" or as "Elizabeth Potter." She paid all the rates herself.

From the 22nd June 1842 to the 22nd Oct. in the same year, the pauper lived with his wife at Merthyr Tydvil, during which period he signed a warrant of distress and an agreement with a tenant, but never received any rent or at any time otherwise interfered with the above-mentioned property.

Since Oct. 1842 the pauper's wife has never seen him, nor has he ever returned to Merthyr Tydvil. The pauper was never dealt with or recognised by the parish officers of Merthyr Tydvil as a ratepayer.

The question for the court was, whether under the above circumstances the pauper gained a settlement by rating in the parish of Merthyr Tydvil as a ratepayer.

*Macaulay* (Spoooner with him) in support of the order of sessions.

*Wills* contra.

Authorities cited:—*R. v. Bramshaw*, Burr. Set. Cas. 98; *R. v. Alton*, Ib. 418; *R. v. Painswick*, Burr. 475; *R. v. Openshaw*, Ib. 522; *R. v. Llangamarch*, 2 T. R. 628; *R. v. Heckmondwike*, 2 Doug. 564; *R.*

Q. B.]

REG. v. YEOMANS.

[Q. B.]

*v. Huthwaite*, 21 L. J. 189, M.C.; *R. v. Bengeworth*, 3 Ell. & B. 637; *R. v. Ringstead*, 7 B. & C. 64; stats. 43 Eliz. c. 2; 13 & 14 Car. 2, c. 12; 1 Jac. 2, c. 17, s. 3; 3 Will. & M. c. 11, s. 3; 8 & 9 Will. 3, c. 30; 35 Geo. 3, c. 101, s. 4.

COCKBURN, C.J.—I am of opinion that the order of sessions should be confirmed. From a very early period it has been uniformly held that in order to establish a settlement by rating to the relief of the poor, it is necessary to show that it was the intention of the parish officers to rate the pauper himself. That doctrine was founded on this, that the parish should have notice of the pauper's gaining a settlement in the parish. In this case there is no evidence of the parish officers ever having had any intention to rate the pauper himself. The only case in which the view of law I have referred to is not acquiesced in, is *R. v. St. Marylebone*, 15 Q. B. 399. That case, however, was a decision on a private Act of Parliament, which provides specially that an outgoing tenant shall be liable for the rates during the period which he occupies, and cannot be considered as overruling the previous cases.

CROMPTON, J.—I am of the same opinion. Upon the authorities we are bound to look at the intention of the parish officers in making the rate. And in *R. v. Hulme* 4 Q. B. 538, it was argued that the occupier as tenant gained a settlement where no person was named in the rate as occupier, if the parish had notice who was the party liable to be rated, by receiving the rates from the tenant; and so the court held, considering that the intention of the parish officers in making the rate was the real question. So in *R. v. Huthwaite* the court considered who was the person intended to be rated, and that being ascertained, that it was of no consequence leaving his name out of the rate or any thing of that kind. This view of the law is not shaken by what fell from my brother Erle, J. in *R. v. St. Marylebone*, which turned entirely on the words of the private Act of Parliament.

*Order of sessions confirmed.*

*Tuesday, Jan. 31.*

REG. v. YEOMANS.

*Desertion of wife—Proof of marriage—Refusal by justices to state case.*

A. was committed by the justices for deserting his wife and family. It appeared that they had been known as man and wife for twenty years, and their daughter, aged thirty-seven, said she had always looked upon them as married; he had compromised a previous charge of the same nature by agreeing to pay five shillings a week. In 1858 A. was married to another woman, was charged with bigamy and discharged. On the hearing of the charge of desertion, it was contended that there was no proof of the defendant's marriage; it was then proposed to call the woman, but he objected to this on the ground that her evidence was not admissible. The justices committed A., and refused to grant a case for the opinion of this court:

*Held, that they had well determined.*

Welsby showed cause, against a rule calling on the justices of Chester to show cause, why they should not state and sign a case. Yeomans was charged before the justices for deserting his wife and family, and was committed as a rogue and vagabond. Before the magistrates, the officer gave evidence that he had known the accused for more than twenty years, and that he always believed that he was the husband of the deserted woman; and the daughter, aged thirty-seven, deposed that she had always regarded her father and mother as married, and that she had never heard a whisper to the contrary. Yeomans and his wife lived together for twenty-seven years; he had left her for ten years. He had been summoned before, and the charge was compromised by his

agreeing to pay 5s. a week for their support, which he did for some time. In Dec. 1858 he was married to another woman, and was accused of bigamy, from which charge he was discharged for want of proof. On the hearing of the present charge against the defendant, it was contended on his behalf, that there was no legal evidence of his marriage with his first wife, and the prosecutor then proposed to call her, but this was objected to by defendant, on the ground that her evidence was not admissible. It was now contended that there was sufficient evidence of the marriage. The charge of bigamy is the only case in which a strict proof of marriage is necessary. [COCKBURN, C.J.—Do I understand you to say that defendant first objects to the evidence of the woman being taken on the ground that she is his wife, and then makes this application on the ground that she is not? ] Yes, that is so.

Wheeler contra.—The defendant was charged under a highly penal statute. The issue before the justices was marriage or no marriage, and this court will not presume that the defendant had committed bigamy. There was no sufficient proof of this marriage, and the daughter's evidence referred to her always looking upon these parties as her father and mother, not as husband and wife. [COCKBURN, C.J.—The severity of the punishment inflicted by the Legislature does not influence the question of what is evidence.] *Reg. v. Symonetta*, 1 Car. & Kir. 164; *Reg. v. Newton*, 2 Moo. & Rob. were cited. [CROMPTON, J.—Those were cases of bigamy.]

COCKBURN, C.J.—I think this rule should be discharged. When the objection was taken on the part of the defendant before the magistrates, that there was no proof of his marriage, it was proposed to produce the woman herself, but that was objected to, and the magistrates were left to deal with the case as best they might on the evidence already adduced. There was evidence that these parties had lived for many years as man and wife; and besides that, there was the evidence of their daughter. Then, on the other side, it was said that he had married another woman; and, on the whole, we must consider whether there was not evidence to justify the justices in acting as they did. I think there was.

WIGHTMAN, J. concurred.

CROMPTON, J.—I am of the same opinion. I think the justices would have done wrong if they had stated a case; they are only to do so when there are disputed questions of law; here the question is one of fact.

HILL, J. concurred.

*Rule discharged.*

## COURT OF EXCHEQUER.

Reported by F. BAILLY, and JOHN DUNBAR, Esqrs.,  
Barristers-at-Law.

*Jan. 16 and 18.*

LEECH (appellant) v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY (respondents).

*Railway company—Liability to repair bridges over turnpike-roads—8 & 9 Vict. c. 20, s. 46; 10 & 11 Vict. c. cxviii, s. 61.*

The 46th section of 8 & 9 Vict. c. 20 (*Railway Clauses Consolidation Act 1845*), which regulates the crossing of or interference with turnpikes or other roads by railways, provides "that (except where otherwise provided by the special Act) such bridges with the immediate approaches, and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained at the expense of the company."

The 10 & 11 Vict. c. cxviii, s. 61, authorising the defendants to carry their line across the turnpike-road leading from N. to L., provided they should erect a proper and sufficient bridge, and then so much of the said turnpike-road as should be broken up or damaged for the purposes of this Act should be reinstated and

[Ex.]

LEECH v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

[Ex.]

made good with the same materials as the road is now composed of, and the fences thereof, wherever necessary, reconstructed and put into complete order by the company and kept in repair for the space of twelve calendar months after the making, forming and completing thereof:

*Held, first (approving the decision of the L. B. in Dale v. North Staffordshire Railway Company, 8 E. & B. 836), that the obligation imposed on the company by the general Act extended to the keeping in repair not only the structure of the bridge, but also the road over and under and approaches to it, and the metalling of these roads.*

*Secondly (per Pollock, C.B. and Watson, B., Martin, B. dissentiente), that this obligation was not limited by the special Act; that the twelve months' limitation contained in that extended only to the repair of those portions of the old road which were broken up and damaged at the points of junction with the new road.*

This was an appeal under the 20 & 21 Vict. c. 43, against an order of justices dismissing a summons on an information against the respondents for the non-repair of the approaches to and the road over a bridge in the parish of Stoke-upon-Trent, in the county of Stafford.

The case stated that under the provisions of their two special Acts, called the North Staffordshire Railway Acts 1846 and 1847, with which were incorporated the Railway Clauses and the Lands Clauses Consolidation Act 1845, the North Staffordshire Railway Company (incorporated by the first special Act) formed several railways, which in the course of their line crossed several turnpike-roads, and some of such roads were carried under and some over the railway. One of such roads was the Newcastle-under-Lyne and Leek turnpike-road, which prior to the formation of the railway was wholly repairable and repaired by the trustees of the road. This road was carried over the railway by means of a bridge, which with its approaches was the subject of a special provision embodied in the 24th section of the Act of 1846, and the same provisions were repeated in the 61st section of the North Staffordshire Railway Act 1847.

The company erected the bridge and constructed the embankment which formed the approaches, together with the fences, as required by the special Acts above referred to, and properly formed and put the road over the bridge and slopes into a fit state for use, and it was duly restored to as good a condition as the same was in at the time when it was first interfered with by the company, or as near thereto as the circumstances admitted. The company also maintained the road across the bridge and slopes in a proper state of repair for the space of twelve calendar months from the completion thereof, but have not since repaired the same, although they have continued to maintain and still maintain the structure of the bridge and the earthwork and embankments forming the approaches to, also the fences both of the bridge itself and of such approaches, all of which (except the mere roadway) are in a proper and sufficient state.

Since the expiration of the said period of twelve calendar months from the completion of the bridge and works, the road over the bridge and its approaches have not been repaired, and such road, by reason of the ordinary wear and tear of the public traffic over and along the same, requires to be remetalled and repaired throughout the entire extent of the bridge and its approaches.

On the 26th Feb. last the trustees of the road caused a notice (set out in the case) to be served on the railway company, stating that the approaches to and the road over the bridge were out of repair, and that unless the same were put into complete repair in the mean time, an application would be made on the 14th March to two justices of the county of Stafford

for an order directing them to put the same in complete repair.

The company having disregarded the notice, the solicitor of the trustees attended before the magistrates sitting at Hanley, and no one appearing for the company, an *ex parte* order (set out in the case) was made and served on them, under the hands and seals of the justices, which, after reciting the complaint and application and hearing, "adjudged and ordered the company, on or before the 11th day of April next, to put the said approaches to the road over the said bridge into complete repair," and also to pay the costs.

This order not having been complied with, a summons was issued, at the instance of the present appellant, the surveyor to the trustees, commanding the defendants to appear on the 20th June to answer the complaint for having unlawfully and wilfully neglected to obey the order of the 14th March.

On the hearing of this summons it was objected on the part of the railway company that the order of the 14th March was bad, inasmuch as the company were not liable to repair the road over the bridge or the slopes, and the justices adopting this view of the case, dismissed the summons, subject to the opinion of the court on a case.

The questions stated for the opinion of the court were—1st. Whether under the provisions of the Railway Clauses Consolidation Act 1845, the company would (without reference to the 61st section of the special Act 1847) be liable to repair the roadway over the before-mentioned bridge and slopes. 2nd. Whether, if they would have been so liable, their liability is restricted by the 61st section of the special Act 1847, to the period of twelve months from the construction of the bridge and works therein specified.

*Bovill, Q.C. (with him Scotland) for the appellant.*—As to the liability of the respondents under the general Act, it has already been decided by the Court of Q. B. in a former case against them (*Dale v. The North Staffordshire Railway Company*, 8 E. & B. 836), in reference to another bridge in this same road, that the general obligation to repair extended not only to the structure of the bridge and approaches, but to the metalling of the road in both. By the general principle of law, whoever is entitled or bound to make a bridge is bound to restore and maintain the approaches, if they are part of a public highway. By the Statute of Bridges, 22 Hen. 8, c. 5, s. 9, whoever is bound to repair a bridge is bound to repair the approaches. The provision of the Highway Act 5 & 6 Will. 4, does not apply here. The only question that can be raised is as to the operation of the special Act. Sect. 4 incorporates the general Act, except so far as its provisions are modified by or inconsistent with those of the special Act. The 61st section provides for the erection of the bridge, which is the subject of this appeal: it provides, "That where the railway is proposed to cross the turnpike-road leading from Newcastle-under-Lyne to Leek, at a place in the parish of Stoke-upon-Trent, near to Etruria-bridge, the company shall erect a proper and sufficient bridge, constructed of brick, stone, iron or other material, so as to carry the said turnpike-road over and across the railway, such bridge also to be constructed with parapet walls of brick, stone, or other material of five feet in height, and of the clear and open width of thirty-three feet at the least between such parapet, and that the said turnpike-road shall be made and altered at the expense of the company on both sides of such bridge, so that the surface of the turnpike-road shall have, when completed, one uniform inclination on both sides, not exceeding one in thirty, and that so much of the said turnpike-road as shall be broken up and damaged for the purposes of this Act shall be reinstated and made good with the same materials as the road is now composed of, and the fences thereof, wherever necessary, reconstructed



[Ex.]

LEECH v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

[Ex.]

and put into complete order by the company, and kept in repair for the space of twelve calendar months after the making, forming and completing thereof; and the company shall also at their own expense make and at all times keep in repair good and sufficient drains or culverts for the purpose of such extra draining of the said road as shall be occasioned by such alteration as aforesaid: and further, that all the works aforesaid in reference to the said turnpike-road, and the bridge, walls and fences aforesaid, shall be done and executed to the satisfaction of the trustees of the said turnpike-road, or of the surveyors or other persons authorised by the said trustees to act in their behalf in the premises." The words "after the making, forming and completing thereof," do not apply to the new road, but only to that portion of the old which is "broken up and damaged," and afterwards reinstated; that is to say, the portion at the junction with the new, or any portion which may be broken in constructing a temporary passage while the bridge is being built. The liability to repair the new road, cast on the company by the general Act, as explained in *Dale's* case, is not at all interfered with. [POLLOCK, C.B.—The twelve months' limitation applies only to what is reinstated; the new road is not reinstated.]

*Davis* (with him *Lush*, Q.C.) for the respondents.—Considering the rights of the parties irrespective of the statutes, if the company restored the road as nearly as possible to its former state, they would do all that the equity between them and the trustees required. [MARTIN, B.—The only question is as to the operation of the 61st section of the special Act.] The 56th section of the general Act applies in cases where the railway interferes with any road: it provides, "If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time it was interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause a new and substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient with the former road, or as near thereto as circumstances will allow, and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have commenced," &c. It is clear the Legislature intended to distinguish between roads and bridges. Sect. 46 regulates the duty of the company as to the bridges; they must at all times be kept in repair: that section has no application to the road. The following sections apply to roads; and sect. 56 limits the obligation to restoring the road as near as may be to its former state; there is no obligation to maintain it. [MARTIN, B.—We must take the decision of the Q. B. in *Dale v. The North Staffordshire Railway Company* to be law, and it decides the 46th section of the general Act applies to the road over the bridge.] That is only a decision of a court of concurrent jurisdiction, and it was a case in which there could be no appeal. [POLLOCK, C.B.—The rule as to the decision of a court of concurrent jurisdiction is this: if there could be an appeal, we are bound by the decision so long as it is unappealed against; but if there be no appeal, we are not bound to uphold it, unless it is right in law, especially if it be *res noviter in judicium vocata*.] The case was decided by only two judges, and is contrary to the law as laid down in a well-considered judgment of the same court, in *Reg. v. The Birmingham and Gloucester Railway Company*, where the court held that the limitation as to the width of the bridge to be constructed did not apply to the road up to it. By the General Highway Act, 5 & 6 Will. 4, c. 50, s. 25, all highways leading over

new bridges shall be maintained by the parties who were liable to maintain the road before the bridge was built. No case can be found where either a private individual or a company were held bound to maintain more than the structure of the bridge, where a road had previously existed; all cases of indictment in the books are for the bridge itself. [WATSON, B. referred to *Reg. v. The South-Eastern Railway Company*, 20 L. J. 428, Q. B.] The Railway Clauses Act is divided into different heads: sect. 46 relates only to bridges; the subsequent sections provide for the case of roads, and it is by sect. 56 this case is regulated. In *Dale v. The North Staffordshire Railway Company*, the attention of the court was not called to sect. 56. [WATSON, B.—Lord Campbell refers to it in his judgment. POLLOCK, C.B.—I am not sure that the two decisions in the Q. B. are at all inconsistent.] Even if the general Act applies to the road over the bridge, the liability of the company is limited by sect. 61 to the keeping the road in repair for twelve months.

*Scotland* in reply.

POLLOCK, C.B.—I am of opinion that the order dismissing the summons was wrong. We are to read the 46th section of the general Act with the special Act, and its provisions are to apply except so far as they are modified by or are inconsistent with the provisions of the special Act. We must therefore take the provisions of the 46th section and apply them to the 61st section of the special Act; except so far as they are modified by it. The 46th section contains a series of enactments. It says that, except where otherwise provided by the special Act, the railway shall be carried under or over the road by a bridge of the height and width and with the ascent and descent in that Act provided, and so on with a number of other provisions. Where any of these are consistent with the special Act, there we are to take the combined provisions; but where the special Act excludes the general Act, there the general Act does not apply—nor where the special Act makes a provision inconsistent with the general Act. Then sect. 61 contains a number of provisions. It provides that the company shall erect a proper and sufficient bridge to carry the road over the railway, thereby controlling the option given to the company by the general Act of carrying the road under or over the railway. It then makes a provision as to the parapet walls on the bridge, leaving the parapet walls on the ascent and descent to be constructed in accordance with the general Act. It then provides that the bridge is to be of the clear open width of thirty-three feet between the parapet walls, so far differing from the general Act, which provides for thirty-five feet; but it must be admitted this mere interference with the width does not control any other provisions of the 46th section of the general Act. It then provides that the turnpike-road shall be made and altered at the expense of the company on both sides of such bridge, so that the surface of the turnpike-road shall have when completed one uniform inclination on both sides not exceeding one in thirty; that is in accordance with the general Act, which provides that the approaches to a bridge taking a turnpike-road over the railway shall have that rate of ascent and descent. We now come to the only provision as to repair. It is to be observed that the 46th section of the general Act provides "such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained at the expense of the company." That is a distinct provision which binds the company, unless it is repealed by the 61st section of the special Act. The proviso there is, "so much of the said turnpike-road as shall be taken up or damaged for the purposes of this Act shall be reinstated and made good with the same materials as the road is now composed of, and the fences thereof, wherever necessary, reconstructed and put into complete

EX.] LEECH v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY—GOUGH v. HARDMAN. [EX.]

order by the company, and kept in repair for the space of twelve calendar months after the making, forming and completing thereof." The section had already provided that the said turnpike-road should be made and altered at the expense of the company; what then is the meaning of these words, "so much as is taken up or damaged?" It appears to me, that to give effect to this provision, we must take it to mean some part of the actual existing turnpike-road which remains after the railway has been constructed, and which existed before it was commenced. The road on the bridge did not exist before, nor can it be said to have been broken up or damaged. The place where the railway actually crosses the old road is broken up and damaged, but that cannot be restored or reconstructed. Again, the clause provides that the fences are to be reconstructed; that can only mean fences which existed before, and which are to be reconstructed in the same place; and this provision seems to me to apply only to the place where the two roads meet, where the new one joins the old. Portions of the latter must be broken and damaged at each end for the purpose of forming the junction; and the proviso seems to me to say that so much of the old road as is disturbed or broken or damaged, where it is necessary to make a breach for the purpose of joining on the road made by the company to the old road, shall be reinstated and made good, and the fences reconstructed and put into complete order, and all this part kept in repair by the company for twelve months. The proviso then leaves untouched the obligation as to the road over the bridge and the approaches under the 46th section. I entirely concur in the meaning put on that clause by the Court of Q. B.; it is in entire accordance with the proper construction of the Act, and by that the company are bound at all times to keep that portion of the road in repair. I think, therefore, the first question should be answered in the affirmative, and the second in the negative, which will be a judgment for the appellant.

MARTIN, B.—I am of opinion that the two questions submitted to us should be answered in the affirmative. As to the first, it turns on the construction of the 46th section of the Railway Clauses Consolidation Act. I think that the exception at the beginning of the clause, "except where otherwise provided by the special Act," overrides all the provisos in the clauses, and we must read the latter one as if saying, "such bridge and the immediate approaches, and all other necessary works connected therewith, shall (except it be otherwise provided by the special Act) be executed, and at all times thereafter maintained at the expense of the company." We must therefore in every case look to the provisions of the special Act. The general proviso is an express enactment that the bridge and its approaches shall at all times be maintained by the company. If I had now to put a construction on the meaning of these words for the first time, my decision would be in entire conformity with that of the Q. B., and I entirely agree with them. Assuming, however, that construction of clause 46 of the general Act to be right, I still think the second question here ought also to be answered in the affirmative. The question is, whether that general liability is restricted by the 61st section of the special Act. I think it is; and if the matter rested with me I should decide it; and I think that by doing so I should put a most convenient construction on the Act. The trustees of the road have thought fit to get a long section inserted with regard to this bridge (I have no doubt the clause is theirs and not that of the company), regulating the mode of constructing it, and applying so much of the general Act as they thought ought to be applied to the case. It seems to me to be a most convenient construction, and a sensible and reasonable mode of dealing with such a case to hold, that if persons think fit to come to the Legislature and make some special demand, we ought to hold that they in-

clude in it all they think right to ask for, and we must not try and spell out these provisions by reference to other Acts. That seems a convenient course, especially when the Act to be carried out gives a clear sense and meaning, and there is no necessity for going out of it to find the meaning of the parties to the contract. If there was a special reference to the other Act, of course it would be different; but here there is nothing of the kind. The enactment deals with everything connected with this bridge that the trustees thought fit to deal with: it provides that the road shall be taken over the railway by a bridge; that the bridge shall be constructed of certain materials, of a certain width, and with the road of a certain inclination; then comes the proviso now in question, and I cannot think it was intended to bear the construction put on it by the court. I do not think that, on the fair and ordinary construction of it, the words "so much of the said turnpike-road as shall be broken up or damaged" can be confined to the mere points where the ascent or descent of the new joins the old road. The next provision is, that the company shall at all times keep in repair the culverts. On the whole, I think this clause was intended to express all the requirements of the trustees. When they wished to have the benefit of the provisions of the general Act, they re-enacted them expressly; they got this Act for their own purposes, and I do not think that they require any aid from the general Act. I therefore think the liability imposed on the company is limited by this section, and that the second question also ought to be answered in the affirmative.

WATSON, B.—I concur with the rest of the court as to the first question. As to the second I agree with my Lord Chief Baron, that the 61st section of the special Act does not extend to prevent the operation of the 46th section of the general Act. Looking to the 46th section I think the general exception, "except when otherwise provided by the special Act," does not mean to exclude that Act, when there is any special provision at all as to a bridge; but that that single provision in the general Act shall apply unless it be expressly excluded. The general Act says the bridge and the slopes are to be repaired by the company: is there anything in the special Act to restrict that obligation? The proviso refers to so much of the road as shall have been broken up: can it be said that the new road over the bridge was broken up? We must give some meaning to the words: this is a proviso imposing something on the company, *plus* the obligation under the general Act. As to that I entirely agree with the judgment of the Court of Q. B.

*Judgment for the appellant.*

Monday, Jan. 16.

GOUGH v. HARDMAN.

*Birkenhead Improvement Acts—Commissioner acting without qualification—Penalty—Two Acts to be construed together.*

The 6th section of the Act 3 & 4 Will. 4, c. lxxvii. (the Birkenhead Improvement Act) provided that no person should be capable of acting as a commissioner for the purpose of that Act except qualified as therein provided. Sect. 10 imposed a penalty on any person who should act as commissioner without being qualified as aforesaid. The 1st section of Act 1 & 2 Vict. c. xxxviii., amending the former Act, repealed so much of the former Act as related to the appointment of commissioners, and to their number, mode of election and qualification. Sect. 2, after regulating the number of the new commissioners, and transferring to them the powers of the former commissioners, provided that "all provisions in the former Act contained in reference to the commissioners thereby appointed should be held to apply to the commissioners appointed under that Act and other Acts in the same manner as if the same were re-enacted and repeated in that Act, except so

H

[Ex.]

GOUGH F. HARRIMAN—HUNT v. HIBBS.

[Ex.]

for as the same were repealed by or were inconsistent with its provisions, and the two Acts should be read as one Act." Sect. 7 provided for a new qualification, but there was no specific re-enactment of the penalty:

*Held*, that the 10th section of the former Act was still in force and that a person acting as commissioner without being duly qualified (as provided in the amending Act) was subject to the penalty of 50*l.* thereby imposed.

This was a demurrer to a declaration claiming a penalty of 50*l.*, in consequence of defendant having acted as a commissioner for the town of Birkenhead without being duly qualified under the statutes in that behalf.

The declaration, after stating that by the Act 3 & 4 Will. 4, c. lxxviii. certain persons therein named were appointed commissioners to carry the Act into execution, and that by the 2nd section (which was set out) it was enacted that no person should be capable of acting as a commissioner in the execution of that Act unless qualified as therein stated, alleged that it was in and by the 10th section of the said Act, also enacted that if any person should act as a commissioner without being duly qualified as aforesaid, he should, for such offence, forfeit and pay the sum of 50*l.*, to be recovered with full costs of suit in any of her Majesty's Courts of Record in Westminster by any person who should sue for the same by action of debt, or on the case, or by bill, suit or information wherein no assign wherein, &c. . . . and every person so sued or prosecuted should prove that he was at the time of acting qualified as aforesaid, or otherwise should pay the penalty without any other proof or evidence being given on the part of the plaintiff or prosecutor other than that such person had acted as a commissioner in the execution of that Act; and whereas, by another Act passed in the first year of the reign of her present Majesty, being an Act to amend the before-mentioned Act so passed in the said third year of his late Majesty King William the Fourth, after enacting that so much of the said hereinbefore-mentioned Act as related to the appointment of the commissioners therein named, and to the number and mode of election and qualification of commissioners to be thereafter appointed should be the same, was thereby repealed; and it was in and by the 2nd section of the said Act of the 1 Vict. enacted, that there should be twenty-four commissioners, for, &c. . . . "and all the powers, duties and authorities of the commissioners in the said therebefore recited Act mentioned should be vested in and exercised by the commissioners to be appointed under and by virtue of that Act, as fully and as effectually to all intents and purposes, and all provisions in the said therebefore-mentioned Act contained in reference to the commissioners thereby appointed should be held to apply to the commissioners to be appointed under that Act and the Acts of such last-mentioned commissioners, in the same manner as if the same were re-enacted and repeated in that Act (except so far as the same were repealed by or are inconsistent with the provisions of this Act or any general public Act) and the said hereinbefore-mentioned Act and that Act should be construed together as one Act." Sect. 7, establishing a new qualification, was then set out, as were also certain provisions of another amending Act, 9 & 10 Vict. c. xxviii.

Averment, that after the passing of the said Acts, and before suit, the defendant acted as commissioner in execution of the Act 1 Vict., without being duly qualified, &c., whereby an action hath accrued to the plaintiff to have, &c., the said sum of 50*l.*, with full costs of suit; yet the defendant hath made default, &c.

Demurrer and joinder.

*Melish* in support of the demurrer.—It is contended

that the clause in the Act 3 & 4 Will. 4, c. lxxviii., imposing the penalty, is virtually repealed, and therefore the action is not maintainable. The Act 1 & 2 Vict. c. xxxiii. repeals the former Act, so far as it relates to the election of the commissioner; the clause imposing a penalty is one which comes within these words; the other provisions are either re-enacted or a new one substituted, but there is no re-enactment of the clause imposing the penalty.

*Wolby*, contra, was not called on.

POLLOCK, C.B.—The matter seems to me so clear as not to require any explanation. The meaning of the Legislature is plain to the meanest capacity. The Act 1 & 2 Vict. provides, that it and the former Act are to be read as one, which is the same as if the clause imposing the penalty was re-enacted in words in the second Act. The penalty is imposed on all persons acting without being duly qualified as aforesaid, that is, as provided for by the amending Act.

MARTIN and WATSON, BB. concurred.

*Judgment for the plaintiff.*

Wednesday, Jan. 25.

HUNT v. HIBBS.

*Municipal Corporation Acts—Burgess-list—Return of by overseers on the precise day fixed—Penalty on neglect—Each overseer to sign and return the proper Burgess-list.*

An overseer neglected to sign and deliver the proper alphabetical Burgess-list to the town-clerk until after the 1st Sept. 1859, contrary to the 20 & 21 Vict. c. 50 (the *Municipal Corporation Amendment Act*), but he did deliver it on or before the 5th Sept. 1859, as required by the 5 & 6 Will. 4, c. 76 (the *Municipal Corporation Act*). In an action to recover the penalty imposed by sect. 48 for the overseer's neglect:

*Held*, that the above Acts of Parliament to be construed as one Act were not merely directory, but peremptory; and defendant, as such overseer, not having duly delivered the proper alphabetical list of burgesses, as required by these Acts, on or before the 1st Sept. 1859, was liable for the amount of the penalty imposed.

*All the overseers must sign the Burgess-list.*

This was an action against the defendant, he being an overseer of the poor of the parish of Weymouth, within the borough of Weymouth and Melcombe Regis, for not properly delivering a duly signed alphabetical list of the burgesses of that borough in the parish to the town clerk there, on or before the 1st Sept. 1859, in pursuance of the *Municipal Corporation Acts*, whereby he had incurred the penalty of 50*l.* The defendant pleaded that he did, on or before the 5th Sept., duly comply in all respects with the provisions of the 5 & 6 Will. 4, c. 76 (the *Municipal Corporation Act*), by duly making out, signing and delivering such list as required by that statute. To this plea the plaintiff demurred on the ground, that the making out, signing and delivering of the list by the defendant after the 1st and on or before the 5th Sept. was no sufficient answer to the offence charged in the declaration; for that it should have been delivered on or before the 1st Sept., in compliance with the 20 & 21 Vict. c. 50.

The declaration alleged that after the 5 & 6 Will. 4, c. 76 (the *Municipal Corporation Act*) and the 20 & 21 Vict. c. 50, "An Act to amend the Acts concerning municipal corporations in England," and before and at the time of the neglect and refusal hereinafter mentioned, to wit, on or before the 1st Sept. 1859, the defendant was one of the overseers of the poor of the parish of Weymouth, within the borough of Weymouth and Melcombe Regis, and before and on the said 1st Sept. 1859 there were divers and very many persons in the said parish duly qualified in that behalf who then were entitled to be enrolled on the Burgess-roll of the

[Ex.]

HUNT v. HIBBS.

[Ex.]

said borough of that year, according to the provision of the statutes, in respect of property within the said parish. Averment, that it was the duty of the defendant, as such overseer of the poor of the said parish, and of the overseers of the poor of the said parish, on or before the said 1st Sept. 1859, to make out an alphabetical list, according to the provisions of the said statutes, of the burgesses of the said borough in the said parish, that is to say, of all persons who should be entitled to be enrolled in the burgess-roll of the said borough of that year, according to the provisions of the statutes in such case made and provided, in respect of property within the said parish, and that the defendant as such overseer ought, on or before the day and year aforesaid, to have signed such burgess-list, and to have delivered the same so signed to the town-clerk of the borough aforesaid. Yet that the defendant, not regarding his duty in that behalf, and not respecting the statutes in such case made and provided, did not, on or before the said 1st Sept. 1859, make out or sign or deliver to the town-clerk of the said borough, such burgess list as aforesaid, but unlawfully neglected and refused so to do, contrary to the term of the statutes in such case made and provided, whereby and by force of the statutes in such case made and provided the defendant has forfeited for his said offence the sum of 50*l.*, and thereby and by force of the statutes in such case made and provided an action hath accrued to the plaintiff, who sues as aforesaid, to demand and have of and from the defendant the said sum of 50*l.* so forfeited as aforesaid. And the plaintiff who claims as aforesaid claims 50*l.* to be paid and apportioned in manner in the said first-mentioned Act in that behalf provided.

Pleas:—1. Not guilty. 2. That after the said 1st Sept., and before or on the 5th of the same month, he the said defendant, in all respects in compliance with the provisions of the said first-mentioned statute, duly made out and signed and delivered such list as in and by that statute is required.

Demurrer to the second plea, that the making out, signing and delivering of the list by the defendant after the 1st and on or before the 5th Sept. afforded no answer to the offence charged in the declaration.

*M. Smith*, Q.C. (*Turner* with him), in support of the demurrer, contended, first, that the 15th section of the 5 & 6 Will. 4, c. 76, so far as regarded the day and time on which overseers of a parish in a borough were to make out, sign and deliver the burgess-lists were mentioned was virtually repealed by the 7th section of the 20 & 21 Vict. c. 50. Secondly, by the 7th section of the 20 & 21 Vict. c. 50, the burgess-list, according to the provisions of the 13th section of the 5 & 6 Will. 4, c. 76, was required to be made out, signed and delivered by the overseers on or before the 1st Sept. in each year, instead of on the 5th Sept., as required by the 15th section of the 5 & 6 Will. 4, c. 76; and that therefore the making out, signing and delivering the burgess-lists, as alleged in the second plea, on or before the 5th Sept., in compliance with the 5 & 6 Will. 4, c. 76, afforded no answer for not doing so on or before the 1st Sept., as required by the 7th section of the 20 & 21 Vict. c. 50. Thirdly, by the 8th section of the 20 & 21 Vict. c. 50, that Act and the 5 & 6 Will. 4, c. 76, were to be construed as one Act; and therefore that the not making out and signing and delivering the burgess-list on or before the 1st Sept. rendered the defendant liable to the penalty of 50*l.* imposed by the 48th section of the 5 & 6 Will. 4, c. 76, and the words in that section, "list as aforesaid," must be construed to mean the burgess-list referred to in the 15th section of the 5 & 6 Will. 4, c. 76, as altered by the 7th section of the 20 & 21 Vict. c. 50. *King v. Burrell*, 12 A.L.J. & Ell. 460, was referred to, where the action was to recover the penalty like this. The declaration stated it to be the duty of the defend-

dant, as overseer, with the other overseers, to make out and sign an alphabetical list of burgesses and overseers, that defendant unlawfully neglected and refused to make out or sign such list. It was held, on motion in arrest of judgment after verdict for plaintiff, that it was unnecessary to show that the others did not sign such list, and that if the signature of a majority was a signing by all, then, as the verdict found that the defendant had not signed, it must be presumed that the majority had not signed, and the court thought that all the overseers should sign the burgess-list, and that an overseer neglecting this duty incurred the penalty imposed by the Act, although his neglect was neither wilful nor corrupt.

*Macnamara* for the defendant.—The plea is good, or, if not, the declaration is bad. The court will not hold that the penalty under this Act attaches except where there has been a total omission on the part of the overseer to deliver the burgess-list to the town-clerk; the provisions of these statutes as to time are merely directory: (*Reg. v. Mayor of Rochester*, 27 L. J. 45, Q.B.; and in error, where a majority of the judges affirmed that judgment of the court below, p.434.)

[*MARTIN*, B.—There is nothing in that case to show that the officer there would not have been liable to a penalty. My idea is that the action was given to compel the parties to be precise and particular in delivering in these lists within proper time. *POLLOCK*, C.B.—What is the definition of a day laid down as being merely directory—not peremptory?] The penalty is not imposed in those direct terms by the 5 & 6 Will. 4, c. 76, s. 48; the words "as aforesaid" may be read to refer to the lists, not "penalty," and in some cases the courts have looked to see if the Act be directory or peremptory: (*R. v. Mayor of Norwich*, 1 B. & Ad. 310.) [*POLLOCK*, C.B.—No doubt the question is, whether the day is so essential as to render the overseer liable if the proper list be not duly delivered on the precise day.] As the clause requiring the list to be an alphabetical list is a penal clause, the court would not hold it to be a valid objection if the list delivered was not strictly an alphabetical list. It would be also consistent with the declaration if a majority of overseers had made out the list, although not signed by the defendant. The case of *King v. Burrell* was before the 16 & 17 Vict. c. 79, s. 14, in 1853, which provides that what is done by the overseers may be lawfully done by the majority of them. [*MARTIN*, B.—How do we know there is more than one? *POLLOCK*, C.B.—Are not churchwardens also overseers?] Yes, that is so. Another point is, that there is no penalty given by the second Act, 20 & 21 Vict. c. 50, and as the wrong complained of is under the second Act, no penalty is attached to this. The penalty mentioned in the 48th section of the 5 & 6 Will. 4, c. 76, for the omission to make out, sign and deliver the burgess-list attaches, if at all, where there has been a total omission, and not when, as in this case, the only default charged is an omission to do so by a given day. It is admitted by the demurrer that the list was in fact made out, signed, and delivered by the time required by the said first-mentioned statute, and that it would be a forced construction of the later statute to hold that a penalty had attached under the circumstances admitted by the demurrer. The only precedent of a declaration upon this branch of the statute alleges that the defendant did not at the given day, "or at any time before or since," comply with the statute. The penalty at all events attaches only in cases of wilful refusal or neglect to comply with the provisions of the statutes, whereas the declaration studiously avoids stating that the omission was the result of wilfulness, and is therefore bad in substance; consistently with this declaration the omission alleged might have arisen from impossibility, ignorance, inability or inadvertence. The action being for a

penalty, the declaration ought to be construed strictly against the plaintiff, and ought to have negatived the existence of every circumstance exempting the defendant from the penalty, and at all events ought to have shown that the alleged default happened without any reasonable cause or excuse. Upon this declaration the plaintiff would succeed in merely proving that the defendant did not make out, or did not sign the list, and *non constat* but that he was physically incapable of doing one of these acts. The other overseers might, for aught that appears to the contrary, in consequence of incapability, have themselves performed all the requisites of the Act of Parliament. The late statute did not inflict any penalty for not complying with its provisions as to the time of making, signing and delivering the lists, and it is not pretended that the penalty under the former Act has been incurred, a penalty cannot be imposed except by express terms, and there are none such in the later statute.

*Smith* in reply.—Both Acts are to be read as one, and so construed, and each overseer is by this Act directed to do what is required by the words of the statutes. The judgment of Patteson, J. in *King v. Burrell* is applicable. The court have already answered all the other objections raised by the other side.

POLLOCK, C.B.—It seems that, although for certain purposes the acts may not have been done on the right day, and the courts hold the time specified to be directory, yet that does not prevent the penalty from attaching. The words “as aforesaid” have reference to the preceding terms used, and require the list of burgesses to be delivered to be alphabetical, and delivered on the precise day named. It may be a question of fact, supposing one or two very slight errors had been made, or mistake crept in, in some immaterial respects, whether the list was an alphabetical list within the meaning of the Act, and was not sufficient. But the objection made in this case to the declaration I think unfounded, and the plea is clearly bad; our judgment will therefore be for the plaintiff.

MARTIN, B.—I am of the same opinion. The declaration should be construed as if on the 15th section of the 5 & 6 Will. 4, c. 76; and I do not think the provisions made requiring the lists of burgesses to be delivered to the town-clerk by the overseer is merely directory: it was by the first Act required to be done by the 5th Sept.; that was by the subsequent Act of Vict. required to be done on or before the 1st Sept.; and the object was to require those things to be done regularly and promptly, and in case of neglect in complying with the provisions of the Acts of Parliament, a penalty is imposed [the learned Baron here read the Act]. It is quite impossible, in my opinion, for the Legislature to have used more distinct terms, and it is of the utmost importance in all these cases that the requirements of these Acts of Parliament should be complied with. [He also referred to *R. v. Mayor of Rochester*, and stated that case.] It seems to me that case has no bearing on this; it only shows how strictly we ought to adhere to the requirements of the Act of Parliament. The 48th section of the 6 & 7 Will. 4, c. 76, refers to “such lists as aforesaid,” and says, unless it be delivered on the 5th Sept., the overseer shall incur the penalty, that, by the subsequent Act of the 20 & 21 Vict. c. 51, is altered to the 1st Sept. It is not if all the overseers do not, but if any do not, and each is therefore liable. I think the declaration is good and the plea bad.

CHANNELL, B.—I also think the plea is bad and declaration good. We must read the sections of the Acts of Parliament together, and take the time to be the 1st Sept. on which the lists were to be delivered, and I think the precise time mentioned in the Acts is to be strictly regarded. It has been argued on behalf of the defendant as if the time should be considered as directory only; but it seems to me that this

should not be. I think the time should be peremptory, and that the overseers should sign and deliver the correct and proper alphabetical list of burgesses on or before the precise day named. Great stress has been laid on *R. v. Mayor of Rochester*, but that case does not affect the material question we have to decide here. The case of *King v. Burrell* answers the point as to the majority of overseers signing the list, and I concur with that decision in thinking each one of them should sign it. It has been suggested that the declaration is bad, as it uses the term “alphabetical list.” It would be going a great way, perhaps, to hold that if a mere technical error was made, and one name was put in the wrong place by a mistake, the list would be bad. At the same time I do not think the objection to the declaration on that account is valid. All the points raised here have been very ingeniously argued by Mr. Macnamara, but they have all been sufficiently answered, and I think our judgment should be for the plaintiff.

*Judgment for plaintiff.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 21.

(Before EARL, C.J. WIGHTMAN and WILLIAMS, JJ.,  
WATSON, B. and HILL, J.)

REG. v. CHARLES HUNTLEY.

*Larceny and receiving—Indictment—“Stolen as aforesaid”—Surplusage.*

*The prisoner was indicted in the first count for larceny of certain goods; and in the second count for that he “the goods aforesaid, so as aforesaid feloniously stolen,” feloniously did receive, &c. The prisoner was acquitted on the first count, but found guilty upon the second:*

*Held, that the conviction was valid, and that the second count might be construed to mean stolen goods generally; and the part of the first count charging them to have been stolen by him, be treated as irrelevant.*

The prisoner was tried before me, as Recorder of Winchester, at the Epiphany sessions 1860.

The indictment was as follows:—

City of Winchester to wit.—The jurors for our lady the Queen, upon their oath present, that Chas. Huntley, late of the parish of St. Maurice, in the city of Winchester, on the 6th day of December, in the 23rd year of the reign of our Sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, with force and arms, at the parish of St. Thomas, in the city aforesaid, twenty yards of street of the value of 3*l.*, of the good and chattels of John Gadd, then and there being found, feloniously did steal, take and carry away, against the peace of our said lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath do further present, that Chas. Huntley, late of the parish aforesaid, in the city aforesaid, afterwards, to wit, on the 6th day of December, in the year last aforesaid, at the parish aforesaid, in the city aforesaid, the goods and chattels aforesaid, of the value aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have, the said Chas. Huntley then and there well knowing the said goods and chattels last aforesaid to have been feloniously stolen, taken and carried away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Before the prisoner pleaded, his counsel moved to quash the second count, on the ground that by reference to the first count it must be read as charging a felonious receiving by the prisoner of goods then stolen by him the said prisoner, the words “so as aforesaid

C. B.]

MORDEN v. PORTER.

[C. B.]

stolen" being referable to the first count, which states the goods to have been stolen by the said prisoner, and it was contended that the count being so read was bad, as a prisoner cannot be said to have feloniously received goods stolen by himself; and *Reg. v. Perkins*, 5 Cox Crim. Cas. 554, 21 L. J. 152, M. C., was referred to, in which it was held that where the evidence is sufficient to convict the accused of stealing, there is no option to treat him either as a thief or a receiver.

The objection was renewed *pro forma* at the close of the prosecutor's case, when it was objected that there was no evidence to support the second count on the same ground as above stated, viz., that the prisoner could not be found to have received goods stolen by himself.

The prisoner was acquitted on the first count of the indictment, but found guilty upon the second count.

I reserved the objection for the consideration of the judges.

Judgment stands postponed on this indictment, and the prisoner remains in gaol, having been sentenced to nine months' imprisonment on another indictment.

A. J. STEPHENS.

No counsel appeared either for the prosecution or the prisoner.

ERLE, C.J.—We are of opinion that the conviction of the prisoner for receiving ought to be affirmed. It was urged on the prisoner's behalf that, inasmuch as, if he stole the goods, he could not be convicted of receiving them, knowing them to have been stolen; so, where the first count of the indictment charged him with having stolen the goods, of which offence he was acquitted, and the second count charged him with receiving the goods "as so aforesaid stolen," he could not be convicted on that count. But we are of opinion that the words "as so aforesaid stolen" in the second count may be construed to mean "generally stolen goods," and that the part of the first count charging him to have been stolen by the prisoner may be treated as irrelevant for the purpose of the second count.

*Conviction affirmed.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAUGHAN WILLIAMS, Esq., Barrister-at-Law.

SITTINGS AFTER HILARY TERM.

Saturday, Feb. 4.

MORDEN (appellant) v. PORTER (respondent).

*Appeal from justices—Trespass in pursuit of game—Mens rea.*

*P. went by the permission of B. over land of E. in pursuit of game. B. had no right so to license P. to go upon the land. The justices stated that they were of opinion that P. acted under the impression of an implied licence from the owner and occupier of the land given to him through B. E. after the trespass said that, if his permission had been asked, he would have given it:*

*Held, first, that this was a trespass within 1 & 2 Will. 4, c. 32, s. 30:*

*Secondly, that there was no such ratification by E. of the leave given by B. as to make it effectual:*

*Thirdly (per Williams, J.) that, in order to constitute a trespass within the above section, it is not necessary that the person trespassing should be conscious at the time that he was a trespasser.*

*But Keating, J. said, if the question of mens rea had been raised on the case, he should have desired further time to consider.*

This was an information before justices in petty sessions against Henry John Porter, for that he within three calendar months then last past, that is to say, on the first day of October then instant, at the parish of Wilburton, in the Isle of Ely, did unlawfully commit a

certain trespass by entering in the daytime of the said day upon certain land in the possession and occupation of John Everett there, in search of game, without the licence or consent of the owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having the right to authorise the said Henry John Porter to enter or be upon the said land for the purpose aforesaid, contrary to the statute in such case made and provided. The justices dismissed the information, and, upon the application of the appellant, stated the case as follows:—

At the hearing of the aforesaid information it appeared that it was laid by the appellant in his character of gamekeeper to Lady Pell, who is lady of the manor of Wilburton, and that the land on which the alleged trespass was committed, containing about nine acres, was situated in that parish, holden by copy of court-roll of that manor, and was the property and in the occupation of one John Everett, as stated in the information. The defendant admitted the fact of being on the land in search of game, but pleaded leave and licence from the owner and occupier, and denied the right of the appellant to prefer the information. It appeared that the defendant, the son of a farmer and brewer in the adjoining parish, is duly certificated, and went to Wilburton on the day in question, on the invitation of one Albert Bailey, for a day's shooting; and, knowing that Lady Pell would not allow any one over her land, he from time to time inquired of Bailey, who accompanied him, but without a gun, whether they were at liberty to go on to the land through which they passed, and was assured by Bailey that he had full liberty to go over the land in question. John Everett, in his examination, proved that he had not given specific permission to the defendant before the day in question; but it was proved that on the defendant's asking his permission on the night previous to the hearing to go over his land, he had said, "they might go over it and welcome, for he wished all the game in the parish was killed;" and that he also at the same time said that, "if the defendant had asked him permission before this happened, he should have given it him." It was also proved by Bailey that he (Bailey) went at all times over Everett's land, and Everett went over his land, by mutual consent, but there was no evidence of that permission being expressly stated to extend to shooting, and Bailey did not take out a game certificate. We being of opinion that the appellant had no such interest in the *locus in quo* as would support a prosecution for trespass, and that if he had, the defendant acted under the full impression of an implied licence from the owner and occupier of the land given to him through Bailey, gave our determination against the appellant in the manner above mentioned. The questions of law arising out of the above statement therefore are—first, has the appellant, as gamekeeper of the manor of Wilburton, such an interest in all the copyhold land within the manor in the ownership and occupation of the several tenants of the manor as will support the above information; secondly, was there in point of law evidence of such leave and licence as would be under sect. 30 of statute 1 & 2 Will. 4, c. 32, a defence to an action at law for trespass, or to the said information; thirdly, would the *ex post facto* leave and licence form a condonation of the offence, and be held to revert back to the time of the alleged trespass? Whereupon the opinion of the Court of C. P. is asked upon the said questions of law, whether or not we the said justices were correct in our determination as aforesaid, and as to what further should be done or ordered by the said court in the premises.

The points intended to be relied upon for the appellant on the argument were:—

First, that it is not necessary that the information

C. B.]

MORDEN v. PORTER.

[C. B.]

should be laid by the owner or occupier of the land, or a person having an interest in it.

Secondly, that the acting under the impression of an implied licence, which is stated as the ground of the decision, is no answer to the information.

Thirdly, that there was no leave or licence which would have been a defence to an action of trespass.

*Couch* for the appellant.—First, *Middleton v. Gale*, 8 Ad. & E. 155, is an express decision in my favour on the first point. Secondly, 1 & 2 Will. 4, c. 32, s. 30, provides that any person charged with any such trespass (in pursuit of game) shall be at liberty to prove by way of defence any matter which would have been a defence to an action at law for such trespass, save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise as thereinbefore mentioned. The fact of the respondent acting under the impression that he had a licence to shoot over the land is no defence. In truth, there was no such licence. Bailey, the occupier, could not give him such licence. He had himself only licence to go over it in the ordinary way, not in the pursuit of game. But if he had been licensed himself to go over it in pursuit of game, he could not have licensed another to do so: (*Duchess of Norfolk v. Wiseman*, cited in *Wickham v. Hawker*, 7 M. & W. 77.) Thirdly, it is clear there was no confirmation by Everett.

*Phear*, contra.—*Middleton v. Gale* is not absolutely binding here. Lord Denman says it belongs to the jury to say whether the informer was interested in the land; and the jury found that he was, and the court puts it on that ground. That, therefore, is not the point. *King v. Corder*, 4 Burr. 2279, decides that, under the 5 Geo. 3, c. 14, the fishing must be shown to be without the consent of the owner. Secondly, the facts amount to this, that the respondent was on the ground of Everett with permission, except that it was not an express permission. To constitute a trespass there must be an invasion of the owner's proprietary right. Everett said there was none. He has ratified Bailey's permission. The respondent was continually asking whether he had permission to go where they were. This is a criminal proceeding; and *R. v. Cridland*, 2 Ell. & Bl. 859, shows that *mens rea* is of the essence of the offence. Erle, C. J. there says: "I think, in a criminal statute, trespass means an intended trespass." [WILLIAMS, J.—The statute seems to show he has the same defence as in trespass.] In trespass intention is nothing; in a criminal offence it is everything. *Cutler v. Ireson*, 4 Jur. N. S. 560, decides that this is a criminal proceeding.

*Crouch*, in reply.—[WILLIAMS, J. referred to *Reg. v. Pratt*, 24 L. J. 113, M. C., and said: Confine yourself to the question of *mens rea*.] He had not taken the trouble to inquire whether Bailey had a right to give permission to go over the land. The act was one which he did not know Bailey had a right to permit him to do. The finding is no answer to the information.

WILLIAMS, J.—I am of opinion that our judgment ought to be for the appellants. Several questions have been raised in the course of the argument. The first question that has been brought before us by the convicting justices is directly decided by *Middleton v. Gale*, and we are bound by that decision. Not that I mean to throw any doubt on the propriety of that decision. Secondly, it is not in point of law true, nor under sect. 30 of the Game Act, that such a leave and licence as this would be a justification. The alleged ratification and confirmation of Everett cannot be referred back to the time of committing the trespass. That ratification consists in the person who might have given it having said, he would have given it if it had been asked of

him. The third question is meant to raise, but does not in exact terms raise the point, whether there was such a ratification of the leave given by Bailey as would render it operative and effectual. Now doubts have been raised in the discussion whether any leave was given by Bailey, but we must not dwell upon the language too scrupulously. We must look to the meaning of the parties, and I take it that Bailey did give permission to shoot over the land, he assuming that he had permission to do so. Some time after the information Everett says that he should have given him leave if he had asked it; but he does not say a word of ratification of what took place, and that argument is well answered against the respondent. Another question raised was, that we ought to affirm the decision of the magistrates, because, although there was no satisfactory evidence that the defendant had the leave and licence of the proprietor, he was acting under the impression that he was doing what he was entitled to do. And it was said that the *mens rea* was absent, and though the point is not sent before us, yet I must express my opinion, that it is quite immaterial whether the party had or had not at the time the consciousness that he was committing a trespass. The statute enacts that every person who goes on land in circumstances such that a civil action can be brought against him shall be guilty, if going in pursuit of game, of a criminal trespass. The Act 1 & 2 Will. 4, c. 32, s. 30, after reciting that after the commencement of the Act game will become an article which may be legally bought and sold, and that it is therefore reasonable to provide some more summary means for protecting the same from trespassers, enacts that, if any person shall commit any trespass by entering or being in the daytime upon any land in search of, or in pursuit of, game, &c., such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money not exceeding 2*l.* as to the justice shall seem meet. It contemplates that, game having become an article of sale, there is more reason than before to protect the proprietors, inasmuch as there is more temptation; and that therefore this proceeding may be taken by a common informer. The sections afterwards provides [his Lordship read the proviso as set out in the argument]. I think the statute leaves the question of *mens rea* open. It leaves open the question whether, if a person having no right to give permission to another to go upon land, and that other does go upon land, and without any intention of violating the statute, does violate it, he is liable. Sect. 46 shows that the trespass of each sort is correlative. No civil action was, I believe, ever thought of after acquiescence. It remains to consider what are the authorities. *Reg. v. Cridland* only decides that where the proceedings are instituted under the statute, and the party is shown to have acted under a *bona fide* claim of right, the justices have no jurisdiction to proceed further in the matter. That is not binding on us in considering the meaning of the statute. In *Reg. v. Pratt* it was never suggested that the man was not guilty because he thought he had a right to shoot from the highway. I think a person who goes on land to shoot must take care that he is not a trespasser, and if he does not take such care, he must be liable for the consequences to the extent of 40*s.* A vast number of excuses would be set up if we were to say that a party, acting as this person has done, should not be liable. I consider the law to say, if you go on a person's land in pursuit of game, in a way to make yourself liable to a civil action, you will make yourself liable to this proceeding. We do not without feeling very great regret decide thus: and I think one farthing would have been quite a sufficient penalty.

WILLIAMS, J. concurred that the judgment should be for the appellant, but without costs.

KEATING, J. also concurred, but said that if the

[ROLLS.]

THE CORPORATION OF THE SONS OF THE CLERGY v. SUTTON.

[ROLLS.]

question of *mens rea* were raised he should require time to consider it. (a)

### ROLLS COURT.

Reported by GEORGE WHITKLEY, Esq., of the Middle Temple, Barrister-at-Law.

Dec. 2 and 3, and Jan. 16.

THE CORPORATION OF THE SONS OF THE CLERGY  
v. SUTTON.

*Charitable Societies—Charitable Trusts Act, 16 & 17 Vict. c. 137, ss. 62, 66—Conflicting clauses—Jurisdiction of Charity Commissioners—Alienation of property—Consent of Charity Commissioners, when requisite—Interpretation of the expressions "voluntary contribution" and "endowment" used therein.*

*Under the 62nd section of the Charitable Trusts Act, 16 & 17 Vict. c. 137, the word "endowment" must be considered as confined to any gift, made to a charitable society for some specific and particular object or purpose; and therefore the jurisdiction of the Charity Commissioners does not extend to voluntary subscription, or any donation or bequest concerning which no special application shall be directed or declared by the donor or testator, nor to any permanent investment of any such contributions, donations, or bequests above mentioned, although made for the purpose of being applied to some defined and specific object connected with such charity.*

*The clause in the interpretation section of the Act, sect. 66—"the expression 'endowment' shall mean and include all land and real estate whatsoever, and any investment and personal estate whatsoever which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof"—cannot be read literally, as the effect would be to expunge the 62nd section; and in order to reconcile the two sections, the word "endowment" in the interpretation clause must be interpreted in the restricted sense in which the word is held to be used in the 62nd section.*

*The consent of the Charity Commissioners is not required to a sale of property by a charitable society, unless it is an "endowment," or the investment of an "endowment."*

This was a special case to obtain the opinion of the court on the question whether the corporation could make a good title to property contracted to be sold to the trustees of the Stock Exchange, without the approval of the Charity Commissioners.

The facts as stated by the case were, that the society was founded by letters patent of King Charles II., dated the 1st July 1678, by which, after reciting that his Majesty was informed by the humble petition of divers of his loving subjects, who were sons of clergymen, that several charitable and well-disposed persons, the children of clergymen and others, had appeared very free and forward in contributing to the relief and maintenance of such of the widows and children of loyal and orthodox clergymen as were poor and indigent, which had been to good effect in placing out many of the said poor children apprentices, and towards the maintenance of others at the University, and to the relief of many of the said poor widows; and reciting that his Majesty was informed and well assured that if he would be graciously pleased to erect and settle a corporation for the receiving, managing and disposing

of the said charity, they should be encouraged to continue and enlarge such charity to the uses aforesaid; his Majesty willed, ordained, constituted, declared and granted that Francis, Earl of Longford, and certain other persons therein named, and their successors, to be elected in the manner therein mentioned, should be a corporation by the name of the Governors of the Charity for the Relief of the Poor Widows and Children of Clergymen; and that they and their successors by that name should for ever thereafter be able to purchase and hold real estate not exceeding the yearly value of 2000*l.*, and also to alien the same; and it was directed that there should be a president, vice-president, three treasurers, and forty-two members, to be called the Court of Assistants of the said corporation, who should have the whole government, management and direction of the affairs and business of the said corporation; and that it should be lawful for the Court of Assistants for the time being, or any five or more of them, whereof the president, vice-president, or one of the treasurers of the said corporation, should be one, as often as they should think needful or expedient, to assemble together and to ordain and make any constitutions, laws, ordinances and statutes whatsoever, which to them or the major part of them should from time to time seem reasonable or requisite, touching or concerning the good estate, rule, order and government of the said corporation; and lastly, that the now stating letters patent, or the enrolment thereof, should be good and effectual in law, notwithstanding the Statute of Mortmain or any other statute, matter, cause, or thing whatsoever.

Further licences to hold lands in mortmain were granted to the corporation on the 6th Dec. 1714, the 6th Feb. 1800, and the 20th Dec. 1810.

During the earlier part of its existence the funds of the corporation arose entirely from voluntary donations and subscriptions. The governors are now the owners of extensive estates in various parts of England, arising either from conveyances made to them for the general purposes of the charity, from devises made to them before the Act 9 Geo. 2, c. 36, for the general purposes of the charity, or from purchases from time to time made by them out of the general funds of the corporation in their hands. These general funds are the produce of voluntary subscriptions, donations, or bequests, or of collections, which used formerly to be from time to time made for the benefit of the charity, or represent accumulations of the income arising from the fixed property of the charity. The charity has frequently received, and still frequently receives, legacies, and has a subscription list for donations and subscriptions, and considerable sums arising from these sources have from time to time been, and still from time to time are, carried over to the general funds of the charity. The governors have also from time to time accepted gifts or grants for special charitable purposes distinct from the general purposes and objects of the corporation, but no question as to any property so situate arises in the present case.

In the year 1682 the corporation contracted for the purchase of an estate in Capel-court, Bartholomew-lane, in the city of London, for the sum of 2832*l.* 5*s.* It appears from the minutes preserved of the transactions of the corporation that the corporation had only 452*l.* in hand towards payment of the purchase-money, and that they borrowed the remainder, 2400*l.*, from various persons, and that the property was by indentures of March 1682 conveyed to trustees upon trust for such persons until they had been repaid their advances, and subject thereto in trust for the corporation.

Shortly afterwards some part of these claims were paid off, but there being no minute-book of the corporation for this period now in existence, there are no

(a) This decision seems at first sight to conflict with that of *Rider v. Wood* (sale, p. 4), in which the court decided that there must be a guilty intent on the part of the defendant. But the present case turns upon the special language of the statute, which makes penal the act of going upon land in pursuit of game under such circumstances that it would be a civil trespass. It must not, therefore, be taken as in any way restricting the rule as to the *mens rea* in other cases.



means of ascertaining out of what funds this was done; the other parties, by a deed dated in 1684, released their claims, and the property was conveyed to the corporation in fee discharged therefrom.

No special trust was declared in either of these deeds concerning the land so purchased.

In 1859 the corporation entered into a contract with the trustees of the Stock Exchange for the sale to them of part of the premises for the sum of 30,000*l*. The trustees are willing purchasers, but for their security they considered it necessary to take the opinion of the court on the question, whether the approval of the Charity Commissioners was necessary to enable the corporation to make a good title and a valid conveyance of the land contracted to be sold by them to the trustees.

The 62nd section of the Act, so far as it is material to be stated, enacts that this Act "shall not extend to any friendly or benefit society, or savings bank, or any institution, establishment or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith wholly maintained by voluntary contributions, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity or income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act, and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription which is now, or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity for the purpose of being held and applied or expended for or to some defined or specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purposes as aforesaid, shall be subject to the jurisdiction or control of the said board, or the powers and provisions of this Act."

The 66th section (interpretation clause), so far as it refers to the question in this cause, is as follows:—"The expression 'endowment' shall mean and include all land and real estate whatever, of any tenure, and any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments and personal estate whatsoever which shall for the time being belong to or be held in trust for any charity or for all or any of the objects or purposes thereof."

The 18 & 19 Vict. c. 124, s. 29 (Charitable Trusts Amendment Act), enacts that "it shall not be lawful for the trustees or persons acting for the time being in the administration of any charity, to make or grant, otherwise than with the express authority of Parliament, under any Act already passed, or which may hereafter be passed, or of a court or a judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion, after more than three years of any existing term, or for any term of life, or in

consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

*R. Palmer, Q.C. and Wickens* for the corporation.

*Lloyd, Q.C. and Waley*, for the trustees of the Stock Exchange, contended that the consent of the Charity Commissioners was necessary to confirm the sale made by the corporation; or that, if in the opinion of the court the question was doubtful, the court might abstain from expressing any opinion on it, which would be in accordance with the practice of the court in suits for specific performance, of not forcing a doubtful title on a purchaser.

The MASTER of the ROLLS.—The question in this case depends upon the construction of the statute 16 & 17 Vict. c. 137, whether under the provisions of that Act the consent of the Charity Commissioners is required to render valid the sale of certain property in Capel-court, belonging to the Corporation of the Sons of the Clergy, and by them contracted to be sold to the trustees of the Stock Exchange. The charter of incorporation of the vendors bears date in July 1678, and by it the corporation is allowed to hold and alien lands in mortmain. The land in question forms part of some land bought in 1682 by the corporation. It was clearly bought for the purpose of investment, and because it was considered to be an eligible purchase for that purpose. The corporation, however, did not possess at that time funds sufficient to pay for it, and about six-sevenths of the purchase-money, amounting to 24,000*l*, was borrowed on mortgage of the property bought. This mortgage was paid off in two years afterwards, in March 1684. It is a portion of the land so bought which is now contracted to be sold to the trustees of the Stock Exchange for 30,000*l*. These facts are only important for the purpose of showing that no special trust attached to this property. It was the property of the corporation, and no doubt all the property of the corporation is held in trust for the general objects for which it was founded; but apart from this no special trust attached to this deed. The question is, whether the Act of the Queen prevents the alienation of this land without the consent of the Charity Commissioners. This depends on the meaning of the 62nd section of the Act. Now, upon this clause alone, the question would seem to be whether the property, the origin of which I have stated, comes within the meaning of the word "endowment" as employed in this clause, in contradistinction to "voluntary contributions." That expression voluntary contribution must not, I think, be confined to annual subscription; it must clearly extend to donations (the words I have read in the Act show that, I think, very distinctly), and if it extends to donations, it cannot be confined to donations below any specified amount: it is equally applicable to 10,000*l*. as it is to 1*l*. It is clear also, that the word "endowment" would extend to and include any sum given for a specific and peculiar trust or object in connection with the particular charity; but the difficulty is this, at what point, and under what condition, does a donation become an endowment within the meaning of this clause? It is obvious that the word "endowment" is not used here in its ordinary and popular sense. So used, it is to my mind impossible to distinguish between a donation and an endowment. In ordinary parlance, a man who grants an annuity of 100*l*. per annum out of his landed estates to the Corporation of the Sons of the Clergy would be said to endow it. I think also that in like manner, a man who gave 20,000*l*. at once to the corporation would be said to have endowed it. It is obvious, in this respect also, that the clause speaks of the income arising from endowment. If the word "endow" has reference to the production of an annual income only, then the fact that the corporation invested its contributions in any permanent investment would alter the character of the money bestowed, and convert

it from a contribution into an endowment; but I think it impossible that the Legislature can have meant to make the control of the Charity Commissioners dependent upon the fact that the affluence or providence of the society had enabled or induced it to secure a portion of its funds by an investment or permanent security. It was suggested in argument that the cessation of voluntary contributions would at once, as a matter of course, put the whole of the property of the institution under the control of the Charity Commissioners. But I dissent from that argument; I think it impossible that such could have been the meaning of the Legislature. Occasional or accidental unpopularity might deprive an institution of the receipt of any contributions for a series of two or three or more years, which, after that lapse of time, might be renewed. I think it impossible to hold that such a circumstance would alter the character of the institution in the meaning of this clause so as to bring it within the scope of the Act, and exclude it from the exception contained in this clause during the period of the cessation of voluntary contributions, and then give it the benefit of the exception again, and take it out of the control of the Charity Commissioners on the renewal of the subscriptions; but yet, if this argument be well founded, the authority of the Charity Commissioners much attach after the contributions have ceased for a reasonable time without a prospect of any returning contributions, which, nevertheless, from altered circumstances, might be shortly afterwards renewed. My opinion is, that the cessation in the receipt of voluntary contributions cannot alter the character of the funds already received by the institution, and that, assuming them to have been originally voluntary contributions, they continue to retain that character as long as they remain in the possession of the corporation, although invested in any permanent security—provided always that they are not, by some competent authority, set apart for, or impressed with, any particular trust. Now my opinion on that point is derived from these words of the clause, which I will read: "Where any charity is maintained partially by voluntary subscriptions and partially by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only;" and then it specifies what is the meaning of, and what is to be done in the case of a donation or bequest: "And no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act, and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription which is now, or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the direction of the commissioners." That is to say, nobody can deny that a donation or bequest would be an endowment, and, if invested, there would be an income from it; but it is especially exempted unless there be (to use the words of the Act) "special application or appropriation." That means something specific as distinct from the general purpose and object of the association. My opinion, therefore, (formed on the consideration of this clause, taken by

[MAG. C.]

itself alone) is, that the word "endowment" has reference to an endowment made for some specific purpose or trust. I use the word specific or particular purpose or trust advisedly, because it is obvious that a gift of a sum of money to the corporation *simpliciter*, or a gift in trust to the corporation, without more, or a gift in trust for the furtherance of the objects and purpose for which the corporation was established, would be one of many different ways of accomplishing the same end, namely, making a donation to the corporation itself. What words would amount to and constitute a particular and specific trust, so as to bring it within the meaning of the word endowment according to the sense in which it appears to me to have been used in this clause, taken alone, it is not necessary for the present purpose to consider, as no such question arises here and the land in question was paid for by and out of the general funds of the corporation, voluntarily contributed for its support. The length of time that the investments have lasted cannot, as I have already stated, alter the character of it. The land remains as much a voluntary contribution as if the money which purchased it had been given to the corporation only twelve months ago, and had been by its managers invested in the purchase of the land rather than in the purchase of stock, in consequence of their considering land to be the more eligible investment. The fact that it is land which was purchased cannot convert the money invested into an endowment, if the purchase of stock or of Exchequer-bills would not have produced that effect. The consequence is, that upon reading of this clause alone, my opinion is that the word "endowment," as used in it, does not apply to land purchased by the corporation simply for the purpose of investment of its funds or savings, and that any other construction would be repugnant to the scope and object of this clause. But the difficulty does not cease when this conclusion is arrived at; on the contrary, it is rather increased. The question on this clause arises on the meaning of the word "endowment" as employed in it. The court, therefore, naturally turns to the interpretation clause in this statute, to see if that sheds any light on the meaning of the word "endowment" as used in the Act; and accordingly we find the following passage in the interpretation clause, which is the 66th, and the words are these:—"The expression 'endowment' shall mean and include all lands and real estate whatsoever of any tenure, and any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof." Now this, at first sight, would appear to be a very startling and extensive meaning to be given to the word "endowment," and, if construed literally, it would seem wholly to supersede the 62nd clause; for it is impossible for any institution to possess any property, or any right to any property whatever, that would not be included in this enumeration. Such a thing as a "voluntary contribution" as contradistinguished from an "endowment" could not, in this extended meaning, be said to exist. The instant that the annual subscription is paid to the treasurer, it is, to use the words of the interpretation clause, "money which for the time being belongs to or is held in trust for the charity." Even tables and chairs and other personal chattels would come within the enumeration of "personal estate whatsoever." It could not, I think, have been the object of the Legislature to enact a clause, introducing a careful, though obscurely worded, exception from the operation of the Act, and then four clauses later to introduce words in a general interpretation clause wholly negating the authority of that 62nd section, and in fact expunging it from the Act. It is the duty of the court, if possible, to reconcile and give effect to both clauses, and, in my opinion, the

only way in which this can be done is to adhere to the interpretation I have already given of the word "endowment" in the 66th clause, namely, the devotion of property to a specific and particular trust, and to give it the same meaning in this 62nd or interpretation clause; that is, to hold that the meaning of this clause is, not to enact that the possession by any charity of any property of the various kinds here enumerated constitutes an "endowment," but that property of all the classes and characters here specified may be made the subject of endowment, in which case the word would properly apply to lands, to money, to every species of real and personal property whatsoever, including even personal chattels, provided any such were, either by the will of the donor or otherwise, impressed with a particular and specific trust in favour of the charity (which, no doubt, might apply to books, or plate, or the like), but which interpretation would not fetter the right of the charity, or the power of its managers, to dispose of the property not so devoted, or, to use the words of the statute, as construed by me, not so endowed, to any purposes which they might consider necessary for the purposes of the institution in the due discharge of the duties attached to them. This would make the distinction between endowed funds and funds voluntarily contributed, taken by the 62nd clause, plain and unambiguous; and this, although not altogether satisfactory, is the only way in which I am able to construe this very obscure statute, and give effect to both its provisions. I cannot adopt the suggestion of Mr. Lloyd, derived from the analogy of suits for the specific performance of contracts, where the court has held that it would not force a title on a purchaser in cases where the question on which the title depends is not considered clear by the court; first, because the principle of those cases—which is, that there exist persons not before the court, and therefore not bound by the decision, who may afterwards raise the same question—does not, as it appears to me, affect the present case, as the only persons who could hereafter raise this question would be the corporation itself, which is before me, and therefore is bound by my decision; and secondly, and principally, because this is a special case, where both parties have agreed to take the opinion of the court on the facts agreed to in that case, and where consequently the court is bound to answer the question put to it, by expressing its opinion. Neither is the court at liberty to evade the question by adopting any such formula as that which I have occasionally met with in opinions from counsel at the bar, namely, that the inclination of the court's opinion lies in one direction, or words equivalent thereto. The court is bound to form and to express its opinion. I have formed mine, and I declare it to be that the consent of the Charity Commissioners to this sale is not necessary, and I answer the case accordingly.

### CROWN CASES RESERVED.

Reported by JOHN THOMSON, Esq., Barrister-at-Law.

Saturday, Jan. 21

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ.,  
WATSON, B. and HILL, J.)

REG. v. THOMAS GOSS.

REG. v. JOSEPH RAGG.

*False pretence—Sale by sample—False representation of quantity—7 & 8 Geo. 4, c. 29, s. 53.*

*A misrepresentation of a definite fact, cognisable by the senses—as where a seller represents the quantity of coals to be fourteen cwt., whereas it is in fact only eight cwt., but so packed as to look more; or where the seller, by manœuvring, contrives to pass off tasters of cheese as if extracted from the cheese offered for sale, whereas it was not—is a false pretence, indictable under the 7 & 8 Geo. 4, c. 29, s. 53.*

### REG. v. THOMAS GOSS.

The prisoner, Thomas Goss, was tried before me at the last Michaelmas Sessions for the borough of Northampton, for obtaining money by false pretences.

The first count of the indictment stated that the prisoner, having in his possession divers pounds' weight of cheese of little value and inferior quality, and contriving and intending to cause it to be believed that the said cheese was of good flavour and excellent quality, and also having in his possession divers pieces of cheese called "tasters," of good flavour, taste and quality, and contriving and intending to cheat one Thomas Roddis out of his money, then and there unlawfully, knowingly and designedly did falsely pretend to Roddis that the said pieces of cheese called "tasters" which he Thomas Goss then and there delivered to Roddis were part of the said cheese the said Thomas Goss then offered for sale, and that the said cheese was of good and excellent quality, flavour and taste, and that every pound weight was of the value of fourpence halfpenny, by means of which said false pretence the said Thos. Goss did then and there unlawfully and fraudulently obtain of and from the said Roddis the sum of three pounds nineteen shillings and sixpence, with intent to cheat and defraud him of the same, whereas the said pieces of cheese which the said Thos. Goss delivered to Roddis were not part of the said cheese which the said Thos. Goss offered for sale, and whereas the said cheese which the said Thos. Goss offered for sale was not of good and excellent quality, flavour and taste, and whereas every pound weight of the said cheese was not of the value of 4½d., which the prisoner well knew.

The second count of the indictment was in the same form as the first, excepting that it did not charge that the prisoner designated the samples as "tasters," and that it contained and negated an additional false pretence, that the cheese offered for sale was of the same quality, flavour and taste as the samples.

The third count stated that the prisoner had in his possession divers pieces of cheese with intent to defraud, and delivered the same to Roddis, and unlawfully, &c., did falsely pretend to him that they were and had been taken from, and were and had formed part and portion of certain cheeses which the prisoner then and there offered for sale, by means of which, &c., the prisoner did unlawfully, &c., obtain, &c., with intent to defraud, &c., whereas, &c. (negating the pretence).

The fourth count stated that the prisoner unlawfully, &c., did falsely pretend to Thos. Roddis that certain pieces of cheese which he then and there delivered and exhibited to Roddis were and had been taken from, and were and had formed part and portion of certain cheeses which the prisoner then and there offered for sale to him, by means of which, &c., the prisoner did then and there obtain, &c., with intent, &c., whereas, &c. (negating the pretence).

It was proved at the trial that the prosecutor Thos. Roddis, on the 19th Sept. last, was attending the cheese fair, held within the borough of Northampton, and that the prisoner was in the fair, and sold to the prosecutor eight cheeses, weighing 1 cwt. 3 qrs. 1 lb., for which the prosecutor paid the prisoner the sum of 3l. 19s. 6d., being at the rate of 4½d. per pound. On the prosecutor going into the fair the prisoner offered to sell him the eight cheeses, and bored six of them with a cheese-scoop, and then produced and offered to the prosecutor several pieces of cheese, which are called "tasters," successively at the end of the scoop for the prosecutor to taste, and in order that he might taste them as being respectively samples and portions of the six cheeses which the prisoner had bored; and accordingly the prosecutor did taste them, and then offered the prisoner 4½d. per pound for the eight cheeses, which the prisoner accepted. The tasters, however, had not in fact been extracted from the cheeses offered

for sale, for after the prisoner had bored the cheeses, and before he handed the tasters to the prosecutor, he took from his coat pocket pieces of cheese of better quality and description than those taken from the cheeses which he had bored, and privily and fraudulently put these pieces of cheese at and into the top of the scoop for the prosecutor to taste, and the cheese which the prosecutor did taste was not any portion of the six cheeses which the prisoner bored. The prosecutor, at the time he bought the eight cheeses, believed that he had been tasting a portion of those cheeses, and in that belief bought them, and paid the prisoner the *3l. 19s. 6d.* for them, which he would not have done unless he had believed that the tasters had been extracted from the cheeses which he so bought. The cheeses were delivered to the prosecutor, and he retained possession of them up to the trial.

The value of the eight cheeses would be about *3d.* per lb.

The prisoner's counsel at the trial objected that there was no evidence to support the indictment, or of any facts which would constitute a false pretence within the statute.

I left the case to the jury, and the prisoner was convicted; but having some doubt as to whether the case of *Reg. v. Abbott*, 1 Den. C. C. 273, had not been shaken by subsequent decisions (see *Reg. v. Brym*, 26 L. J. 84, M.C.), I reserved the case for the opinion of the Court of Appeal. JOHN H. BREWER.

No counsel was instructed to argue on behalf of the prosecution.

*Merewether* for the prisoner.—This case was reserved in consequence of the remarks of some of the judges upon the case of *Reg. v. Abbott*, 1 Den. C. C. 273; S.C. 2 Cox Crim. Cas. 430, which was decided upon the authority of *Reg. v. Kenrick*, 5 Q. B. 49. The facts in the present case are precisely the same as in *Reg. v. Abbott*; and unless that case can be impeached, this conviction must, no doubt, be upheld. In *Reg. v. Reduck*, 7 Cox Crim. Cas. 126; S.C. 1 Deara & B C.C. 24, Lord Campbell, C.J. said: "If this were *res integra*, I should not agree with *Reg. v. Abbott*, because I think that there the intention of the prisoner was to obtain a better bargain, and not *animo furandi*; but that having been decided by ten judges, I do not wish on the present appeal to disturb it." So in *Reg. v. Eagleton*, 6 Cox Crim. Cas. 559; S.C. 1 Deara & P. 515, the authority of *Reg. v. Abbott* and *Reg. v. Kenrick* was much disputed in the course of the argument; but the court said that it did not then become necessary to consider those cases. In *Reg. v. Brym*, 7 Cox Crim. Cas. 312, the defendant, in order to obtain a loan on a quantity of plated spoons, represented to a pawnbroker that they were of the best quality, and were equal to Elkington's A (meaning spoons and forks made by Elkington, and stamped with the letter A); that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The jury found that these representations were wilfully false, and that by means of them the loan was obtained. Held (Willes, J. and Bramwell, B. *dissentientibus*) that the conviction was wrong, and that the representation being a mere exaggeration or puffing of the quality of the goods in the course of a bargain, it was not a false pretence within the statute. In *Reg. v. Sherwood*, 7 Cox Crim. Cas. 270, the prisoner, after he had agreed with the prosecutor to sell and deliver a load of coals at a certain price per cwt., falsely and fraudulently pretended that the quantity which he had delivered was 18 cwt., and that it had been weighed at the colliery, and the weight put down by himself on a ticket which he produced, he knowing it to be 14 cwt. only, and thereby obtained an additional sum of money; and this was held to amount to a false pretence within the statute. In that case a difficulty was felt by the court in drawing the line

between indictable and non-indictable false representations.

The COURT said that they had no doubt about *Reg. v. Abbott* being a decision that they would act upon and sound in principle, but they desired the case of *Reg. v. Joseph Itagy* (being on the same subject), to be called on before giving judgment.

REG. v. JOSEPH RAGG.

Joseph Ragg was tried before me at the General Quarter Sessions of the peace for the county of Leicester, held on the 3rd Jan. 1860, for obtaining money under false pretences from Henry Harris.

The indictment stated the pretence to be a false pretence as to the character and weight of a quantity of coals sold and delivered by the prisoner to the prosecutor.

It appeared in evidence as follows:—The prisoner was a coal dealer. On the 28th Nov. he called at the house of the prosecutor in Loughborough, with a load of coals in a cart, and inquired if he (the prosecutor) wanted to buy a load of "Forest" coal. The prosecutor replied that the coals did not look like Forest coal, because they looked so dull. The prisoner replied, "I assure you they are Forest coal, and the reason of their looking so dull is because they have been standing in the rain all night; there is 15 cwt. of them, for I paid for 14 cwt. at the coal-pit, and they gave me 1 cwt. in." On this the prosecutor bought the coal, and paid *7s. 6d.* for the load. The prisoner unloaded the cart, and packed the coals in the prosecutor's coal-place. When the prosecutor saw the coals in the coal-place, they appeared to be much too small a quantity to weigh 15 cwt., and he had them weighed, when it was found that they weighed 8 cwt. only.

The prisoner had at this time received his money and gone away, but the prosecutor went after him, challenging him with the fraud, and asking for redress. The prisoner, however, refused to make any, stating "that he did not make childish bargains, and that the prosecutor could not do anything to him, because he had not sold the coal by weight but by the load."

The prosecutor stated that he had bought the coal on the representation of the prisoner that there were 15 cwt., and the size of the cart and the appearance of the coal therein warranted the belief that there were 15 cwt.; but it turned out that the coal was loaded in a particular manner, technically known as "tunnelling;" that is, the coal (which is in large lumps) is so built up in the cart that one lump rests on the edges of that below it, and large spaces are left between the lumps of coal, and thus there is an appearance of a greater quantity of coal than there actually is.

From further evidence, it appeared that the coal was not Forest coal at all, and had not been bought at the pit, but was Rutland coal, and bought that same morning at a wharf in the town of Loughborough; that the cart, when loaded at the wharf, had weighed 8 cwt. only, and although the prisoner stated that other coal had been added to it from another cart-load purchased at the same time from the wharf, there was no evidence of this produced at the trial.

It further appeared that on the same day, and a very short time after the coal was sold to the prosecutor, the prisoner had offered the same load to another person as containing "13 cwt., but on looking at the cart it was evident that the coal was "tunnelled," and the prisoner was then and there challenged with the fact, and told that there was not above 8 cwt. in the cart, or 10 cwt. at the most.

The prisoner was not defended by counsel, and the jury found him guilty.

With respect to the false pretence as to the "character" of the coal, it appeared to me, on inquiring of the witnesses, that there was not much real difference in value between the Forest coal and the Rutland coal, and that the preference of one over the other

was rather according to the idea of the customer, than the actual value of the article; and I should not have considered it a case of false pretences under the statute had this been the only misrepresentation; but I considered that the evidence showed, not merely a false statement as to the quantity, but a preconceived intention to defraud, and a mode of packing the coal, resorted to for the purpose of fraud, and that therefore the jury properly found the prisoner guilty.

On referring, however, to the case of *Reg. v. Sherwood*, I found that some of the learned judges who gave judgment therein had apparently drawn a distinction between the case of a false representation made during the bargaining and that made after the sale was completed; and in the present case, "as the false pretence was made in the course of the progress of a sale," I did not feel justified in sentencing the prisoner until the subject had come under the consideration of the judges. I therefore postponed the sentence, and directed that the prisoner might be liberated on bail to appear and receive sentence at the next Easter sessions.

HT. J. HOSKINS, Deputy Chairman.

No counsel were instructed either for the prosecutor or prisoner.

ERLE, C.J.—We are of opinion that the conviction in each case was right. With reference to the case of Joseph Ragg, there was a false representation that the quantity of coals was 15 cwt., whereas only about 8 cwt. were delivered, and there was a pretence of a delivery of 7 cwt., no part of which had been delivered. This falls within the class of cases of false representations as to the quantity of goods delivered, the principle of which is a false pretence of a definite fact cognisable by the senses, which is an indictable offence within the statute. With regard to the case of Thomas Goss, there was also a false pretence of a definite fact within the cognisance of the senses; for by a sample of an entirely different cheese which he falsely represented as a sample of the cheese to be sold, he procured the purchaser to buy the inferior cheese, and part with his money. That was a false pretence as to the substance of the article for sale, whereby the prisoner was enabled to pass off a counterfeit article. In *Reg. v. Roebuck*, 1 Leas. & B. 24; S. C. 7 Cox Crim. Cas. 126, it was held that falsely representing to a pawnbroker that a chain is silver, the prisoner knowing it to be a base metal, is indictable. So here the drawing from the prisoner's pocket dishonestly samples from another cheese, and not the cheese intended for sale, which was a totally different substance, and falsely pretending to the purchaser that those samples were part of the substance which he was to buy, that is equally an indictable offence within the statute, and falls within the class of cases to which belong *Reg. v. Abbott*, where the substance of the purchase was a cheese of the identical character with the taster; and *Reg. v. Dundas*, 6 Cox Crim. Cas. 380, where the article sold was falsely pretended to be Everett's blacking, which was a known article in the neighbourhood, whereas in fact the article sold was a totally different thing. In the case of *Reg. v. Bryan*, the case of the plated spoons represented as equal to Elkington's A, having as much silver and foundations of the best material, the judges who constituted the majority decided that case on a very sound distinction, for there the representation was matter of undefined opinion, and not within the limit of indictable offences. A great deal of dissatisfaction has been expressed with that decision, as if it must operate as an encouragement to falsehood and fraud, and lead to a great deal of mischief; but it should be recollected what an extreme calamity it is to a respectable man to have to stand his trial at a criminal bar as a cheat upon an indictment at the instance of a dissatisfied purchaser, and this he might be liable to for merely using an imaginative style of address

upon the sale of his goods. It is of great public importance to endeavour to draw the line distinctly between false representations which are indictable and those which are not. In the present case there was a false representation that an article was a genuine substance, and so passing off a counterfeit substance, and that was an indictable offence. My brother Willes, J., in *Reg. v. Bryan*, threw a great deal of light on the law as to false pretences, and though he differed from the majority of the judges in the decision, he did not differ from the principle of that decision, but only upon the application of that principle to the case. The majority of the judges thought the representation there to be a matter of opinion only; my brother Willes thought it a representation of the substance, as if the representation had been, there is as much silver in the spoons as in Elkington's A, and in his judgment it was the false representation of a definite fact. We are therefore of opinion that this conviction must be affirmed.

WIGHTMAN, J.—I am of the same opinion. I would merely add, with reference to the cheese cases and Elkington's case, one observation. If the prisoner had said that the cheeses were equal to the tasters produced, that would have fallen within the Elkington's spoon case; but he said to the prosecutor, "These tasters are a part of the very cheeses I propose to sell to you;" and therefore it was a representation of a definite fact.

The rest of the Court concurring,

Convictions affirmed. (a)

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMSON, T. W. SAUNDERS, and C. J. B. HICKSLEY, Esqrs. Barristers-at-Law.

Wednesday, Jan. 25.

ORAM v. GAIT.

Turnpike toll—Agricultural produce—Milk—3 Geo. 4, c. 126, s. 32.

Milk does not come within the meaning of the words "or other agricultural produce," in sect. 32 of the 3 Geo. 4, c. 126 (General Turnpike Act) so as to be exempt from toll.

This was a case stated under the 21 & 22 Vict.

(a) There is no part of the criminal law so difficult to determine as the precise point at which a false representation becomes criminal, and consequently indictable. Judges and authors have alike failed to frame a precise and clear definition of the offence. It is certain that all false representations made by the seller are not criminal, for if it were so, every puff would be indictable. No amount of mere exaggeration is criminal, as for instance, where a quack declares that his medicine will cure all diseases, or the tailor that his clothes are the best cloth and fit. But a false representation of a fact seems to be indictable, as where a chain is represented as gold, when it is not gold, or as in the above case, the cheese given to taste is represented to be part of the cheese sold, when it is not so. This definition, however, is not quite perfect, for in *Reg. v. Bryan*, 7 Cox Crim. Cas. 312, a false representation that silver was equal to Elkington's A was held not to be indictable, the assigned reason being that it was a mere misrepresentation of quality, and not of a fact, and it may be concluded that if the representation had been that the silver was Elkington's A, the indictment might have been sustained.

However, as the decisions now stand, the safest rule for magistrates to observe will be to treat as criminal only a false representation by a seller of goods as to some fact not touching their mere quality. And it is also very important for them to bear in mind that in all charges of false pretences there must be, not only an actual false pretence, but that it must have been known to the prisoner to be such, and that it must have been used with intent to defraud—that intent being of the essence of the crime. Consequently the proofs to be required in all such cases are of

First, the pretence itself, which may be either by words, or by acts equivalent to words.

Secondly, proof by the prosecution that the pretence was false in fact.

Thirdly, that it was by reason of that particular false pretence that the prisoner obtained the property.

Fourthly, that he resorted to it with intent to defraud, and this intent may be gleaned from all the circumstances of the case.

Q. B.]

THE GOVERNOR, &amp;C., OF THE NEW RIVER v. SARAH HANKIN JOHNSON.

[Q. B.]

c. 43, upon a conviction of a tollgate-keeper for taking illegal toll.

By sect. 32 of the 3 Geo. 4, c. 126 (the General Turnpike Act), it is enacted "that no toll shall be demanded or taken by virtue of this or any other Act of Parliament on any turnpike-road . . . for any horse, beast, or other cattle or carriage employed in carrying or conveying on the same day . . . any hay, straw, fodder for cattle and corn in the straw which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder, or corn in the straw, potatoes, or other agricultural produce," &c.

The respondent in this case had passed through a turnpike-gate in the city of Wells, driving a horse and cart laden with cans of milk. The appellant, who was the gatekeeper, claimed and took a toll for such horse and cart, whereupon the respondent summoned him before the magistrates of Wells for taking an illegal toll, the milk being, as he contended, "agricultural produce" within the exemption above stated. The magistrates being of this opinion, convicted the appellant.

No one appeared for the respondent.

F. Edwards, for the appellant, contended that milk does not come within the exemption in sect. 32 of the 3 Geo. 4, c. 126, and that the gatekeeper was right in demanding the toll, and that the justices were wrong in convicting him. (He was stopped by the court.)

COCKBURN, C.J.—You need not further argue the case; we are all with you upon the question. The section enumerates certain things, as hay, straw, &c., followed by the general words of, "or other agricultural produce." These latter words must be confined to things *ejusdem generis* with those which have preceded them. The conviction cannot be sustained.

WIGHTMAN, J.—If the construction put upon this section by the magistrates could be upheld, it would exempt carts laden with meat.

CROMPTON and HILL, JJ. concurred.

Conviction quashed (a).

Wednesday, Jan. 18.

THE GOVERNOR AND COMPANY OF THE NEW RIVER (Appellants), AND SARAH HANKIN JOHNSON, (Respondent).

Waterworks Clauses Act 1847 (10 Vict. c. 17)—  
Compensation for damage.

*The Waterworks Clauses Act 1847 enables the undertakers to make drains, &c., and provides that in the exercise of their powers they shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. This proviso, however, does not give a right to compensation in any case where but for the statute a right of action would not exist.*

*The respondent was possessed of a well, and the company by making a drain drew off the water which percolated into the well, and by the same means drew it off by percolation after it had found its way into the well.*

*Held that, as no action could be maintained for this injury, so no compensation could be claimed for it under the statute.*

This was an appeal under the 20 & 21 Vict. c. 43, against an order of the magistrates of the borough of Hertford, made upon the New River Company, for the payment by the appellants to the respondent of the sum of 2l. 16s. 7d. and costs.

It appeared that the company were, in and by their local Act, entitled "An Act to enable the New River Company to construct certain sewers, drains and other

works in and near the town of Hertford, and for other purposes" (17 & 18 Vict.), and the Acts incorporated therein, empowered to construct certain sewers, drains and other works, in and near the town of Hertford, and that in doing so they drained the spring of a certain well, belonging to a message and premises of the respondent, in consequence of which she was obliged considerably to deepen her said well, and do other works attending the same to obtain a proper supply of water, and in so doing had incurred the expense of 2l. 16s. 7d. In the said local Act was incorporated the Waterworks Clauses Act 1847 (10 Vict. c. 17), the 12th section of which enables the company to make (*inter alia*) drains, cuts, &c., "provided always, that in the exercise of the said powers the undertakers shall do as little damage as can be, . . . and shall make full compensation to all parties interested, for all damage sustained by them through the exercise of such powers." It appeared by the evidence that the company for the purposes of their Act opened the public road in front of the respondent's house, and that as soon as the ground was dug out to form the sewer the water in the respondent's well became less in quantity, and that the diminishing continued till the well became quite dry.

This case was part argued on the 16th Nov. last, by Woollett for the respondent and Bovill, Q.C. for the appellants, when its further argument was postponed till the present term; but the court being now differently constituted, it desired Woollett again to state his argument.

Woollett (Foster with him) now again argued for the respondent, that the order of justices was perfectly good, and that the company were liable under the 12th section of the Waterworks Act (incorporated in the local Act) to make compensation for the damage sustained by the respondent. He contended that the company were liable, first, for interrupting the water in its access to the well; and secondly, for drawing it from the well after it had found its way there. He endeavoured to distinguish this case from *Chasemore v. Richards*, 33 L. T. Rep. 350, and *Acton v. Blundell*, 18 L. J. 280, Ex. He also cited *The London and North-Western Railway Company v. Bradley*, 6 Rail. Cas. 151; *Sturton v. Woolrych*, 26 L. J. 303, Ch.

Bovill, Q.C. (Bushley with him) was not called upon.

COCKBURN, C.J.—I think this order must be quashed. The recent decisions fully establish what is the correct view we are to take of Acts of Parliament when they give compulsory powers to interfere with the rights of property and provide for compensation, namely, that a party shall not be damaged by having his right of action taken away, and that therefore, unless the company are doing something which but for the compulsory powers they could not do, they shall not be liable to make compensation. The question, therefore, here is, whether the company have interfered with the rights of the respondent in such a way as would give a right of action? Mr. Woollett says that they have interfered with the water in its coming to the well, and that they have drawn it away after it has got there. Now, as regards the first injury, *Chasemore v. Richards* is an authority to show that the abstraction of water percolating through the earth is not a cause of action, and so in this case the abstraction would not give a right of action, and therefore there should be no compensation under the statute. Then as to abstracting the water after it has got to the well, *Acton v. Blundell* is an authority to show that no action will lie for that. It would be a very great pity to throw any doubt upon the proper construction of such clauses under these Acts of Parliament. Where there could be no right of action, it would be very mischievous to hold that any right to compensation is given by statute, unless upon the clearest language.

(a) This case is important, as defining what agricultural produce is exempt from tolls. It must be *ejusdem generis*, with "hay, straw, fodder, corn, &c." in the way to be used by the farmer, not being carted away for sale.

WIGHTMAN, CROMPTON and BLACKBURN, JJ. concurred.  
*Order quashed without costs. (a)*

Nov. 15 and Jan. 26.

THE MAYOR, &C., OF STOCKPORT v. CHEETHAM.  
SAME v. DAVENPORT.

*Local Improvement Acts, 7 Geo. 4, c. cxviii. ss. 71, 73—1 Vict. c. cxxix. ss. 107, 108, 109, 115—Construction.*

*To an action by commissioners acting under a Local Improvement Act against the owners, &c., of buildings, to recover the expenses incurred in paving, flagging, soughing, cleansing, and completing a certain street, the defendant pleaded that the said street was a public street and common highway, repairable and repaired by the inhabitants at large as a common highway:*

*Held, on demurrer (with reference to the several local Acts), a bad plea.*

These were actions brought by the mayor and corporation of Stockport, as commissioners under an Act for improving and regulating the borough. The declarations stated that, after the passing of the said Act, divers streets within the said borough, and amongst others a street called York-street, were respectively laid out, but were not paved, flagged, soughed, cleansed, completed, and put into good order and condition in such manner and with such materials and with such drains as were to the satisfaction of the said commissioners appointed for putting the said Act, and the several powers therein contained, into execution, and the same respectively for and during all the times hereinafter mentioned had buildings, tenements, yards and inclosed places other than such as were used only as arable, meadow, or pasture land at the respective sides thereof, to the extent of one-half part of the whole length of the said streets respectively, and exclusive of streets, squares, places, lanes, roads, paths, ways, courts, and other public passages and entries leading into, out of, or across the same; and the defendant was the owner of a house, building, ground, and land within the said street called York-street, and divers other persons were also owners of houses, buildings, ground, and land within and adjoining that street; and that street continuing not levelled, flagged, soughed, drained, completed, and put into good order and condition as aforesaid, the said commissioners deeming it just, necessary and proper to cause the same to be levelled, flagged, soughed, drained, cleansed, repaired, amended, completed, and put, inclusive of streets, squares, places, lanes, roads, paths, ways, courts, and other public passages and entries leading into, out of, over, or across the said street, into good order and condition, and having power and authority to do so under and by virtue of the said Act, did cause their clerk to give and leave notice in writing to and with the defendant and each and every other of the owners and occupiers of the buildings, lands, grounds, and hereditaments within and adjoining to the said street, called York-street, so to be levelled, paved, flagged, drained, soughed, cleansed, repaired, amended, completed, and put into good order and condition as aforesaid, requiring the defendant and other such owners, and each of them collectively, to level, pave, flag, drain, sough, cleanse, repair, amend, complete and put the said street, inclusive of all streets, squares, places, lanes, roads, paths, ways, courts and other public passages and entries, leading into, out of, over, or across the same street, into good order and condition, in such manner and according to a certain plan produced and

shown at the time of the service of the said notice, and with such materials, sewers, soughs, gutters, sinks, drains and watercourses, as the said commissioners in the said notice directed, and the said commissioners did by the said notice give the defendant and others, the said owners and occupiers, notice, that in case they neglected or refused, for the space of six calendar months after the said notice, to level, pave, flag, drain, sough, cleanse, repair, amend and otherwise complete and put the said street into good order and condition, and with such materials, sewers, soughs, gutters, sinks, drains and watercourses as aforesaid, pursuant to the said notice, that then and in such case the said commissioners would cause the same to be done, and recover the costs, charges and expenses thereof, in case of refusal to pay the same, in such manner as in the said Act is mentioned; and the plaintiffs alleged that the defendant and other the said owners neglected and refused, for the space of six calendar months next after the said notice, to pave the said street, and with such materials as aforesaid, pursuant to the said notice; and thereupon afterwards the said commissioners caused the levelling, paving, flagging, draining, soughing, repairing and amending of the same, to be done according to the said Act, and the charges and expenses of and attending their doing the same amounted in the whole to a large sum of money, and the proportions of such charges and expenses to be paid by the said owners respectively, according to the said Act, were afterwards ascertained by the said commissioners, and the defendant's equal share and proportion of the said charges and expenses to be paid by him and calculated according to the said Act, and ascertained as aforesaid, amounted in the whole to a large sum of money, to wit, 27*l.* 8*s.* 8*d.*; and the defendant had notice of the premises. And the defendant, although required by the said commissioners to pay the same, has refused and still refuses so to do, and the said commissioners are still unpaid and not reimbursed the same. And the said commissioners have done all things, and all things have happened and exist, to entitle the said commissioners to have payment made to them of the said sum.

There were also counts for money payable and for money paid by the plaintiffs to the defendant's use.

Seventh plea.—That the said street, called York-street, was before and at the times of the giving or leaving of the said notices, and thence hitherto has been, and still is, a public street and common highway repairable and which theretofore had been repaired and kept in repair, and during all the times aforesaid ought to have been, and still ought, to be repaired and kept in repair, when and as often as necessary, by the inhabitants at large of a certain district or division within which the same was and is situate, and the inhabitants of which district or division, from time whereof the memory of man is not to the contrary, have been used and accustomed to repair and amend, and during all the times aforesaid ought to have repaired and amended, and still ought to repair and amend, when and as often as necessary, all common highways situate within the said district or division, and which otherwise would be repairable by the parish at large.

Demurrer and joinder in demurrer.

*Collier, Q.C. (Welsby with him)*, for the plaintiff, contended, first, that the fact of York-street being a common highway repairable by the inhabitants at large of a certain district or division, does not exclude the jurisdiction of the commissioners or discharge the defendant from liability to pay the expenses sued for. Secondly, that York-street is a street within the meaning of the "Act for improving and regulating the borough of Stockport in the several counties of Chester and Lancaster:" (1 Vict. c. cxxix.) Thirdly, that the expenses sued for were incurred in respect of matters and works within the jurisdiction of the commis-

(a) This is in accordance with a recent series of decisions that have determined that there is no property in water percolating through the earth to a well by no defined channel, and that it may be abstracted by digging elsewhere; so also that when water has entered the well it may be abstracted by percolation by another well.



[Q. B.]

THE MAYOR, &amp;C. OF STOCKPORT v. CHKEETHAM—SAME v. DAVENPORT.

[Q. B.]

sioners, and which the inhabitants at large of the said district or division were not liable to do or perform. Fourthly, that the persons liable to the said expenses are the owners of the houses, buildings, ground or land within or adjoining the said street.

*Mellish*, for the defendant, contended that, according to the true construction of the 107th, 108th, 109th and 115th sections (a) of the local Act, for improving and regulating the borough of Stockport, the plaintiffs have no power to compel the owners of premises adjoining streets to pay the expense of paving the streets where the streets are highways repairable by the parish or township. *Cur. adv. vult.*

*Jan. 26.—COCKBURN, C.J.*—The question argued before us in this case was, whether the 108th section of the 1 Vict. c. cxxix (local) extended to highways, which were public and repairable by the inhabitants of the township. It was admitted by Mr. Mellish, who argued for the defendant, that the words of the enactment, in their plain and grammatical construction, were sufficient to include such public highways; but he contended that the language used would be satisfied by the limiting it to the highways not repairable by the inhabitants at large; and that many inconveniences would result from giving the section the wider application. On the other hand, it was argued on behalf of the plaintiffs, that in order to carry out the intent and object of the statute, it was necessary to give to the provision in question its proper meaning; and reference

(a) The following is an abstract of the sections referred to:—1 Vict. c. cxxix (local) s. 107, provides that when any streets, squares, lanes, roads, paths, courts, ways or passages in the borough shall be well and sufficiently made, sewered, paved, flagged, repaired, amended, supported and put in order to the satisfaction of the commissioners, the said commissioners may, on the application of the owner or owners of the soil, or of the greater part in value of such owners, declare such streets, &c. to be highways, and order the surveyor of highways to repair and keep the same in good condition, and after such declaration and order the same shall be deemed to be public highways, and shall be kept in repair by the inhabitants of the township wherein the same shall be situate. Sect. 108 empowers the commissioners to cause all such of the present streets, &c. laid out but not paved, flagged, soughed, cleansed, completed and put into good order, or any portion thereof which shall have any buildings, tenements, yards, or inclosed places, except such as are used only as arable, meadow, or pasture land, whether the same shall be in a continuous line or not at the side or respective sides thereof, to the extent of one-half of the whole length of such streets, &c. to be freed from fences, posts and other obstruction, and to be paved, flagged, soughed, drained, cleansed, repaired, completed, amended and put into good order in such manner, with such materials, sewers, &c., and on such levels as to the said commissioners shall seem most necessary; and the charges and expenses attending or in any measure relating to such new pavements, flagging, levelling, draining, soughing, cleansing, sewers, &c., and completing and putting into good order and condition, shall be paid and reimbursed to the said commissioners by the owners of the houses, buildings, ground, or land within or adjoining the said streets, &c., so to be now paved, &c., each such owner paying an equal share or proportion thereof, according as such new pavement, &c. are or is or shall be, either before, behind, or at the side or corner of his or their house or houses, &c., except as before mentioned, and such portions of the said costs, charges and expenses as relate to such levelling, and the necessary drains, &c. for conveying the surface water into the main sewers, shall and may be charged to such owners without reference to the extent of their respective premises, in such proportions as the said commissioners shall consider fair and reasonable; and if such owners shall neglect or refuse to pay such charges and expenses, the same shall and may be levied by distress or by action at law. Sect. 109 provides that before the commissioners shall cause such streets, &c. to be levelled, paved, flagged, &c., they shall give notice in writing to the owners and occupiers of the buildings, land, ground and hereditaments within or adjoining the said streets, &c., requiring them collectively to level, pave, flag, &c. and put into good order and condition, and in case such owners shall neglect or refuse for six months after such notice to level, pave, &c., then the commissioners are required to cause the same to be done, and to recover the costs, charges and expenses thereof from such owner or occupier. Sect. 115 enacts that nothing therein contained shall extend to exempt the inhabitants of the several and respective townships from the repair of any highways.

was made to the preamble of the statute to enforce that view. The statute is for improving the borough of Stockport. It recites a former local Act, 7 Geo. 4, c. cxviii, and for the same object, the Parliamentary Reform Act, which created Stockport together with parts of four other adjoining townships, a parliamentary borough; and also the Municipal Corporation Act, by which the limits of Stockport as a corporate borough are made co-extensive with its limits as a parliamentary borough. It may be well here to observe, that when the 7 Geo. 4, c. cxviii, passed, the town of Stockport and the township of Stockport were coterminous, and that the 7 Geo. 4 was confined to that township. The 1 Vict. c. cxxix, then proceeds to recite as follows:—"And whereas those parts of the said borough of Stockport not comprised in the said first recited Act are very populous, and the several streets, lanes and passages therein are not sufficiently paved, lighted, repaired and cleansed, and the same are subject to various nuisances and annoyances, and the said township of Stockport since the passing of the said first recited Act hath greatly increased, and still is increasing, in building, and it is expedient that further and additional forces should be established for better paving, sewerage, cleansing, lighting, regulating and improving the said township of Stockport, and also for the paving, sewerage, cleansing, lighting, regulating and improving such parts of the said townships of Heaton Norris, Brinnington, Cheadle Bulkeley and Cheadle Moseley, as now form part of the said borough of Stockport, and for the opening and forming more convenient ways, approaches and streets within the said borough of Stockport." It is therefore plain that it was the intention of the Legislature that further powers should be established for better paving the whole town, and for paving the added parts of the new borough. This renders it important to ascertain what were the powers of the commissioners under the old Act of the 7 Geo. 4. For if the commissioners under that statute possessed a similar power with regard to the highways within the township of Stockport to that which the ordinary meaning of the language of the section now in dispute imports, with such a guide to the intention of the Legislature as that which the recital referred to affords, it would be doing violence to the construction of the enactment not to follow the ordinary meaning of the words because of the inconveniences which it is alleged would result from so doing. The 71st section of the 7 Geo. 4, c. cxviii, is very similar to the 107th section of the 1 Vict. c. cxxix; so much so as to afford ground for supposing that the latter was taken from the former; and in like manner the 73rd section of the former Act resembles the 108th section of the latter. The language of the 73rd section is as follows: "To cause all such parts of the public streets, lanes, highways and passages within the said township that now are in the estimation of the said commissioners fully built upon, but not finished, paved, flagged, or otherwise put into good order and condition, and all such public streets, lanes, ways and passages as are now making or may hereafter be made within the said township which now have or may hereafter have buildings erected at the respective sides thereof, to the extent of three-fourth parts thereof, to be made, paved and flagged." It is to be remembered that the statute 7 Geo. 4 refers to a time prior to the last Highway Act; that all public highways then dedicated to and accepted by the public were repairable by the inhabitants at large. It is therefore impossible to satisfy the 73rd section of the 7 Geo. 4, c. cxviii, by any construction which would exclude highways repairable by the inhabitants at large from its operation. The object of the enactment seems to be directed to the proper paving of such ways as had buildings erected on the sides thereof, to the extent of three-fourth parts thereof. A similar object seems to be aimed at by the 108th section of the 1 Vict. c. cxxix, except that the



Q. B.]

REG. v. JOHNSON—FRENCH AND OTHERS v. TUCKER.

[C. B.]

buildings are limited to one-half part of the length of the street to be paved. On the grounds, therefore, that a similar power was given to the commissioners under the first Stockport Improvement Act, and that the Legislature intended by the present Act not to abridge, but rather to enlarge, the powers given by the first Act, we think that the construction which the plain meaning of the enactment warrants should prevail, and our judgment must be for the plaintiffs. We desire to guard ourselves from being taken as expressing any opinion as to what would be the effect of such a provision as the one under consideration, where no previous statute served to show the meaning of the terms used. We have thought it unnecessary to determine the more general question, in consequence of the intent of the Legislature being here clearly indicated by the former enactment.

*Judgment for the plaintiffs.*

Wednesday, Feb. 8.

REG. v. JOHNSON.

*Practice—New trial—Obstruction of highway. After a verdict of "not guilty" on an indictment for obstructing a highway, a rule for a new trial will not be granted on the ground that the verdict is against the evidence.*

Indictment for obstructing a highway.

At the trial the verdict was found for the defendant. A rule nisi having been obtained for a new trial, on the ground that the verdict was against evidence,

*Hayes, Serjt.* showed cause.—This being substantially a criminal proceeding, and the verdict having been found for the defendant, the court will not grant a new trial on the ground of the verdict being against the evidence, and so put the defendant upon his trial a second time. Cases cited:—*R. v. Reynell*, 6 East, 315; *R. v. Oxfordshire*, 16 East, 223; *R. v. Mann*, 4 M. & S. 337; *R. v. Burley*, 5 M. & S. 392; *R. v. Wandsworth*, 2 B. & Ald. 63; *R. v. Chorley*, 12 Q. B. 515; and *R. v. Russell*, 3 E. & B. 942.

*Field* in support of the rule.—In *R. v. Russell* it was held that the court would grant a new trial in the case of a prosecution substantially for the purpose of trying a civil right after an acquittal, where the ground of the rule is misdirection or the verdict is against evidence, and in the course of the argument Lord Campbell, C.J. observed that an indictment for non-repair of a highway was very much in the nature of a question as to a civil right.

*WIGHTMAN, J.*—When the case first came before us, I had great doubt whether it was a case in which the court would grant a rule for a new trial on the ground that the verdict was against the evidence. At the trial there was conflicting evidence, and the jury have found a verdict of acquittal, contrary to what we might think right. The question is, ought we now on that ground to grant a new trial? It is said that this proceeding, though in form a criminal one, is really instituted to try a civil right. But is that so? It does not bind the right; and besides, the defendant, on conviction, is liable to be treated as a criminal, and to be subjected to fine and imprisonment. On the whole, I think it better to abide by the rule, where so much of the criminal law is incidental to the case, not to grant a new trial on the ground that the verdict is against the evidence after the defendant has been acquitted.

*CROMPTON, J.*—I also think that we ought not to interfere with a leading rule like this in criminal cases. I do not mean to say that there are not cases of prosecutions in which the court would interfere after a verdict of acquittal; but I adhere to what I said in *Reg. v. Russell*. This indictment assumes more of a criminal nature than one for the non-repair of a highway. I think it much better to put the prosecutors to a fresh indictment, than interfere on slight grounds with the rule as to not granting a new trial in such cases.

*HILL, J.*—This is an indictment for a nuisance; and there has been a verdict of not guilty, after a trial on the merits; and it is sought to set aside the verdict, and obtain a new trial, on the ground that the verdict is against the evidence. The verdict binds no right; and that is a strong fact to consider as to granting a new trial. It appears to me that it would be a violation of principle to grant a new trial in such a case.

*Rule discharged.*

**COURT OF COMMON BENCH.**

Reported by DANIEL THOMAS EVANS and R. VAUGHAN WILLIAMS, Esq., Barrister-at-Law.

**REGISTRATION APPEAL.**

Nov. 16 and 24.

FRENCH (appellant) v. TUCKER (respondent).

SMERDON (appellant) v. TUCKER (respondent).

BICKLEY (appellant) v. TUCKER (respondent).

*Election law—Borough vote—Qualification—Occupier of house with land under same landlord—Reversion, severance of, by secret deed—Reform Act, 2 Will. 4, c. 45, s. 27.*

*A tenant held a house and land under the same landlord, sufficient, together, to give him the borough franchise. The landlord, in course of the year of occupation, and without notice to the tenant, sold the reversion of part of the premises to a third person, who thereupon objected to the tenant's name being retained upon the list of voters, on the ground that the reversion, being severed, he did not hold under "the same landlord" within the meaning of the 25th section of the Reform Act, 2 & 3 Will. 4, c. 45, and the voter's name was expunged by the revising barrister:*

*Held, that the name must be restored to the list; that the taking of premises of sufficient value from the same landlord was the principal test relied on by the Legislature, and that here, the tenant having so taken them, and having continued to hold them on the same terms, the reversion, whether severed or not, was, as to his interest, the same reversion; therefore he was entitled to retain his vote.*

At a court held before the revising barrister appointed to revise the list of voters for the borough of Ashburton, Robert Tucker duly objected to the name of John French being retained on the list of persons entitled to vote in the election of a member of Parliament for the borough of Ashburton.

The facts of the case were as follow:—

The voter, John French, occupied as tenant, from the 31st July 1858 to the 31st July 1859, a building and land within the borough of Ashburton, of the annual value of 11l. The only objection to the vote was, that the premises were not occupied under the same landlord. On the 31st July 1858 William Tucker, a son of the objector, was the landlord of all the premises.

The tenancy was a tenancy from year to year under a verbal agreement, at the annual rent of 11l. The estate of the said William Tucker was an estate for a long term of years, and he still retains that estate in part of the premises; but on the 12th July 1859 he sold to his father, the objector, Robert Tucker, an interest in part of the premises. By a deed of that date, duly executed, the said William Tucker, in consideration of the sum of 11l, demised to the objector Robert Tucker one of the fields occupied by the voter, to hold during the joint lives of the said William Tucker and Robert Tucker, subject to the payment of a rent-charge of 4l, issuing out of all the premises occupied by the voter.

The transaction was a *bond fide* sale for adequate value. The consideration was really paid, but no notice of the sale or conveyance was ever given to the voter, and he did not know of it until it was disclosed

C. B.]

FRENCH AND OTHERS v. TUCKER.

[C. B.]

in the revising barrister's court. The voter had not since the execution of the conveyance paid any rent either to William Tucker or Robert Tucker. The premises retained by the said William Tucker and the premises demised by him to Robert Tucker were not, when separated, of sufficient value to confer a vote.

The objector admitted that the object of this arrangement was, by severance of the reversion, to destroy the vote.

On the part of the voter it was contended that inasmuch as there had been no attornment by the voter, nor any apportionment of rent agreed to by him, nor any recognition by him of any other landlord, he still continued (notwithstanding the execution of the deed) to occupy all the premises under William Tucker, the original landlord; and that even the statute 4 Anne, c. 16, which made rendered attornment unnecessary in certain cases, was inoperative in this case, inasmuch as no notice of the deed had been given to the voter before the 31st July 1859.

The revising barrister was of opinion that the statute 2 Will. 4, c. 45, s. 27, required not only an original taking, but a continual occupation under one landlord; and that after the execution of the deed William Tucker ceased to be the landlord of the premises thereby demised to Robert Tucker, and the revising barrister therefore decided that the voter had not proved his qualification, and expunged his name from the list.

If the Court of C. B. should be of opinion that the decision was wrong, then the name of the voter John French was to be restored to the list of persons entitled to vote in respect of property occupied within the parish of Ashburton, thus:—

French, John	Ashburton	Building & land	Dobbeare-road.
--------------	-----------	-----------------	----------------

*Karslake* for the appellant.—The question here arises under the 27th section of the Reform Act, by which a qualification to vote at an election for a city or borough is conferred upon any one "who shall occupy within, &c., as owner or tenant, any house, &c., being either separately or jointly, with any land within such city, borough, or place occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l*." &c. If this endeavour to deprive the appellant of the franchise is to prevail, great hardship will be effected, and a tenant occupying for the purpose of the franchise may find, for the first time when before the revising barrister, that a secret deed severing the reversion has been made, and in that manner he has been disqualified. As to the word "landlord" in the 27th section, it can hardly be contended that it means one and the same person, or any change or assignment of the whole reversion would operate to deprive the tenant of the franchise. The apportionment made by the deed is not in any way binding on the tenant, who may dispute it. If a strict construction be put upon the transaction, it can hardly be said that the assignee has become landlord at all. The tenant did not hold under a lease by deed, therefore the case does not come within the stat. 32 Hen. 8, c. 34, consequently the assignee could not sue on the contract between the assignor and the tenant: (*Standen v. Christmas*, 10 Q.B. 135; *Bickford v. Parson*, 5 C.B. 920.) It is clear that at common law the assignment of the reversion could have no effect whatever until the attornment of the tenant. [WILLIAMS, J.—There can be no doubt that the statute of Henry 8 does not apply to anything but deeds under seal: (*Doe dem. Agar v. Brown*, 2 E. & B. 331.)] A doubt has been raised whether, in the absence of express contract between the parties, an action will lie for use and occupation: (*Churchward v. Ford*, 2 Exch. 448.) There Bramwell, B. says, "the word 'landlord' does not mean the lord of the soil, but the person between whom and the tenant

the relation of landlord and tenant exists:" (*Bliss v. Collins*, 5 B. & Al. 876.) [BYLES, J. referred to Co. Litt. 148 a, where it is said, "if the lessor granteth part of the reversion to a stranger, the rent shall be apportioned, for the rent is incident to the reversion."] It is submitted that the words in the Reform Act, "occupying under the same landlord," mean holding under the same title without reference to the same actual person, and a person holding under the same title is entitled to the franchise. There has here been no retaking from different persons; and it may be taken to be an occupation within the meaning of the statute, under the same landlord.

J. D. Coleridge for the respondents.—The words of the proviso to the 27th section are most material, and they provide that no person shall be registered in any year unless he shall have occupied such premises as aforesaid (that is, under one and the same landlord) for twelve calendar months next previous to the last day of July," &c. If tenants in common join in making a lease, the tenant has so many landlords, and not one and the same landlord, within the meaning of this Act of Parliament. If such taking would not have conferred a vote originally, it will not now. The reversion has been severed; there has been a *bona fide* sale of part of the tenant's holding to a *bona fide* purchaser, and he has no longer one and the same landlord. The right to recover for use and occupation is gone by this deed. [WILLIAMS, J.—Without saying your construction is wrong, I cannot help thinking that the Legislature never contemplated such a consequence as this. His Lordship referred to *Morton v. Freedy*.] Adding the value of the land to that of the building, is in itself insufficient to confer the borough franchise under the section: (*Capel v. Overseers of Aston*, 2 Lutw. 143; *Burton v. Overseers of Aston*, 1b.; *Colkins v. Thomas*, 13 C.B. 639.) Maule, J. says, "the words 'therewith,' and 'under the same landlord,' require an identity of the person under whom the tenant holds as tenant" Rogers on Elections, 61, contains a note on this, wherein it is said, "this restriction may enable a landlord to deprive a tenant holding two tenements of him of his vote, for if he chose in the course of the year to dispose of one of the tenements held by the voter, the latter would not occupy as tenant under the same landlord." That is the case here; it matters not what was the object for which the sale was effected, whether to deprive the tenant of his vote or not. It is submitted that the view of Maule, J. is correct, and the decision of the revising barrister should be affirmed.

*Karslake* in reply.—As to the opinion of Maule, J., on which reliance has been placed by the other side, it is remarkable that it appears in none of the reports except Lutwyche. The opinion of Mr. Rogers also comes for the first time before the court. Under the words "same landlord" you are not restricted to the same identical person, for if a person who is landlord dies, and his heir succeeds him, the heir is landlord, and the "same landlord" within the meaning of the statute. It may be remarked that the Attornment Act, 4 Anne, c. 16, s. 9, which does away with the necessity for attornments by tenants, provides against a tenant being prejudiced or damaged who has not had notice of the grant. *Cur. adv. vult.*

ERLE, C.J.—In these cases, which were consolidated, the question was, whether the voter was qualified under sect. 27 by the occupation of a house with land under the same landlord. The premises were demised to him by the same landlord, and so the qualification was inchoate; but in the course of the year of occupation the landlord sold the reversion of a part of the premises to a third person, so that in one sense the reversion was not in the same landlord during a whole year, and because the occupation was in this sense not under the same landlord during

the whole year it was contended that the qualification was destroyed. But we are of a contrary opinion, thinking that the requisitions of the statute have been substantially fulfilled. It seems to us the taking of the same landlord of premises of sufficient value is the principal test relied on by the Legislature; if he so took the premises, and under the taking continues to hold them, or holds on the same terms, the reversion, whether severed or not, is as to his interest the same reversion. The statute does not express that the change of landlord during a year should destroy the qualification, and we do not gather from the context that the Legislature had any such intention. If the assignment of a part of the reversion would disqualify, it is obvious that the power might be used to prevent the free exercise of the right of voting, and would defeat in many cases the intention of the appellant in taking the premises. The appeal, therefore, will be allowed, and the decision of the revising barrister in these three cases reversed.

*Decision reversed—Judgment for appellants.*

Wednesday, Feb. 1.

HOUNSELL v. SMITH AND OTHERS.

*Highway—Waste—Quarry—Duty to fence.*

*The owner of land adjoining a highway may excavate the soil, without fencing, so long as what he does is not a public nuisance.*

*S. and others were owners of uninclosed waste land between two highways, over which land persons wishing to pass from one road to the other were accustomed without interruption from, and with the leave of, the owners so to pass. The licencees of S. and others worked a quarry in the waste land, into which H., in passing by night from the one road to the other, accidentally fell and was injured:*

*Held, that H. had no cause of action against S. and others, what was done not being a public nuisance within the principle of Barnes v. Ward, 9 C. B. 392.*

**Declaration.**—That before the time of committing the grievance hereinafter mentioned, the defendants were seised in their demesne as of fee as tenants in common, and possessed of certain waste land, parcel of the manor of Henbury, in the county of Gloucester; and that long before the time of committing the said grievance a quarry had been and was opened upon and within the said land for the getting of stone, which quarry before and at the time aforesaid was being actually worked by a certain person with the licence and permission of the defendants, and upon the terms of payment to the defendants of certain rents and royalties for the licence and privilege of working the same and of getting and taking away the stone thereof; and the plaintiff says that the said waste land upon and within which the said quarry was and is situate has been and is wholly uninclosed and open to the public, and that all persons having occasion to cross and pass over the said waste land have been used and accustomed to go upon, along and across the same without interruption or hindrance from, and with the licence and permission of, the owners of such waste land, and that the said quarry was and is situated near to and between two public highways leading over the said waste land, and was and is precipitous, and of great depth and width, and dangerous to persons who might accidentally deviate or stray respectively, or who might have occasion to cross over the said waste land for the purpose of passing from one of such roads to the other of them beside or near the said quarry; and that the defendants, well knowing the premises, negligently and improperly, and contrary to their duty in that behalf, left the said quarry wholly unfenced and unguarded, and took no care and used no means whatever for guarding or protecting the public or any person so accidentally deviating from the said

roads respectively, or passing over the said waste land, from falling into the said quarry, and being thereby killed or greatly hurt and disabled; and the plaintiff says that, on the night of the 9th Jan. 1859, having occasion to pass along one of the said roads, and having by reason of the darkness of the night accidentally taken and proceeded along the wrong road, he was crossing the said waste land so lying open and uninclosed towards and for the purpose of getting into the other of them which he had so occasion to use as aforesaid, and not being aware of the existence or locality of the said quarry, and being unable by reason of the darkness to perceive the same, or the edge or brink thereof, and the same being as aforesaid wholly unfenced and unguarded, he by reason thereof, and of the negligence of the defendants in that behalf, was precipitated down and into the quarry to a great depth, and thereby was seriously bruised, hurt, wounded and disabled, and his leg was broken, and he suffered great pain and anguish, and has sustained permanent injury, and incurred great expense in endeavouring to get cured of the said injuries, and has been and is otherwise greatly damaged, and the plaintiff claims 100*l*.

**Pleas.**—1. The defendants say they are not guilty. 2. And for a second plea, that they were not possessed of such waste land as therein mentioned in manner and form as in the declaration alleged. 3. And for a third plea, that the waste land on which the said quarry was and is situate was not and is not wholly uninclosed and open to the public as alleged. 4. And for a fourth plea, that all persons having occasion to cross or pass over the said waste land upon and within which the said quarry is situate, have not been used or accustomed to go upon, along, or across the same without interruption or hindrance from, and with the licence or permission of, the owners of the said waste land, in manner and form as alleged. 5. And for a fifth plea the defendants say, that the said quarry was not and is not near to and between two public highways leading over the said waste land, in manner and form as alleged. 6. That the said quarry was not dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross the said waste land for the purpose of passing from one of the said roads to the other of them, in manner and form as alleged. 7. That the said quarry was not being worked by such person as in the declaration mentioned, with the licence and permission of the defendants, upon such terms as therein alleged. And the defendants further say that the declaration is bad in substance.

**Replication and demurrer.**—1. The plaintiff joins issue on the pleas of the defendants. 2. The plaintiff also says that the third plea is bad in substance. 3. The plaintiff also says that the fifth plea is bad in substance. 4. The plaintiff also says that the declaration is good in substance.

**Joinder in demurrer.**

**Karelake** for the defendants.—It does not appear here that the public were authorised to cross the waste, but merely that they were accustomed to do so. Where a private road is made up to a house and people are induced to use it, the owner placing obstructions in the road is liable for any accident that may arise: (*Corby v. Hill*, 4 C. B., N.S., 556.) But that is not the same case as this, nothing being done to induce the public to cross from the one road to the other. Where leave has been given to hunt or shoot, if the sportsman falls into an unfenced quarry of the licenser, no action will lie. The statement in the declaration is, that the quarry was unfenced; but I submit that the fact of the quarry being near two highways is insufficient to render a fence necessary: (*Blyth v. Topham*, Cro. James, 158.) It may be that if you induce an animal to come on your ground and then kill it, you will be liable: (*Seymour v. Maddox*, 16 Q.B. 326; *Hardcastle v. South Yorkshire, &c.*

C. B.]

HOUNSELL &amp; S. SMITH AND OTHERS—JONES v. HOWELL.

[Ex.]

4 H. & N. 67.) Or if you dig a hole abutting on a highway: (*Burnes v. Ward*, 9 C. B. 392; *Southcote v. Stanley*, 1 H. & N. 247.) [BYLES, J.—There is no allegation here that the defendants knew the state of the quarry. The occupier ought to fence, not the owner of the land.]

*Kingslake*, Serjt. contra.—The declaration states that the defendants were seised in their demesne as of fee of certain lands, &c. The quarry is worked by leave and licence of the defendants, the owners of the soil. The quarry does not pass so as to exclude the owner: (*Musket v. Hill*, 5 Bing. N.C. 694.) There is an allegation that the defendants knew the state of the quarry, and the facts alleged in the declaration, by the words "well knowing the premises." It is alleged that to deviate from the road was dangerous, that the public have been accustomed to go over the same by the leave and licence of the defendants. *Barnes v. Ward* is the same in principle as this case; so also *Jordan v. Crump*, 8 M. & W. 782, and *Blyth v. Topham*. Although the cases show that no action will lie for mere holes in a waste, it is admitted that where an accident occurs from an excavation so near to a highway as to be dangerous, the rule is otherwise. *F. i. m. stone and another v. Wheeley and another*, 2 D. & L. 203, agrees with *Barnes v. Ward*. He also commented on *Sarch v. Blackburn*, 4 C. & P. 297; *Bruck v. Copeland*, 1 Esp.; *Hardcastle v. South-Western Railway Company*; *Seymour v. Maddox*; *J. v. Great Western Railway Company*, 4 C. B. N.S. 506; and *Southcote v. Stanley*.

*Karslake* was not called upon to reply.

WILLIAMS, J.—I am of opinion that the judgment should be for the defendants. I will first consider the declaration as if it did not contain the allegation of a right of passing over the waste, and I think on authority and reason that the declaration, so considered, is bad. The averments are, that before grievance the defendants were seised in fee of certain waste lands, and that a quarry was worked there by the licence of the defendants. The declaration states further that the waste is wholly uninclosed, and that the quarry therein is situated near two highways, and is dangerous to all persons who should accidentally deviate from the highways, or who should happen to cross from one road to the other. The complaint is not that the quarry is there, but that it is dangerous to those who should accidentally deviate or cross, &c. I am of opinion that no duty was cast upon the defendants in this case. The law has been long settled, and was lately confirmed by the decision in the case of *Blyth v. Topham*, which fully settles the principle that if a hole is made or continued near a highway, no action lies against owners of the land. *Burns v. Ward* no doubt qualified the general doctrine so far, that where a public nuisance is caused, there an action will lie against the person who created it. But in this case there is nothing beyond a hole some distance from the highway, not so near as to amount to a public nuisance, though it is so near that inadvertence would lead a person to fall into it. It has long been established that these circumstances give no right of action. The principle of *Barnes v. Ward* is, that if a road is dedicated to the public, a precipice cannot be dug on each side so as to render the road useless. A party cannot do that without being guilty of a public nuisance. Now will the allegations vary this case? "All persons having occasion to cross and pass over the said land have been accustomed to go over," &c., "without interruption from, and with the licence and permission of, the owners," &c. There is no allegation of a right, but the mere statement of a fact, that persons were allowed to go over without any complaint being made. But it cannot be said that the owners of the soil are to be held accountable for accidents suffered by such persons. Permission having been given, it must be taken

with the concomitant circumstances, and the public must take proper care. If permission is given to walk along a road near a cliff, no action will lie for falling over the cliff against the owner of the land. It is clear here that this is not the case of a person invited to use a road without knowledge on his part of any peril, as in the case of *Corby v. Hill*. What was decided in that case was, that nothing ought to be put on the road so allowed to be used, and which people were induced to use. This case is not within the exception of *Barnes v. Ward*, because there is no allegation that there is a public nuisance.

KEATING, J.—I am of the same opinion.

*Judgment for the defendants.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY, and JOHN DUNBAR, Esqrs.,  
Barristers-at-Law.

Nov. 8 and 24.

JONES v. HOWELL.

*Notice of action—False imprisonment—Malicious trespass—7 & 8 Geo. 4, c. 30.*

*On a Sunday night a female who occupied a house, the property of the defendant, saw one of two men who were together throw a stone at the window; she sent for defendant, told him, and described the two men, saying it was the one with the stick did it. The defendant followed and arrested both. The plaintiff was the man who held the stick and who had actually thrown the stone:*

*Held, the defendant was entitled to notice of action under sect. 41 of the statute.*

This was an action of trespass and false imprisonment. Plea, not guilty by statute 7 & 8 Geo. 4, c. 30, ss. 24, 28 and 41 (Malicious Trespass Act). The case was tried before Byles, J. at the last Monmouthshire assizes. It appeared that the plaintiff and another man knocked, at a late hour on a Sunday night, at the door of a public-house kept by a tenant of the defendant; the landlady answered them from a window, and refused to let them in or give them refreshments. Plaintiff commenced throwing stones at the window and broke some panes of glass. The landlady sent for defendant, described the men, and said it was the one with the stick did it. Defendant followed and overtook the men; he arrested both, and conveyed them to a public-house, where they were locked up for two hours, and next day taken before a magistrate. It appeared the plaintiff was the man with the stick, who actually threw the stone. No notice of action was given to defendant; on the trial it was submitted that he was entitled to it, and not having been given, plaintiff could not recover. For the plaintiff it was contended that, as defendant's tenant had directed the arrest of two men, one of whom she knew was innocent, she could not suppose she was acting legally, and therefore did not come within the statute or give the defendant the benefit of it; that the arrest was not justifiable, as the plaintiff was not "found committing the offence" by the party who arrested him. There was some suggestion of undue violence. The learned judge left three questions to the jury—first, did the plaintiff commit wilful and malicious damage; secondly, did the defendant *bonâ fide* intend to arrest the man who did the damage, and to act under the authority of the tenant; thirdly, did he use more violence than was necessary. The jury found all three in favour of the defendant. The learned judge thereupon directed a nonsuit, reserving leave to plaintiff to move to enter a verdict for 5*l*.

*Smythies* now moved for a rule to that effect, or for a new trial.—The plaintiff was not found committing the offence by the person who arrested. The defendant did not intend to act under the statute. [CHANNELL,

[EX.]

MEYERS AND ANOTHER v. RAWSON—WYATT v. WHITE.

[EX.]

B.—That is not necessary to a justification: *Read v. Cohen*, 13 C. B. 850.] The arrest was on a Sunday for an offence not indictable, and therefore could not be justified, even under a warrant: (*Egginton's case*, 2 Ell. & Bl. 717; stat. 29 Car. 2, c. 7, s. 6; *Rea v. Myers*, 1 T. R. 265.) The question of *bona fides* ought not to have been left to the jury: (*Horn v. Thornborough*, 3 Ex. 846.) *Cur. adv. vult.*

Nov. 24.—CHANNELL, B. delivered judgment.—In this case we are of opinion that there ought to be no rule. The action was for false imprisonment, the defendant justified under the stat. 7 & 8 Geo. 4, c. 30. [His Lordship then stated the facts.] The learned judge left to the jury the question whether the defendant had acted *bona fide* and under the belief that he had the authority of the female, his tenant, to arrest one or other of the parties, and they found for the defendant. The learned judge, as it appears to us, left the question to them properly, and in accordance with the authorities; and that being so, the finding disposes of that part of the application which goes to a new trial, and it disposes also of the rest of it, because the plaintiff could only be entitled to enter a verdict for himself, on the ground that every matter was found in his favour. The leave given by the learned judge was upon one point only, whether the plaintiff was "found committing" the offence within the statute. It was also objected that the arrest was on a Sunday. It is unnecessary for us to give an opinion on that point, or on the other points made on moving for the rule. It is enough to say we are of opinion that the defendant was entitled to notice of action, and as there is a plea on the record which raises the question, it is manifest the plaintiff cannot be entitled to set aside the nonsuit. There must therefore be no rule. *Rule refused.*

Jan. 16 and 18.

MEYERS AND ANOTHER v. RAWSON.

*Industrial and friendly societies—Statutes 15 & 16 Vict. c. 31, and 17 & 18 Vict. c. 25—Liability of members.*

*A scire facias lies against the member of an industrial and friendly society, constituted under the Act of 1852, to levy the amount of a judgment recovered against the registered trustees, there being no property of the society to answer the claim.*

This was a declaration on a *scire facias* calling on defendant to show cause why plaintiffs should not be at liberty to issue execution against him as a member, to levy the amount of a judgment recovered by them against the registered trustees of a society called "The Bradford District Industrial Flour Mill Society," established under the provisions of the Industrial and Provident Societies Act 1852. The writ recited that no registered officer had been appointed to be sued on behalf of the society pursuant to the Act, and that there was no property or effects of the society whatever to pay the amount of the execution, and that the defendant was a member of the society at the time when the debt in respect of which the judgment had been recovered was contracted, and still continues to be so.

Demurrer and joinder.

*Mellish* (with him *Cockle*) for the defendant.—The 17 & 18 Vict. c. 25, s. 5, makes the property of the society liable, but there is nothing in the Act to authorise the issuing of execution against an individual member, and the court will not give it unless the Act expressly provides for it. In the Banking and Joint-stock Companies Acts the power is expressly given: (*Harrison v. Timmins*, 4 M. & W. 510.)

*Field* for the plaintiffs.—The 11th section of 15 & 16 Vict. expressly provides that the liability of members shall not be limited by the Act. *Burton v. Tannahill*, 5 E. & B. 800, is an express authority in our favour.

*Cur. ado. vult.*

Jan. 18.—WATSON, B. delivered judgment.—This was a proceeding by *scire facias* against the defendant upon a judgment obtained against the trustees of the society called the Bradford District Industrial Flour Mill Society, established under the Industrial and Provident Societies Act of the 15 & 16 Vict. c. 31, to legalise the formation of industrial societies, of which the defendant was, and is alleged to be, a member; to which there was a demurrer. It was argued on the part of the defendant that there was no provision contained within the Act of Parliament to give any remedy against the individual members of the society, but that the only remedy on the judgment was against the funds of the society. By the statute of the 17 & 18 Vict. c. 25, it is declared "that it is expedient to vary the provisions of such laws (that is to say, the 15 & 16 Vict. c. 31, and 13 & 14 Vict. c. 115) in relation to these societies, so far as concerns the manner in which legal proceedings shall be carried on in any matter concerning any such society." By the 1st section it is enacted "that the society shall sue and be sued in the name of the registered officer, and if there be no registered officer, then in the names of the trustees of the society." There being here no registered officer, the action is brought against the trustees. And then it is provided by the 5th section that execution may go against the property of the society—which means the present property of the society, because it would cause inextricable confusion if you had to resort to, and find out, what property vested in the persons who were members at the time the contract was made. That is the object and purpose of the clause. It was argued that, according to the case of *Horris v. Timmins*, reported in the 4 M. & W. 510, they could not have execution against the members. That case only decides that against the nominal defendant, the registered officer, you cannot have execution, unless he is a member of that society. That was one of the classes of societies like joint-stock companies. It was argued that if he had been made a member of the society, then of course this nominal defendant would have been liable, like the others, to execution. The only question here is, what is the proper course to pursue as to members who are individually liable by *scire facias*. Now, it is quite clear, on looking at the 11th section of the 15 & 16 Vict. c. 31, this is put beyond all question, because it says, "Nothing in this or the former Acts shall be construed to restrict in any way the liability of members of a society established under or by virtue or claiming the benefit thereof, to the lawful debts and engagements of the society." This case seems to have been, in fact, decided by the case of *Burton v. Tannahill*, 5 E. & B. 800, where it was held that no action could be maintained against the members of a society of this kind, the only remedy being by a proceeding against them under the 17 & 18 Vict., and in the course of the discussion *Crompton, J.* is reported to have said, "Why may there not be an action against the officer, and then a proceeding against the individuals to obtain the fruits of the judgment?" *Wightman, J.*: "Just as in the case of joint-stock companies." *Crompton, J.*: "That seems the very object of these enactments." That observation of my brother *Crompton* we perfectly agree in, and therefore we give judgment for the plaintiffs.

*Judgment for the plaintiffs.*

Feb. 13 and 14.

WYATT v. WHITE.

*False imprisonment—Arrest—Search-warrant—Reasonable and probable cause.*

*The defendant, a miller, having seen some sacks with his mark made up in some packages of waste, the property of plaintiff, went and made an information before a magistrate, and obtained a search-warrant. The warrant, in the usual form, directed the con-*

[Ex.]

WYATT v. WHITE.

[Ex.]

*stable, if he found any of the informant's property, to arrest the plaintiff. The plaintiff was accordingly taken into custody, but the case was afterwards dismissed, and plaintiff brought this action. At the trial the judge held there was reasonable and probable cause for obtaining the search-warrant, but not for the arrest, if it was not necessarily involved in the other:*

*Held, that the warrant to arrest was issued as a matter of course as a part of the search-warrant, and the defendant having reasonable and probable cause for laying the information in the first instance, was not responsible in damages for the subsequent arrest.*

The declaration contained three counts. First, trover for bags, the property of plaintiff; secondly, false imprisonment; thirdly, malicious prosecution.

Plea:—Not guilty; not possessed; that certain bags, the property of the defendant, were mixed up with those of the plaintiff, and defendant committed the trespasses complained of in order to obtain possession of them.

On the trial at Gloucester, before Willes, J., at the last summer assizes, it appeared that the defendant is a miller at Blakeney, and the plaintiff a marine store dealer at Colesford, in the county of Gloucester. On the 7th Feb. 1859 the defendant happening to be on the quay at Lydney Basin, saw a large pile of junk or bags partially covered with tarpaulin; amongst them he saw one sack bearing his trade-mark filled with junk; he lifted the tarpaulin and saw several other of his sacks. He was informed the sacks had been sent to the basin by the plaintiff to be shipped to Bristol. The defendant then went to the police-station, and afterwards before a magistrate, when he laid the following information:

"Gloucestershire, to wit.—The information and complaint of Richard Watts White, taken upon oath this 7th day of February, in the year of our Lord 1859, before the undersigned, one of her Majesty's justices of the peace in and for the said county of Gloucester, who says he has reason to suspect, and does suspect, that some sacks and pieces of sacks, his property, have been stolen, and are now lying at the Lydney Basin, in the parish of Lydney, in the county of Gloucester, and are in the possession of Thomas Wyatt, of Coleford.

"(Signed) RICHARD WATTS WHITE.

"Taken and sworn, &c."

The magistrate thereupon issued the following warrant:—

"Gloucestershire to wit.—To the constables of the county of Gloucester, and to all other peace officers in the said county of Gloucester. Whereas information hath this day been laid before the undersigned, one of her Majesty's justices of the peace in and for the said county of Gloucester, by Richard Watts White, miller, that he has reason to suspect, and does suspect, some sacks and pieces of sacks his property have been stolen, and are now lying at the Lydney Basin, in the parish of Lydney, in the county aforesaid. These are therefore to command you in her Majesty's name forthwith, with proper assistance, in the daytime to enter such premises, and there diligently search for the said goods, and if the same or any part thereof shall be found upon such search, that you bring the goods so found, and also the body of Thomas Wyatt, of Colesford, who claims the said property; and oath now being made before me substantiating the matter of such information, these are therefore to command you in her Majesty's name forthwith to apprehend the said Thomas Wyatt, and bring him before some or one of her Majesty's justices in and for the said county, to answer to the said information, and to be further dealt with according to law. Given under my hand and seal, this 7th day of February, in the year of our Lord 1859, at Lydney, in the county aforesaid."

"(Signed) THOMAS ALLAWAY."

On the search being made in the heap of sacks at the basin, a number of sacks and parts of sacks with the mark of defendant were found and taken possession of by the police. In the course of the afternoon the plaintiff came down to the basin; he was taken into custody and conveyed before a magistrate, who admitted him to bail. The next day he appeared before the magistrates at petty sessions; the defendant was examined, and in support of his information, after identifying the sacks as his property, stated that he lost about 1000 sacks a-year from their not being returned by his customers, but some had been stolen from him; nor had he lost any by any other means than their non-return by his customers; he could not state when the sacks in question had been in his possession. The magistrates dismissed the charge, and the sacks were eventually given up to the plaintiff.

At the close of the plaintiff's case the learned judge intimated his opinion that there was reasonable and probable cause for the search-warrant, but not for the arrest. A verdict was eventually entered for the plaintiff, damages 20*l.*, thus divided: on the first count, 20*s.*; on the second count, 4*l.*; on the third, 15*l.* A rule was subsequently obtained to enter the verdict for defendant on the second and third counts.

*Huddleston*, Q.C. and *Gray* now showed cause.—There was an entire absence of reasonable and probable cause for the proceedings of defendant. The plaintiff was in the habit of dealing in old sacks and bags. There was no disguise about the transaction, the sacks were placed openly on the quay. The application for the search-warrant supposes that the party has possession of the property criminally. He would not grant the warrant unless it was stated that the party holding the goods had got possession of them by criminal means. What reason had defendant to suppose the sacks were stolen? Millers lose sacks every day, and there was no justification for his imputing a crime to the plaintiff. Even if there was reasonable and probable cause for the search-warrant, there was none for the arrest, and defendant is responsible for it. The amount of damages was settled by the judge, and the question of malice was not left to the jury, but is still open to the court. They cited *Webb v. Ross*, 4 H. & N. 111; 32 L. T. Rep. 282; *Elsce v. Smith*, 1 Dow. & Ry. 97; 2 Hale's Pleas of the Crown, 150.

*Pigott*, Serjt. and *Powell* in support of the rule.—The learned judge was clearly of opinion there was no evidence of malice, and did not reserve that question. The evidence showed ample reason for the search-warrant, and the judge ruled there was reasonable and probable cause for it. The defendant was not responsible for anything else. The warrant for the arrest was the act of the magistrate. It is usual, when a search-warrant is granted, to order the arrest if the goods are found: (Hale's Pleas of the Crown, 150; Burn's Justice, tit. "Search, Warrant.")

*Cur. adv. vult.*

Feb. 14.—BRAMWELL, B. delivered judgment.—I have spoken to my brother Willes about this case, and he reports that the question of malice was not reserved. The learned judge ruled that there was an absence of reasonable and probable cause for causing the plaintiff to be apprehended; but that there was no absence of reasonable and probable cause for causing the search-warrant to be issued. The truth is that he was under the same impression (which turns out to be erroneous) as I believe we were all here, and the counsel were also till the matter came to be looked into, that the application for the search-warrant does not (as it now turns out we all thought it did) involve the application for a warrant to arrest. It turns out that the application for the one involves the application for the other, and upon explaining this to my brother Willes, he said that he had only expressed an opinion

Ex.]

WYATT v. WHITE—REG. v. WILLIAM HUGHES.

[C. CAS. R.]

enough for the decision of the case for the moment, and he would consider it as though he had expressed no opinion upon it at all. That being so, the question is reduced to this—Is there an absence of reasonable and probable cause shown for the information which the defendant swore before the magistrate? Because that is what he has done. All that follows from it is the consequence of that. But the question is, whether an absence of reasonable and probable cause for that is shown, and I am of opinion that an absence of reasonable and probable cause for laying that information is not shown. It is not necessary to go into minute details upon the matter, but I will say this—the defendant is a miller, and he swears that he loses a thousand sacks a-year. He says, indeed, that he only loses them by his customers not returning them. Hence it was argued, very forcibly, how could he say they were stolen from him under those circumstances? He does not say they were stolen from him. It was also urged, if he cannot say they were stolen from him, how could he say they were stolen from anybody else? To which the answer is, he does not say they were stolen, but believes they were. The question is, whether it is a wholly unreasonable belief for a man who has a thousand sacks not returned to him from his customers to entertain—whether it is unreasonable for him to think, when he sees a quantity of sacks, some of which are new—not many, perhaps—cut up into waste, and being made away with for the purpose of being turned into paper, that they are his sacks. The new ones are of importance, undoubtedly, in this matter, because, if they had been old ones, and unfit for use, there would have been no ground for thinking that any of those had been stolen; but some of them being new, it seems impossible to say that there was an absence of reasonable and probable cause. All the rest of the deposition is true—namely, that they were on the wharf, and that they were in the custody of the plaintiff. For these reasons, therefore, it appears to me that the plaintiff has not shown an absence of reasonable and probable cause for the information of the defendant, and that being so, the latter is entitled to make this rule absolute—the effect of which is, as I understand, that the verdict stands for 14.

CHANNELL, B.—I am entirely of the same opinion. Upon the point of malice I shall say nothing; first, because I understand from my brother Bramwell, after consultation with my brother Willes, that it was not reserved, and in the next place it is not necessary in the view I take of this case. I certainly was under the impression at first, during a part of the argument (and which appears to have prevailed with my brother Willes), that there was a distinction between this warrant, so far as it authorised them to search the premises where the sacks were, and so far as it authorised the apprehension of the party named in it. But it appears to me, upon looking into the authorities in Burn's Justice, and especially looking into Hale's Pleas of the Crown, that the magistrate was not only at liberty to issue, but would issue as of course, a warrant with this double aspect—if I may use such an expression. I do not understand it to be an application for a warrant to arrest a person on a charge of felony, and be brought before a magistrate to be dealt with according to law. A warrant in that form is warranted by the authorities. It seems to me that the question is, was there a want of reasonable and probable cause for the information which the defendant laid before the magistrate? Now I agree that all the circumstances are entirely explained by what afterwards occurred, and that the plaintiff is involved in no imputation whatever; but we are to look at what determined and justified the impression on the mind of the defendant the moment before he laid the information. He sees a tarpaulin; the use of it is well explained, but still he sees enough to be satisfied that

under that tarpaulin would be found some of his property. He found one or two sacks, no doubt his property, bearing his trade-mark upon them; and in one sack, if not two, he finds strips of sacks, evidently strips of new sacks; and with marks upon them sufficient to enable him to distinguish those as his property. I think that there was no want of reasonable and probable cause such as would entitle the plaintiff to maintain the action upon the second count, either for the 4*l.* in respect of the search-warrant, or for the 15*l.* in respect of the apprehension that took place. The result, therefore, is, as my brother Bramwell has said, that the verdict will stand for the sum of 1*l.*

Rule absolute.

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 21.

(Before ERLE, C.J., WIGHTMAN and WILLIAMS, JJ., WATSON, B. and HILL, J.)

REG. v. WILLIAM HUGHES.

*Felony—Accessory before the fact—Conviction after acquittal of the principal charged—11 & 12 Vict. c. 46, s. 1—General verdict on counts for larceny and receiving.*

*The first two counts of an indictment charged A. and B. with stealing, and the third charged B. with feloniously receiving. A. was acquitted, no evidence having been offered against him, that he might be a witness against B. Upon his and other evidence which proved that B. was an accessory before the fact of the stealing, the jury found a general verdict of guilty against B., which was so entered up: Held, that the conviction was good, the 11 & 12 Vict. c. 46, s. 1, making an accessory before the fact a principal felon, and that therefore the conviction of the prisoner is not now a condition precedent to the conviction of an accessory before the fact, and that there was no inconsistency in an accessory before the fact being also a receiver.*

Case reserved by the Recorder of Manchester.

At the Court of Quarter Sessions holden in and for the city of Manchester, in the county of Lancaster, on the 2nd Jan. 1860:

John Hall and Henry Hughes were tried before me on the annexed indictment; both pleaded not guilty. After the jury were charged the learned counsel for the prosecution said he did not propose to offer any evidence against Hall, and applied to have him acquitted in order that he might be examined as a witness; and on his assuring me that in his judgment that course would serve the ends of justice, I acceded to it, and he was acquitted and called as the first witness.

He had been thirteen months in the service of the prosecutors, and according to his evidence Hughes first solicited him to rob his master on the 20th or 22nd of Nov., asking him if he could get him a few pounds of fents, and he would keep it dark, and to bring them to him at any time, and they would be right. That accordingly the next day he took eight pounds of patchwork, which he had stolen from his masters, to Hughes, who gave him half-a-crown for it, the selling price being 7*d.* per lb. This patchwork was afterwards found in Hughes's cellar (his place of business), and he stated that he had got it from Hall.

That on the Monday following he was passing Hughes' place, who called him in and asked if he could get him any more of those fents; he said he could, and it was arranged between them that a person of the name of Lowe, who was called into the cellar, should go next day to the warehouse of Hall's masters 100, Mosely-street, and bring the parcel he was there to get from Hall to Hughes.

Lowe, who did not appear to be aware of the nature

of the transaction between Hall and Hughes, forgot his appointment.

Hall went the same afternoon to inquire why the man had not come; he was sent for to Hughes' place, and said he had got drunk and forgot it, and it was then arranged between Hughes and Hall and Lowe, that Lowe should go to the warehouse of the prosecutors, 100, Moseley-street, next morning, the 30th Nov., at half-past eight, and there receive a parcel to be given to him by Hall, and bring it to Hughes, and Hughes directed him to bring the parcel to his cellar (which was his place of business and was under a public-house), but if he was not in when he came with it, he was to take the parcel into that public-house and leave it there for him (Hughes) until he returned. On the morning of the 30th Nov., Hall opened the warehouse at a quarter past eight, and found Lowe there waiting for him, and about a quarter to nine Hall gave him a bundle of fents that belonged to his masters, and he went away with them.

A policeman on duty in the neighbourhood saw Lowe carrying this bundle on his shoulder, followed him and saw him take it into the public-house over Hughes' cellar, which was then shut, and on going into the kitchen of the public-house he saw the bundle lying on the kitchen-table there, and from the account given of it by Lowe he took it to the station. Another policeman took immediate possession of Hughes' cellar, and waited till he came in, and asked him if he had sent a man for any goods that morning; he replied, "I have sent a man for some prints to 100, Moseley-street." He was then taken into custody.

The patchwork or fents found in Hughes' cellar, and which he said he had got from Hall, and the bundle of prints brought by Lowe from 100, Moseley-street, to the said public-house, were identified by the prosecutors as their property.

Mr. Wheeler appeared as counsel for Hughes, and cross-examined the witness, and addressed the jury on behalf of Hughes, contending that they ought utterly to disregard everything that Hall had said, and acquit his client.

I summed up the evidence, and told the jury that they alone were to decide on the credit to be given to the witnesses, but that, if they believed Hall to the full extent of his evidence, Hughes was a guilty participant in both larcenies. That if they doubted about that, they would have to consider whether they were or were not satisfied that he received the property knowing it to have been stolen. And with reference to the fact of receipt of the second parcel of goods which Lowe was sent for by Hughes, with directions in case he should be out when he came to leave it for him at the said public-house, and Lowe having done so, I told them that was as much a receipt by him as if it had been brought to him in his cellar and left there.

The jury retired at seven o'clock to consider their verdict, and I left the court. They some time afterwards gave a general verdict of guilty, which was so entered. They strongly recommended the prisoner to mercy.

The question for the opinion of the court is—

Whether, as the facts showed that Hughes, if guilty at all of the larceny, was guilty only as an accessory before the fact, and Hall the principal having been acquitted, I ought not to have told the jury that Hughes was entitled to his acquittal on the counts for larceny, and that they were to confine their attention to the count for receiving only; and if I ought so to have directed them, whether, on this general verdict, judgment can now be pronounced on the count for receiving.

Hughes was admitted to bail to appear and receive judgment when called upon.

ROBT. B. ARMSTRONG, Recorder of Manchester.

## COPY OF INDICTMENT.

City of Manchester, in the county of Lancaster, to wit.—The jurors for our lady the Queen upon their oath present, that William Hall and William Hughes, late of the city of Manchester, in the county of Lancaster, on the 22nd day of November, in the year of our Lord 1859, at the city aforesaid, and within the jurisdiction of this court, and within the space of six calendar months from the first to the last of the several acts of stealing charged in this indictment, ten pounds weight of cotton fents, of the property of William Henry Smith and another, then and there being found, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Hall and William Hughes, on the 30th day of November in the year aforesaid, and within the jurisdiction of this court, and within the space of six calendar months from the first to the last of the several acts of stealing charged in this indictment, 18lbs. weight of cotton fents, of the property of the said William Henry Smith and another, then and there being found, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Hughes afterwards, to wit on the same day and year aforesaid, at the city aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, the property aforesaid, before then feloniously stolen, taken and carried away, feloniously did receive and have, he the said William Hughes then and there well knowing the same to have been feloniously stolen, taken and carried away, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

William Hall, not guilty.

William Hughes, guilty.

Dr. Wheeler (*Hopwood* with him) for the prisoner. —First, the prisoner Hall having been acquitted of the larceny, and Hughes having been found guilty on evidence of being an accessory before the fact, it is contended that that conviction cannot be supported. The finding is inconsistent, for if Hall did not commit the larceny, how could Hughes be an accessory? and there was no evidence to support the charge against Hughes except as an accessory before the fact. If two persons are indicted for conspiracy, and one be acquitted, the other cannot be convicted. The accessory shall not be constrained to answer to his indictment till the principal be tried (9 E. 4, 48 a); but if he will waive that benefit, and put himself upon his trial before the principal be tried, he may, and his acquittal or conviction upon that trial is good: (Stamf. P. C. lib. 1, c. 49 f, 46 b.) But it seems necessary in such a case to respite judgment till the principal be convicted and attaint; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him, but if he be acquitted of the accessory that acquittal is good, and he shall be discharged: (1 Hale P. C. 623.) The 11 & 12 Vict. c. 46, s. 1, which enacts "that if any person shall become an accessory before the fact to any felony, whether the same be a felony at common law or by statute, such person may be indicted, tried, convicted and punished in all respects as if he were a principal felon," simply alters the form of pleading only. The old law stands as before: "If A. be arrested, or in prison for felony, and B. rescues him, or the gaoler suffers him voluntarily to escape, though this be a distinct felony in B. the rescuer, and in the



gaoler, for which they may be presently indicted, yet they shall not be arraigned or put to answer till A. be convicted and attainted by judgment." (2 Hale P. C. 223) And the same rule holds with regard to accessories generally.

HILL, J.—The preamble of 11 & 12 Vict. c. 46, is, "Whereas it is expedient that any accessory before the fact to felony should be liable to be indicted, tried, convicted and punished in all respects like the principal, as is now the case in treason and in all misdemeanors, be it enacted," &c. That to my mind is a strong indication that the Legislature intended to make the guilt of an accessory the same as that of a principal; and the enacting part seems to make them both principal felons.

Wheeler.—There is nothing in the statute, it is submitted, which makes the accessory liable, if the thief is acquitted of the charge. The words, "indicted, tried, convicted and punished," refer to the mode of procedure only.

WIGHTMAN, J.—If the accessory has been tried, convicted and sentenced before the principal is tried and acquitted, could he bring a writ of error? It might be that the sentence had expired before the trial and acquittal of the principal, I therefore think the enactment intended to make the accessory a principal.

Wheeler.—It is contended that the statute intended to make no further change with regard to accessories before the fact than what the judges did of their own authority with regard to accessories after the fact. As to the second point—the general verdict. The recorder charged the jury, if they had any doubt as to Hughes being a participator in the larcenies, to consider the count for receiving, and to find their verdict as to one or other of the charges. The jury, however, returned a general verdict, which it is not possible to apply; for if Hall was not the thief, then Hughes could not be a receiver: (statutes cited, 7 Geo. 4, c. 64, s. 9; 14 & 15 Vict. c. 100, s. 15.)

Sowler, for the prosecution, was not called upon.

ERLE, C. J.—We are all of opinion that the conviction was right, notwithstanding the points relied upon by the prisoner's counsel. This was an indictment against Hall and Hughes, in the first and second counts for larceny, and in the third against Hughes only, for feloniously receiving, and no evidence being offered against Hall, the jury were directed to acquit him. Hall was then called as a witness against Hughes, and the jury found Hughes guilty, on evidence of being an accessory before the fact. The question is, is that an inconsistency, and does it entitle Hughes to be acquitted? Now, we think that the 11 & 12 Vict. c. 46, s. 1, has made the crime of being an accessory before the fact a substantive felony, and that the old law making the conviction of the principal felon a condition precedent to the conviction of the accessory before the fact is taken away by that clause. The first question is, whether that enactment meant only that the indictment should be cleared of technical matters, or created it a substantive felony. Upon that we are of opinion that the statute made it a substantive absolute felony, the being an accessory before the fact. Then, where the accessory before the fact is first convicted and sentenced, is there any proceeding by error or otherwise to discharge him? We are of opinion that there is not. It is said that it might be that his sentence would expire before the trial of the principal, who might be acquitted; but we are of opinion that in that case no wrong would be done. Whether the principal be tried before or at some time after the accessory before the fact, still there may be guilt in the accessory. We must look beyond technical considerations, and see whether there was a larceny. There are many cases in which an acquittal takes place, and yet the actual guilt is clear. Therefore we are of opinion that the statute did intend to create the responsibility of an accessory before the fact a sub-

stantive felony. With respect to the second point, as to the general verdict, the learned recorder having charged the jury, left the court, and the jury some time afterwards returned a general verdict of guilty, which was entered upon both charges. It is said that that is an inconsistency. Looking at the evidence, there can be no doubt of the substantial guilt of the prisoner, and the court will make every intendment to support the conviction consistently with the evidence. In our judgments there is no inconsistency in being an accessory before the fact and a receiver afterwards, and we think that the jury might reasonably and logically convict the prisoner of both offences.

The rest of the Court concurring,

Conviction affirmed.

Saturday, Jan. 28.

(Before ERLE, C. J., WIGHTMAN and WILLIAMS, JJ. MARTIN and CHANNELL, BB.)

REG. v. RACHEL WARDROPER.

Husband and wife—Charge of joint receiving—Presumption of marital coercion.

A., B. and B.'s wife were indicted jointly for burglary and receiving; the jury found A. guilty of burglary, and B. and his wife of receiving. Part of the property was found in B.'s house, and from that fact, and others, the jury were warranted in finding B. guilty of receiving. To connect the wife with the matter, it was proved that some time after the burglary the wife was seen dealing with part of the stolen things, when she made a statement importing a knowledge that the things had been stolen, and that they were to be made away with. The judge at the trial declined to leave it to the jury to find whether B.'s wife received things from her husband or in his absence, and the jury found B.'s wife guilty of receiving:

Held, that the conviction could not be supported.

The prisoner was indicted at the last Newcastle Assizes, together with her husband and a man named Prishous, for burglary and receiving.

The jury found Prishous guilty of housebreaking, and the prisoner and her husband of receiving.

The housebreaking was the breaking into a jeweller's shop at Newcastle, and committing a very extensive robbery of the stock.

The property stolen consisted, amongst a great variety of other things, of rings, watch-keys, brooches, stones for being set in brooches, and foreign coins.

There was evidence of part of the stolen property being found in the house where the prisoner and her husband lived together, and of other circumstances which I think warranted the jury in finding the husband guilty of receiving, but except what follows there was no evidence which peculiarly affected the prisoner.

A young woman deposed that some time after the burglary the prisoner, in the absence of her husband, produced to her a quantity of watch-keys, brooches, stones for being set in brooches, and coins, and said they were to be destroyed; that she said she had been down the street changing some foreign money, and thought she was going to be taken up for it; and that she asked her (the young woman) to come down if she was taken and collect the largest coins, and say a foreign captain had given them to her (she being a prostitute).

I think there was evidence that all those articles were part of the stolen property.

It was also proved that at the time of the prisoner's apprehension, she had upon her fingers some of the stolen rings.

At the close of the case for the prosecution it was submitted by counsel for the prisoners, that as against Rachel Wardroper there was no evidence that she received the articles, either in the absence of the husband, or from any other person than him, and that if there was evidence for the jury, the question would be

whether she received them from him, and if not from him, whether she received them in his absence.

I ruled that there was evidence for the jury, and did not leave either of those questions to them. The jury convicted the prisoner, and I thought her conviction right; but after the jury had found their verdict I was asked to inquire whether the jury found that the prisoner received the articles in question from her husband, or in his absence. I declined to do so.

I request the opinion of the Court of Criminal Appeal whether the prisoner was rightly convicted, assuming that all the other evidence as to the receiving was of such a character as to entitle her to be acquitted, by reason of her relation of wife to the other convicted receiver.

If they think she was not rightly convicted, they will please direct the prisoner to be discharged.

The following cases were relied on at the trial on the part of the prisoner:—

*Archer's case*, 1 Moo. C. C. 143, where husband and wife were convicted on a joint indictment for receiving stolen goods, it was held that the conviction of the wife was bad, it not having been left to the jury to say whether she received the goods in the absence of her husband.

*Reg. v. Brooks*, 6 Cox C. C. 148: a wife received from her husband goods which he had stolen, she knowing at the time that they were stolen, and she endeavoured afterwards to prevent their discovery. The judge told the jury that, as her husband had delivered the stolen articles to the prisoner, the law presumed that she acted under his control in receiving them, but that this presumption might be rebutted. If, therefore, in considering the evidence they were perfectly satisfied that at the time when she received any of the articles she knew that they were stolen, and in receiving them acted voluntarily and with a fraudulent intention, she might be found guilty. The jury having found her guilty, the Court of Criminal Appeal quashed the conviction.

ERLE, C.J.—The court thinks that there were sufficient circumstances in the case to authorise the prisoner's counsel to request the learned judge to put the question he desired to the jury, so that the point should have been left to the jury for their determination. It was perfectly consistent with the facts proved that the goods might have been taken to and received by the husband at his own house, and so come into the possession of the wife through her husband, in a manner that did not render her liable to be convicted. The goods clearly were taken to the husband's house. If the question had been left to the jury, and they had convicted the wife, the court would have supported that conviction, but as it had not been so left, the court thought it more satisfactory that her conviction should be quashed.

WILLIAMS, J. delivered a similar judgment.

MARTIN, B.—On consideration, I think that I ought to have dealt differently with this case at the trial, and called the attention of the jury with greater accuracy to the law on the subject. I am not satisfied that I dealt as I ought to have done with the case.

WIGHTMAN, J.—The charge was of a joint receiving.

CHANNELL, B.—I am of opinion also that the prisoner was entitled to have the questions suggested by the counsel left to the jury. I attach great importance to the fact of the charge being a joint receipt by her and her husband. *Conviction quashed.*

## House of Lords.

Reported by JAMES PATERSON, Esq., of the Middle Temple, Barrister-at-Law.

Wednesday, Feb. 8.

KERR v. WILKIE.

*Statutory trusts.—Notice of meetings under the statute.—Adjournment of meeting.—Notice of adjournment.*

*A statute empowering neighbouring owners to build a bridge, with powers of raising themselves, constituted certain persons by name, and all others deriving 100l. a-year from the lands, trustees. Notice was to be given of all meetings by circular sent to all the trustees. The interpretation clause stated trustees to mean "the acting trustees."*

*Held, that K., though qualified to be a trustee, yet not being among those named, and never having acted, was not entitled to any notice of the meetings: Held, further, that a notice of a meeting stating the purpose thereof extended to an adjourned meeting, and that no notice of the adjournment was required to be given.*

*Quære, whether the failure to give notice of the meetings to any one of the acting trustees would have vitiated the proceedings of the trustees?*

This was an appeal from a judgment of the Court of Session in Scotland.

A statute (15 Vict. lxii.) was passed in 1852, called "the Kelvin Bridge Act," the object of which was to enable certain trustees to build a bridge for the improvement of a locality near Glasgow, and for that purpose to make a rate on the adjoining proprietors. The first section enacted that John Bain (and certain other persons, naming them) "and all other parties who hold or derive in their own right, or who may hereafter hold or derive in their own right, the sum of 100l. sterling of annual feu duties or annual rents out of or from any part of the lands hereinafter described, shall be, and they are hereby appointed, the trustees for carrying this Act into execution, and shall be called "the Kelvin Bridge Trustees." The 2nd section enacted "that when and so often as the number of trustees acting under the authority of this Act shall by death, refusal, or incapacity to act be reduced to a less number than ten, it shall be lawful for the remaining trustees for the time being at their next meeting to appoint other trustees liable to be rated and assessed under the provisions of this Act," &c. The 4th section required the trustees to hold meetings at least once every three months, "and the first meeting of the trustees shall be held within three months after the passing of the Act, and shall be called by any one or more of the trustees, and all the subsequent meetings of the trustees shall be called by the clerk to the trustees (either when he himself shall find it necessary, or on the requisition of any one of the trustees or of the treasurer) by circular sent through the post-office to each trustee, and posted not later than the second day before the day of meeting, and five of the trustees present at any meeting shall be a legal quorum; and the trustees present at each meeting shall elect their own chairman, and the notices calling the various meetings shall specify generally the business to be transacted thereat." By sect. 34 "no rate or assessment to be made shall be valid unless notice of the intention of making such rate or assessment, and of the time at which the same is intended to be made, and of the place where a statement of the proposed rate shall be deposited for inspection, shall be given by the clerk of the trustees by circular to all the proprietors and feuars intended to be charged with such rate, or their respective agents, and posted at Glasgow at least seven days previously to such rate being made." The interpretation clause, sect. 92, enacted, "the word 'trustees' shall mean the trustees acting by virtue of this Act."

The appellant R. Malcolm Kerr, barrister-at-law, in

H. OF L.]

KERR v. WILKIE.

[H. OF L.]

1854 commenced an action of reduction, the object of which was to set aside all the proceedings of the trustees under the statute, on the following grounds:—He alleged that he was proprietor of certain lands in the county, which were comprehended in the statute from which he derived in his own right upwards of 100*l.* of annual feu duties and rents; that, therefore, he was one of the trustees (though not individually named) appointed by the Act; that a meeting of the trustees had been called by circular in 1852, with a view to carry the Act into operation, but that no circular was sent to him giving notice of such meeting; that another meeting had been called by circular, the purpose being stated to be to impose an assessment, but that no such circular had been sent to the plaintiff; that this meeting took up various matters of business, but did not impose any assessment; that the meeting adjourned from 24th Dec. 1852, the day on which it was summoned, till the 5th Jan. thereafter. This adjourned meeting on the latter day imposed an assessment of 1*l.* 10*s.* per acre. A subsequent meeting in 1853 also imposed a similar assessment for the following year. Of neither of those meetings had the plaintiff received any notice whatever. That such meetings were therefore illegal and void, and the proceedings ought to be set aside.

The defendants, the Bridge Trustees, contended that they had acted within the powers of the statute. The Court of Session held that no sufficient ground had been stated for setting aside the proceedings; whereupon the plaintiff brought this appeal.

*Rolt, Q.C.* and *Anderson*, for the appellant, contended that by the 1st section the appellant was *de facto* constituted a trustee under the Act, and that he was entitled to a notice of every meeting. The statute required to be followed strictly: (*R. v. Longhorne*, 4 Ad. & E.; *Mauler v. Moureiff*, 5 Bell's Ap. 345; *R. v. Croke*, 1 Cowp. 26; *Friend v. Bennett*, 3 C. B., N.S.) Moreover there was no notice of the adjourned meeting given, and the notice of the original meeting did not extend to it.

The *Attorney-General* (Bethell) and *Bovill, Q.C.*, for the respondents, contended that the trustees meant only "the acting trustees," and no others required notice of the meetings; that the appellant was not an "acting trustee;" that even if he had been a trustee within the meaning of the Act, the omission to send a notice would not have been fatal; that the notice of the meeting extended to the adjournment: (*Scadding v. Lorient*, 3 H. L. Cas. 418.)

*Anderson* replied.

The LORD CHANCELLOR.—My Lords, I am of opinion, and must so advise your Lordships, that there is no ground whatever for this appeal. The first ground taken, and which was, I think, the ground mainly relied upon on the part of the appellant, seems to me to be wholly untenable. That was, that no notice was given to the plaintiff, or to those who may be denominated the qualified trustees of the adjourned meeting at which the rate was made. Now, my Lords, I am of opinion that it was not necessary to give notice to that class, they never having acted as trustees. And with reference to that, I look to the definition of the word "trustees" in the 92nd section of the Act of Parliament, where we are desired to consider that "the word 'trustees' shall mean the trustees acting by virtue of this Act." These trustees (if they are to be considered as trustees) never have acted, and it would be most preposterous to suppose that the Legislature intended that notice should be given to each one of that indefinite body of everything that was to be done at any meeting; and that if any one of them did not receive notice it would nullify the proceedings. Their qualification is given in those terms: "And all other parties who hold or derive in their own right, or who may hereafter hold

or derive in their own right, the sum of 100*l.* sterling of annual feu duties, or annual rents, out of or from any part of the lands hereinafter described." Now, who is to find out who are qualified by having 100*l.* derived in their own right, or hereafter to be derived, not only of annual feu duties, of which there is some record, but of annual profits, of which there are no means of forming any judgment? In order to exclude that, the definition says that none are to be considered as trustees except they have acted as trustees, and these gentlemen who now appear as appellants, never having acted as trustees, no notice was necessary to be given to them. I abstain from giving any opinion upon the question whether, they being trustees, and having acted as if they were without any bad faith, an accidental omission to serve any of them with notice would or would not have nullified the proceedings. I abstain from giving any opinion upon that question, for it does not seem necessary for the House to consider it. Now, then, we come to the other objection, upon which Mr. Rolt relied much less in his very luminous argument, that is, that there was no notice of the adjourned meeting as regards the purpose for which that meeting was to be held. Now, my Lords, whether that is a good objection or not depends entirely upon this, whether the adjourned meeting was to be considered as part of the original meeting; that is to say, whether there is an identity between the two meetings. If the adjourned meeting were a separate and independent new meeting, certainly new notice should be given; and, according to the 34th section of the Act of Parliament, without such notice no rate can be made. But, my Lords, it seems to me quite clear that this meeting having the power of adjournment, and having exercised that power *bonâ fide* when the adjournment took place, it was part of that meeting, just as much as if it had been a meeting held on the same day. My Lords, supposing that there had been a debate, as has been suggested during the argument, and that during that debate the clock had struck twelve at night, could there not have been an adjournment till the following day at nine o'clock, and would not the meeting that was then resumed have been part of the meeting which had taken place the day before? I cannot doubt it for a moment. And whether the adjournment be only for three hours or for three days, if the proceeding is *bonâ fide*, can make no difference. Mr. Rolt very properly admitted that the moment you admit identity of meeting, no more is to be said, and the notice that was given for the first meeting holds good for and includes all the other meetings following upon it. Now there has been a great deal of argument as to whether the case of *Scadding v. Lorient*, relating to the parish of St. Pancras, applies to this case. It seems to me that it does completely apply to it. It seems to me not only to apply in its principles, but in its circumstances. But, independently of that case, I hold it to be quite clear that, upon general principles, an adjournment, where there is power of adjournment, if *bonâ fide*, is only a continuation of the meeting; and that being so, it seems to me to be quite unnecessary to consider more minutely how far that case does apply to the present. It is not pretended that there is anything in that case contrary to this general principle. I think that it does apply to this case even in its circumstances, as well as in its principle; but if there had been no such case to be found in the books, I should without hesitation have given my opinion to your Lordships that this was the same meeting, and that the notice that was given for the original meeting as to the purpose of making a rate applied until the rate was actually made. For these reasons I must advise your Lordships to dismiss this appeal with costs.

LORD BROUGHAM.—I entirely agree with my noble and learned friend. The decision in the case of *Scadding v. Lorient*, by this House, was not necessary in

H. OF L.]

KERR v. WILKIE—PARISH v. SLEEMAN.

[CHAN.]

order to throw light upon this case, but it greatly assists us. The opinion of the learned judges there taken lays down that which amounts to a general principle; but it was unnecessary to have it laid down, for I agree with my noble and learned friend that if a meeting is held, and then a power possessed by those who hold the meeting to adjourn it, except under peculiar circumstances, which do not exist in this case, the original meeting and the adjourned meeting must, generally speaking, be taken to be absolutely identical.

LORD WENSLEYDALE.—I entirely agree with my noble and learned friends that this appeal ought to be dismissed. I entirely agree with my noble and learned friend upon the woolsack upon the construction of this Act of Parliament. I think it is clear that this Act of Parliament, though extremely ill-drawn, meant something more to constitute a person an acting trustee than that he should be the proprietor of lands yielding 100*l.* sterling in feu duties or annual rents. I abstain from giving any opinion whether it was necessary to summon the present appellant, supposing he had been a regular trustee. The inclination of my opinion certainly is, that it would have been necessary to summon all those who were acting trustees, and that every proceeding before the board of trustees would have been *coram non judice*, if they did not summon all the acting trustees. However, it is not necessary to give a final opinion upon that point. The second question which struck me at first in the argument of Mr. Bolt as entitled to a good deal of weight, was, that the persons who were liable to be assembled had a right to have notice of the precise day upon which the meeting for making the assessment was held. That is under the 34th section. It occurred to me at first that there was a distinction between this case and *Scadding v. Lorant*, that case not having decided this particular point, and on that account I wished to hear counsel argue as to that case; because there is a considerable difference between the case of persons affected by the rate, and the case of those who are themselves a component part of the body which is to act. With reference to those, no doubt there is a general power, although it is not given by the Act of Parliament, to adjourn. If such an adjournment took place, those who were members of the body so adjourning would be bound to take notice of their own proceedings. They might have objected to the adjournment if they were present, or if the adjournment were made by the chairman of the meeting, as it is done in some cases; those who were not present ought to have been present and take notice of it. But with regard to third persons affected by the rate, they would not necessarily be parties to what took place at the meeting; and the question occurred to my mind, whether there ought to have been notice given to them, if nothing was done on the previous day, of the adjournment of that meeting. However, the argument in the case of *Scadding v. Lorant* completely satisfies me that there is no weight in that point which struck me at first; because, though that point was really not taken in the court below, it was taken in the court above, in your Lordships' house, and on that occasion it was decided that there was no weight in that objection. The notice required in that case to be given of the object of the meeting by the clerk after the second session on the church is just equivalent and in the same position as the notice required by this sect. 34, which is a notice to be given by the clerk of the trustees by circular to all the proprietors of feu rights. And it was in that case found by the special case, that notice was given of the original meeting, but that there was no notice in the church of the adjourned meeting, and your Lordships expressly decided that there was no occasion for such notice. It appears to me, therefore, that that point is overruled by the case of *Scadding v. Lorant*, so

that the objection altogether fails. I concur, therefore, in the opinion of my noble and learned friend, that this appeal must be dismissed with costs.

LORD CHIEF JUSTICE concurred on the first point, though the Act of Parliament was extremely perplexed and confused. With regard to the other point, I also agree entirely. I think that the case of *Scadding v. Lorant* decided the question. But independently of that case, I should have thought, when a meeting is to be held and business to be transacted, and where it is possible that at the original meeting the whole of the business may not be got through, that there must be power to adjourn that meeting, and that the adjourned meeting is to be considered as part of the original meeting. If that be so, I apprehend that that gets rid of the whole question; because, if the adjourned meeting in this case is part of the original meeting, then there was ample notice to the parties. And in this case more particularly so, because there is not, as in the case of a poor's rate, a mere notice that the vestry are to assemble and to make the rate; but there is no notice of the rate which is proposed, and the proprietors themselves are entitled to attend the meeting of which they have notice, for the purpose of objecting to the rate or assessment upon their property. Therefore it must be assumed that if any person had an objection to make to the rate to be imposed, he would attend the original meeting, and that he would there state his objection; or if he found that the business could not be got through at that meeting, he would have notice of the adjournment of his case, and distinct and personal notice upon the subject of the adjournment of the question of the rate. Therefore it appears to me that upon this point the case of *Scadding v. Lorant* is conclusive; but without the case of *Scadding v. Lorant* I should be clearly of opinion that there was not the slightest objection here on the ground of the want of notice of the agenda or purpose of the adjourned meeting.

*Affirmed with costs.*

## COURT OF APPEAL IN CHANCERY.

Reported by C. H. KERR, THOMAS BROOKSBANK and JOSHUA METCALFE, Esqrs., Barristers-at-Law.

Jan. 11 and 12.

(Before the LORD CHANCELLOR (Campbell).

PARISH v. SLEEMAN.

*Lease—Free of all outgoings—Land-tax.*

*In an agreement for a farming lease, the tenant agreed to pay a rent of 40*l.* per annum "free of all outgoings." He afterwards claimed to be allowed to deduct from his rent the land-tax and commutation rentcharge:*

*Held (overruling the decision of Stuart, V.C.), that the tenant was not entitled to make these deductions.*

This was an appeal from the decision of Stuart, V.C., reported 1 L. T. Rep. N.S. 24, where the facts of the case are stated. The question arose on an agreement signed on Oct. 3, 1851, the material part of which is as follows:—

"The undersigned Samuel Rowles Pattison, as landlord, hereby agrees to let, and the undersigned Joseph Parish to take as tenant, all that farm in and called Tinnye, in the parish of Bridgerule, late in the occupation of Thomas Leigh, and now of the said landlord, for a term of fourteen years from Lady-day next, determinable at the end of the first seven years thereof, at the yearly rent of 40*l.*, payable quarterly, free of all outgoings, the landlord to abate 5*l.* per annum of the rent for the first two years, in consideration of the present condition of the place, and to put the said farm into repair forthwith, and the tenant to keep the same in repair."

The lease was originally prepared in chambers, and on settling it the chief clerk was of opinion that the

Q. B.]

MITTON v. THE OVERSEERS OF THORNBURY.

[Q. B.]

land-tax and tithe commutation rentcharge were excepted from the payments to be made by the tenant under the term "free of all outgoing." Stuart, V.C. confirmed the certificate of the chief clerk, and from this decision the defendant Mr. Sleeman now appealed.

*Sped* appeared for the defendant, the appellant. *Hobhouse* for the plaintiff, the respondent.

The following authorities were referred to:—*Smith v. Anderson*, 4 Russ. 352; *Marshall v. Wisdall*, Freem. 148; *Bradbury v. Wright*, 2 Doug. 624; *Bennett v. Womack*, 7 B. & Ald. 629; *Cranston v. Clarke*, Sayer, 78; *Church v. Brown*, 15 Ves. 258.

The LORD CHANCELLOR.—The question in this case arises on the construction of an agreement entered into between a landlord and a tenant, whereby the landlord agrees to let, and the tenant to take a farm for a term of fourteen years at the yearly rent of 40*l.*, free of all outgoing. Stuart, V.C. was of opinion that the land-tax and tithe commutation rentcharge ought to fall on the landlord, the tenant not being by this agreement deprived of the right to deduct them which otherwise he would have had; but in this decision I confess I am not able to agree. The tenant, by Acts of Parliament relating to these charges, is held primarily liable both for the land-tax and the tithe commutation rentcharge, but he is entitled to deduct them from his rent. It appears to have been the intention of these parties that the rent was to be paid free from these outgoing. It is admitted that the plaintiff for some time paid his rent without deducting these charges, and his counsel was unable to point out any other outgoing to which he was primarily liable. Here his Lordship referred to the cases of *Cranston v. Clarke*, *Bradbury v. Wright* and *Bennett v. Womack*, and concluded by saying, that he was of opinion that the certificate ought to be varied by making the rent payable free from the land-tax and tithe commutation rentcharge.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS and C. J. B. HEATLEY, Esqrs., Barristers-at-Law.

Nov. 9. and Jan. 26.

MITTON (appellant) v. THE OVERSEERS OF THORNBURY (respondents).

*Extra-parochial—Poor-rate—Agreement with owner of estate to maintain his own poor—Custody—Evidence*—20 Vict. c. 19, s. 1.

*On a question whether N. was part of the parish of T., an ancient agreement was produced to show that it was. The agreement was between the owner of N., and the then rector and parishioners of T., and by it all the poor from N. which should happen to be chargeable to the said parish T., notwithstanding the said estate N. doth happen to lie in the said parish T., should be in no way chargeable to the rest of the inhabitants of T., but that the said estate N. should maintain the same poor, and the said estate was to be freed from the poor-rate. This agreement was found in 1858 among the title-deeds of another large estate belonging to a different person in the parish of Thornbury:*

*Held that it was admissible in evidence as coming from proper custody.*

The *Extra Parochial Places Act*, 20 Vict. c. 19, enacted that, "after the 31st Dec. 1857, every place entered separately in the report of the Registrar-General in the last census, which now is, or is reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, the relief of the poor, the county, police, or borough rate, the burial of the dead, the removal of nuisances, the registration of parliamentary and municipal

voters and the registration of births and deaths, be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report." In the registrar's report N. was not entered by itself as reputed to be extra-parochial; but the entry was T. with N.:

*Held, that N. did not become a parish per se under 20 Vict. c. 19, s. 1, by virtue of such entry in the Registrar's report.*

This was a case stated on appeal by an inhabitant of Netherwood, against an assessment to the poor-rate of the parish of Thornbury, and the only question at issue was, whether Netherwood was extra-parochial, or part of the parish of Thornbury.

It was found that, from the year 1698 to the present time, Netherwood has maintained its own poor, but that it paid church-rates to Thornbury, and its baptisms and marriages took place there. To account for the fact of Netherwood's maintaining its own poor, the respondents produced an agreement dated 1698, between the owner of Netherwood and the inhabitants of Thornbury, which released Netherwood from liability to the poor-rate of Thornbury, on condition of maintaining its own poor, although it was in the parish of Thornbury.

The other material facts in the case sufficiently appear in the judgment.

Nov. 9.—*Huddleston* (H. James with him) for the respondents.—The appellant was properly rated to the parish of Thornbury, as Netherwood is part of that parish. The agreement of 1698 shows that conclusively. That agreement is evidence as coming from proper custody, and accounts for the way Netherwood came to maintain its own poor, and shows that it originated in a mere private arrangement between the then owner of the estate and the parish: (*Bishop of Meath v. Marquis of Winchester*, 3 Bing. N.C. 183; 1 Taylor on Ev. 523; *Bullen v. Michell*, 2 Pri. 413; *R. v. Walcott*, 2 B. & Ald. 157.)

*Bovill* (J. J. Powell with him) for the appellant.—The agreement of 1698 was not admissible, as it was not found in proper custody: (1 Taylor on Ev. d. 596; *Potts v. Durrant*, 2 Eagle & Young, 432.) Secondly, the Census Return Act of 1851, 13 & 14 Vict. c. 53, s. 5; and 20 Vict. c. 19, Extra-Parochial Places Act, made Netherwood a separate parish. By the latter statute, Netherwood having been entered in the Registrar-General's report as extra-parochial, it is to be deemed a parish for the purposes of the poor-rate among others; and overseers have been appointed accordingly for it. It cannot therefore be liable to be assessed to the poor-rate of Thornbury.

*Huddleston* in reply.—The entry in the registrar's report is Thornbury-with-Netherwood; that is not a separate entry, as required by the 20 Vict. c. 19, s. 1. Besides, sect. 7 enacts, "Nothing above contained shall apply to any extra-parochial place in respect whereof there shall be any agreement with any parish as to the liability of such place to contribute to the poor-rate of such parish contained in any Act of Parliament."

*Cur. adv. vult.*

Jan. 26.—BLACKBURN, J.—This was a case stated for the opinion of this court, to determine the validity of a rate made for the relief of the poor of the parish of Thornbury, in which the appellant was rated as occupier of an estate called Netherwood. The case was argued in last term before my brothers Wightman, Hill and myself. The objection to the rate was on the ground that Netherwood estate was not properly included in a rate made for the relief of the poor of the parish of Thornbury. Our decision in this case would not have finally determined the real question between the parties, as the appellant might still raise the same point in an action of trespass, contending that the warrant of distress was without jurisdiction; but as both parties having prayed for decision on the real point,

[Q. B.]

MYTTON v. THE OVERSEERS OF THORNBURY.

[Q. B.]

and agreed to be bound by it, we have considered the question carefully. Two distinct grounds were relied on by the appellant. First, it was said that Netherwood estate never was a part of Thornbury parish, being extra-parochial. The appellant's case so far depended on the fact, that for many years past Netherwood estate had not contributed to the relief of the poor of Thornbury, and, on modern reputation, that Netherwood estate was extra-parochial. There are many facts stated in the case strongly tending as evidence to show that Netherwood estate is not extra-parochial; but it is not necessary to inquire on which side the balance of evidence preponderated, as it was scarcely contested by the appellant's counsel that if the respondents succeeded in accounting by legal evidence for the practice as to the relief of the poor, this part of his case failed. - The second ground depended on the effect of the recent Act: (stat. 20 Vict. c. 19.) It is convenient to deal with these two grounds separately. As to the first objection, the case stated that "from the year 1698 to the present time, Netherwood has (with an exception not material for us now to notice) maintained its own poor," and has never been charged with the support of the poor of any other place. Of the mode in which the poor of Netherwood were provided for before 1698, there is no evidence except as appears by the agreement hereinafter mentioned. The case afterwards states that "on or about the first day of April 1858, an agreement, a copy of which is hereunto annexed, and is hereby admitted to relate to the Netherwood estate, and is to form part of this case, subject to any objection which may be raised to its being admissible in evidence on the present appeal, was found by Evan Pateshall, Esq., of Wilfred-house, Bault, in the county of Brecon, among the title-deeds of a large estate, of which he is owner, in the parish of Thornbury, and immediately delivered over by him to the present rector of Thornbury, in whose custody it has since remained." This agreement is dated the 12th Jan. 1698, and expressed to be made between Samuel Pytts, Esq., a former owner of Netherwood estate, and the then rector and certain parishioners and owners of land in Thornbury. One of the principal points argued before us was, as to the admissibility of this document in evidence, and our decision on its admissibility will dispose of this part of the case. The document purported to be made between Samuel Pytts of the one part, and the six persons named and described as of Thornbury, as well on behalf of themselves as on the part and behalf of all the rest of the inhabitants of Thornbury, of the other part, and commences by a recital that Samuel Pytts had an estate, called "Netherwood," within the parish of Thornbury, late the estate of James Pytts, Esq., deceased; and that there was an agreement formerly made by James Pytts in his lifetime, and the then parishioners of the parish of Thornbury, "that all such poor that should happen at any time after to be chargeable to the said parish from the estate called Netherwood estate, 'notwithstanding the said estate doth lie in the said parish of Thornbury,' should be no way chargeable to the rest of the inhabitants of Thornbury, but that the said estate should maintain and keep the same poor distinctly and apart from the rest of the inhabitants of Thornbury and their estates. And that all the rest of the estates of all the inhabitants and parishioners of the said parish of Thornbury, should maintain and keep all such poor as should come and arise, and be charged or chargeable, from any other place or places in the said parish of Thornbury, distinctly from the said estate called Netherwood estate, and that the same should be no way liable to maintain the same, which said agreement was never reduced into writing, and as all the parties were content that the agreement should be then put in writing, and confirmed under their hands and

seals, and ratified for the time to come for the preventing of all disputes that may at any time or times hereafter arise or come, touching and concerning all such poor that shall have happened at any time or times hereafter to come and arise in the said parish of Thornbury, and charged on the same, it is agreed by and between the parties to these presents that, notwithstanding the said estate, called Netherwood, is lying and being in the said parish of Thornbury, the same should be no way liable to maintain and keep, or be at any charges or expenses in maintaining and keeping, any poor that shall at any time or times hereafter arise, happen, or come in or from any other part of the said parish of Thornbury, but only all such poor as shall at any time or times hereafter happen, arise, or come from the said estate, called Netherwood estate, and that the same shall be distinctly maintained from the rest of the estates of the inhabitants and parishioners of the said parish of Thornbury." The instrument then contained covenants by the parties for carrying out the agreement. It purported to be sealed by Samuel Pytts, and by two of the other parties named. It does not purport to be executed by the other parties, but purports to be agreed to under it by the two other inhabitants. This instrument, after it is properly proved, is decisive, both as evidence explaining the modern practice as to the relief of the poor in a manner quite consistent with Netherwood estate being a part of the parish, and as a declaration by the deceased owner of the Netherwood estate and the other inhabitants as to the extent of the parish, that being a matter on which evidence of reputation is admissible. It purports to be an ancient instrument, and is proved, if produced from proper custody. It was argued that in the present case there was nothing to show that Mr. Pateshall was owner of any portion of the estates formerly belonging to those who were parties to the deed, though he had a large estate in the parish; but in the language of Tindal, C.J., in delivering the opinion of the judges in the *H. of L. in The Bishop of Meath v. The Marquis of Winchester*, 3 Bing. N. C. 200:—"Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authority to documents found within it, for it is not necessary that they should be found in the best and most proper place of deposit." We think that such an instrument as this relating to the interests of all the estates in Thornbury might naturally and reasonably be expected to be found among the title-deeds of a large estate in that parish. That being so, the first objection fails, as we think it proved that Netherwood estate was a part of Thornbury parish. The second ground of objection rests on the provisions of the statute 20 Vict. c. 9, s. 1. That after the 31st Dec. 1857, "Every place entered separately in the report of the Registrar-General on the last census, which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of the assessment to the poor-rate, the relief of the poor, the county, police, or borough rate, the burial of the dead, the removal of nuisances, the registration of parliamentary and municipal voters, and the registration of births and deaths, be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report." It was contended that up to the time when the agreement was found by Mr. Pateshall (which was after the 31st Dec. 1857), Netherwood estate was reputed to be extra-parochial, and that no rate was levied therein for the relief of the poor. An extract from the Registrar-General's report was given in the case, which, it was said, showed that Netherwood estate was entered separately in the report, and consequently it was argued that Netherwood estate was

since the 31st Dec. 1857, by virtue of this Act, a separate parish for the purposes of the poor-rate. If Netherwood estate had been separately entered in the report within the meaning of the Legislature, we are inclined to think that this would have been so. The Census Act, 13 & 14 Vict. c. 53, required the enumerators to return all accounts to the Registrar-General, but did not require the Registrar-General to make any particular use of them. The Registrar-General did, however, digest the information into an elaborate report, which was laid before both Houses of Parliament and printed. The extract from the report given in the case does not sufficiently show its nature, and we have considered it our duty to examine the report at large. In this report the Registrar-General has set forth a tabular statement of the population of the United Kingdom; he has for the convenience of arrangement divided the whole kingdom into districts, each of which is designated by a separate name, and a separate number. These districts he has again divided into subdistricts, each of which is designated by a separate name and a separate number; and these subdistricts are again subdivided into "parishes, townships, or places," each of which is designated by a separate name and a separate number, and against each of which is printed the word "parish," "township," "extra-parochial," or "chapelry," as the case may be. On the margin of this report are printed, in a small type, such notes as the Registrar-General has thought fit to add. This report was prepared in this form merely because the Registrar-General thought it the most convenient shape in which to communicate the result of the information acquired in making the census, and no legal effect resulted from his having done so, nor was it contemplated at the time that his report would affect the rights of any one. But the 20 Vict. c. 19, appears to have been framed on the supposition that where a place was reputed to be extra-parochial, and the repute had been such as to lead the Registrar-General to enter it separately as a place, it would be convenient, for the purpose of acquiring titles and avoiding litigation, to make that place extra-parochial for all secular purposes in future. There are very many places entered in that report with a separate number as separate places to which this would apply, but Netherwood is not so entered. "Thornbury-with-Netherwood" is entered as one place with one number. There is, it is true, a note appended, showing that the Registrar-General had information before him which might, perhaps, have led him to enter Netherwood separately, if he had been aware that this would several years later become of importance. Perhaps, if he had known that it was to be important, he would have entered other places jointly which are now entered separately. We cannot enter into such speculations. We can only say, that on looking into the report referred to in the statute, we are of opinion that Netherwood is not a place entered separately in that report. We think, therefore, that the second objection also fails, and that the rate is good. There will be judgment for the respondent.

Saturday, Feb. 25.

REG. v. THE LONGTON GAS COMPANY.

*Highway - Obstruction - Laying down gas-pipes.*

*Town commissioners empowered by statute to light the public streets with gas, and to break up the footways and carriage-ways for laying down the gas-pipes, and to enter into contracts with other companies to execute such works, cannot confer on a private gas company not having any parliamentary powers, authority to break up the footways or carriage-ways for the purpose of laying down service pipes from private houses, and connecting them with the main pipes.*

*A householder who gives directions to have such works*

*done for the purpose of lighting his house with gas, is liable to be convicted as a principal giving orders to commit a nuisance.*

Indictment for a nuisance in breaking up the footpaths and streets of the town of Longton, Staffordshire.

The first count alleged that the defendants on the 9th Aug. 1858, in the High-street in Longton aforesaid, being the Queen's common highway used for all, &c., to go, return, pass and repass on foot in and along the same at their free will and pleasure, unlawfully and injuriously did dig up the pavements of the said footway, and put and place bricks, earth, &c., upon the said footway, and did make therein certain holes and trenches, and laid and placed down iron pipes in the same, whereby the highway aforesaid was obstructed and incumbered.

There were other counts charging the defendants with creating a similar nuisance in other streets and roads in the town.

The case was tried before Crompton J. at the last Stafford spring assizes, when a verdict of not guilty was entered as against four of the defendants, and a verdict of guilty against all the other defendants, subject to the opinion of the court on a case.

The town of Longton is in the district known as "The Potteries," and contains about 15,000 inhabitants. It is two miles from St. ke-upon-Trent, where the works of the Stoke Fenton and Longton Gas Company, hereinafter called the Stoke Fenton Company, are situate.

Before the 2 Vict. c. xlv. Longton was not lighted by gas at all. By that Act, which was "An Act for establishing an effective police in places within or adjoining to the district called the Staffordshire Potteries, and for improving and cleansing the same, and for better lighting parts thereof," Longton and several other towns and places were divided into four districts, called respectively the Longton, the Fenton, the Stoke, and the Trentham districts. Each district was placed under the government and direction of separate and distinct commissioners of police.

By sect. 68 power was given to the commissioners to light the public streets and places of Longton with gas or oil, and to execute the necessary works, or to enter into contracts with any company or other persons to execute the same, but not to fix any lamps, or carry any pipes through or against any dwelling-house or private building without the consent in writing of the owners or occupiers thereof.

By sect. 69 the commissioners were empowered, in case they should think proper to light the said public streets and places, to dig and break up the soil of any footways and carriage-ways, and to lay down pipes, &c., and from time to time to take up and repair the same, restoring the soil to its former state.

By sect. 83 it was provided that the expenses of lighting should be defrayed by a rate on the occupiers.

Soon after the passing of the said Act the Stoke Fenton Company was established, and incorporated by 21 Vict. c. xi., for the purpose of supplying Stoke Fenton and the places adjacent with gas; and the company erected gasworks, and laid down mains and pipes for public and private lighting through the streets and footways of Longton, and other places. Since that time the commissioners have from time to time contracted with the company, for lighting the public streets and places within Longton, and other portions of the Longton district; and the company have accordingly lighted the public streets and places, and also private houses and buildings. The only authority which they had for breaking up the streets and footways, and laying down the mains for public or private lighting, was the permission given to them by the Longton commissioners under the said Act.

While the 21 Vict. c. xi. was before Parliament, a

[Q. B.]

REG. v. THE LONGTON GAS COMPANY.

[Q. B.]

company was established under the name of the Longton Gas Company (Limited), hereinafter called the Longton Company, and in Aug. 1858 the said last-mentioned company began to erect their works.

The contract entered into by the commissioners with the Stoke Fenton Company expired on the 1st May 1858, and was not renewed. On the 15th June they contracted with the Longton Company for the supply of gas to the public lamps for the term of three years, upon the same terms as they had previously contracted with the Stoke Fenton Company, and also conferred on the Longton Company the same powers for breaking up the streets and laying pipes within the Longton district, which they had conferred on the Stoke Fenton Company. The Longton Company accordingly made a contract with one William Moore, for laying the necessary mains and pipes for the purpose of carrying out their contract with the commissioners, and the work was commenced on the 9th Aug. 1858.

The only act proved against Knight, one of the defendants against whom a verdict of guilty was entered, was that, he being the owner and occupier of a house, contracted with the Longton Company to have it lighted, and that he then directed the workmen of the Longton Company to lay down the service pipes for the purpose of connecting his house with the company's mains, which was accordingly done. Another defendant, William Moore, was the contractor with the Longton Company as aforesaid; another, William Hunt, was the manager of the company; and the others were labourers in the employ of the company. These defendants, besides making the necessary excavations for laying down the mains and carrying service pipes to the various public lamps in the Longton district, also caused to be dug a great many other trenches in the different parts of the streets and highways of the district for the purpose of laying down service pipes, in order to supply gas to private individuals for the lighting of private houses and shops.

The defendants used all reasonable dispatch in digging the trenches and laying down the pipes, and in restoring the streets and highways; and during the time that the trenches were being dug and were open, and the pipes being laid, the streets and highways were not otherwise interfered with than was necessary for digging the said trenches and laying the said pipes. Before the said works were commenced, the Longton Company had obtained the consent of the board of surveyors of highways of the town of Longton, and the approval and consent of the inhabitants of Longton, assembled in a public meeting convened by the chief bailiff.

The lord of the manor of Longton had also given a similar consent.

*Bevill (Pigott, Serjt. and Scotland with him) for the prosecutors.*—The defendants could have no authority to break up the streets, except it was conferred by some statute. Under the 2 Vict. c. xlv., the commissioners have power to authorise the breaking up of the streets for public purposes only, not for lighting private houses. In the Gasworks Clauses Act 1847, 10 & 11 Vict. c. 15, ss. 6–12, a variety of provisions and safeguards is introduced to prevent undue interference with the public rights by the breaking up of streets for the purpose of laying pipes. A mere private joint-stock company, like the Longton Gas Company, not incorporated or authorised by Act of Parliament, has no authority to break up the public street for the purpose of laying down mains and service pipes. The parties who gave their consent, as stated in the case, could not confer any power to do what the defendants did. Cases cited:—*Ellis v. The Sheffield Gas Consumers Company*, 2 Ell. & Bl. 767; *Bradlee v. The Governors of Christ's Hospital*, 5 Scott N. R. 79.

Sir F. Kelly (*Huddleston and McMahon with him*) for the defendants.—The question now to be decided

was not raised in *Ellis v. The Sheffield Gas Consumers Company*. In *Rez v. Jones*, 3 Camp. 230, Lord Ellenborough said: "If an unreasonable time is occupied in delivering beer from a dray into the cellar of a publican, it is a nuisance. A cart or a waggon may be unloaded at a gateway, but this must be done with promptness. So, as to the repairing of a house; the public must submit to the inconvenience necessarily occasioned; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." It is found that the works of the defendants were done with reasonable dispatch. The soil below the surface of the streets belongs to the owners of the adjoining land, *ad medium flum. vis.* [COCKBURN, C.J.—The public acquire the right, subject to the right of the individual owners to have the use, for instance, of a hole for the coal-cellar.] Every dedicatory of a way must be taken to have reserved to himself rights for the enjoyment of his own property, *e.g.*, for supplying his house with light, fuel and water. If a person is to be restricted to using the highway as a way merely, he could not put a ladder up for the purpose of doing anything to his house: (*R. v. Ward*, 4 Ad. & Ell. 384; *R. v. Betts*, 16 Q. B. 1022; *R. v. Russell*, 23 L. J. 173, M.C.)

*Cur. adv. vult.*

COCKBURN, C.J.—The indictment in this case charged the defendants with obstructing certain highways and footways in the town of Longton in the county of Stafford, by placing earth and bricks there, and by digging trenches therein. At the trial certain of the defendants were convicted, subject to the opinion of this court upon a special case, from which the following facts appeared:—In the town of Longton there was a gas company, established by an Act of Parliament, which incorporated the provisions of the General Gas Companies Act. There was also a body of commissioners for the purpose of public lighting, with powers to lay down mains and pipes for the public lighting of the town, but with no powers to supply or lay down pipes for the supply of private houses or individuals. The commissioners, who had formerly been supplied with gas by the old company, entered into a resolution to transfer, and did duly transfer, their powers to the defendants the Longton Gas Company (Limited), who were a joint-stock company, but without any parliamentary powers as a gas company. The indictment was preferred against the company for obstructing the public highway by opening trenches and laying down pipes, and conveying gas to the public highway and to private houses. On the argument before us, it was conceded on the part of the Crown that the conviction could not be sustained against the defendants in respect of the acts done in making and laying down mains and pipes for the public lighting of the town, the acts in such respect being authorised by the powers transferred to them by the commissioners. It was admitted on the part of the defendants, that they had no parliamentary powers which gave them authority to create obstructions, or lay down pipes for private supply. The question, therefore, was confined to the acts done by the defendants in laying bricks and earth and digging trenches in one instance across the street, but in the other instances across the footway of the street, for the purpose of laying down supply or service pipes to private houses, from the mains laid down under the powers of the commissioners for public lighting. It appeared that these service pipes had been laid down by the joint-stock company at the request and by the direction of the owners of the houses; and that they had been so laid down carefully, without creating any unnecessary nuisance. It was not disputed, however, that the highway was obstructed so as to amount to an indictable nuisance, unless the defendants were justified in committing the acts complained of in the exercise of



Q. B.]

Re THE TOTTENHAM BOARD OF HEALTH, *ex parte* PERRY.

[BAIL C.]

the right of each householder, to make such slight temporary obstruction on a highway or footway as necessarily incidental to the enjoyment of his property, such, for example, as the obstruction caused in using the common coal-holes in the pavements, the unloading of carts, the putting up boards for repairing, and other similar temporary obstructions. We are of opinion that the present case does not fall within any of the exceptions to the general law as to the obstructions of highways. We find no authority, according to which so wide and large an exception to the general rule is established, as would allow either a private person, or anybody acting at the request of private persons, to open the streets, for the purpose of supplying private houses with water or gas from sources from which a supply of water or gas may be procured. Such an act is not in any respect a user of the highway such as occurs where a cart or carriage stops before a door, or where goods are unloaded on the highway, to be immediately taken into the house. Such matters may well be said to be a use of the highway as a highway; and this is made more clear by the rule that where there is an excess or abuse, in such case, the party is indictable. Thus, where, instead of using the highway merely for taking the goods in, the party sawed blocks of wood in the street before taking them in, he was held to be indictable for so doing. The case put of the coal-holes in the pavement of a street is perhaps the one apparently most in favour of the defendants. It is not, however, to be assumed that there is any right in the owner of a house to open the pavement to make a new coal-hole where none has existed before. He could not, we think, make a new hole in the middle of the street, if his cellar extended so far. In many instances, no doubt, such coal-holes may be of right, as where they have been made when the houses were first built, and so, as was suggested during the argument, the highway has been dedicated subject to such use. In many cases of a single obstruction for a short time, for the purpose of obtaining some such advantage, there would probably be no indictment, although the party might strictly be liable to indictment, and although, were such instances multiplied, it might become necessary to indict. It may be also that the almost universal use of coal-holes may have led to their not being complained of, as they might be, from their being regarded as a usual, if not a necessary, means of enjoying the house if made in their usual place. They do not, in any of these respects, appear to be analogous to the case now before us, for there is no evidence that the right here claimed originated in any reservation, nor is its exercise matter of absolute necessity, nor is it one ordinarily exercised by the owners of property, except under parliamentary powers, and subject to regulations imposed for the protection of the public. The case is not one of absolute necessity, either for the party or for the public, as in the case of boarding required during the repairing of a house, to protect the public, or in the case of putting a ladder against a house to clean windows, or to escape in the case of fire. General convenience is greatly against the allowing private persons or companies, without parliamentary powers, to interfere from time to time with the public streets. The making such openings from time to time for water, gas, sewage, and other purposes, and the opening of the streets for repairs and alterations, are a serious inconvenience even when done under the restrictions which an Act of Parliament puts upon the persons clothed with parliamentary authority so to act; and it would be difficult to see how far the annoyance might extend, if unauthorised dealings of this nature with the highways were allowed. Is every private person to be at liberty to open the street for the purpose of laying down a pipe to any gasworks, or to any conduit of water, or to any well

or fountain in a market-place? How far is such right to extend? If everybody may lay down a pipe from the nearest water or gas, how great would be the inconvenience from the continuous opening of the streets for the first laying down and for the constantly recurring purpose of repairing. Were such private rights as to gas, sewerage and water-pipes to be allowed, the highways would be in a constant state of obstruction. The present is an exceptional case, where it happens, from the fact of the mains being laid for public purposes, that it is more easy to get at the supply of gas than in ordinary cases; but this ought not to affect the principle. The case does not seem to us to fall within what may be called the ordinary incidents and rights, which in common sense and from common use, are understood to appertain to the enjoyment of property. On the contrary, a right, as is here claimed, of interfering with the streets is never exercised except under the authority of Acts of Parliament conferring special powers, with great care, and under proper control, in the case of gas, by placing the companies supplying it under the provisions of the General Gasworks Companies Act, according to which the parties are subjected to wholesome restrictions, and to the control of the magistrates. We think, therefore, that the obstructions in question are indictable, and that the conviction was right; and the verdict must be entered accordingly. A question was raised, but not very seriously pressed, as to whether one of the defendants, who had given directions to have the particular works done to his own house, was properly convicted. On this we entertained no doubt, as the party giving orders to commit a nuisance is a principal in the transaction. It was agreed at the trial that the defendants should be at liberty to turn the case into a special verdict, if the court should think fit to give them leave so to do, and considering the importance of the question, we think it quite right that such leave should be given. If that course be taken, that which was conceded in the argument must be found as a fact in the special verdict, namely, that there was obstruction to the road; and the question must be, as to whether the parties are indictable for making such obstructions under the circumstances. Our judgment will be for the Crown as to the obstructions arising from laying down the service pipes.

*Judgment for the Crown.*

### RAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

*Tuesday, Jan. 31.*

(Before BLACKBURN, J.)

REG. v. THE TOTTENHAM BOARD OF HEALTH,  
*ex parte* PERRY.

*Public Health Act, 11 & 12 Vict. c. 63.*

*Upon an application for a warrant under sect. 103, the justices are not required to draw up any formal order.*

*Denman* (on behalf of two justices of Middlesex) and *B. C. Robinson* (on behalf of the Tottenham Local Board of Health) showed cause against a rule calling upon their respective clients to show cause why an order for the payment of two district rates for 1857 and 1858, made under the 11 & 12 Vict. c. 63, ss. 102 and 103, amounting to 1*l.* 10*s.* 4*d.*, and upon which a warrant of distress had issued, should not be removed into this court by writ of *certiorari*, in order that it may be quashed. It appeared that, upon the justices deciding upon the application, their clerk, as an act of courtesy, handed the defendant a memorandum of their decision, and this without the knowledge of the justices, and without their signatures attached. Upon the application for this rule many objections were taken to this document, it being treated as a legal order under the statute. It was now contended that, under

[ROLLS.]

Re THE BRISTOL FREE GRAMMAR SCHOOL.

[ROLLS.]

the 103rd section, no formal order was necessary, and that what the clerk to the justices did was merely an act of gratuitous civility.

*H. James*, in support of the rule, after contending that an order was necessary, argued that, if not, yet, as his client had been misled by the act of the clerk to the justices, the rule should be discharged, without costs.

**BLACKBURN, J.**—It is clear that no order was required by the statute. The point upon which the rule will be discharged is, that this was an inoperative document, and not a judicial proceeding which could do either good or harm. *Rule discharged, with costs.*

### ROLLS COURT.

Reported by **GEORGE WHITLEY, Esq.**, of the Middle Temple, Barrister-at-Law.

March 13 and 21.

Re THE BRISTOL FREE GRAMMAR SCHOOL.

*Free grammar school—Boarders.*

*The court will sanction a scheme allowing the masters of a free grammar school to take boarders only with reference to the special circumstances of each case, and where it will not interfere with the objects of the original foundation of the school.*

This was an application by the majority of the trustees of the Bristol Grammar School to vary one of the provisions of the present scheme, which prohibits the masters from taking boarders.

The Bristol Free Grammar School was founded by letters patent, granted in the reign of Henry VIII., and a house or hospital and lands were conveyed to the mayor, burgesses and commonalty of Bristol, for the establishment of the school, for "all children who would repair to the said school for learning and knowledge of the Latin and other good learning, and that freely, and without anything to be taken, other than fourpence only for the first admission of every scholar into the same school."

The corporation were empowered to make ordinances for the government of the school.

This capitation fee was increased from time to time until, in 1812, it was fixed at the sum of 4*l.* for each scholar, the son of a burgess or freeman residing within one mile of the city on his admission, all other scholars to pay such sum as should be agreed upon between the master and the parents of such scholars.

The revenues of the charity and the fees paid by the scholars being insufficient to pay adequate salaries to the masters, on two different occasions, viz. in 1764 and 1812, resolutions were passed by the corporation, by which the masters were authorised to take boarders, and the practice continued for some time, but the number of free day scholars on both occasions fell off, and it was again discontinued.

By a scheme approved by the decree of the Court of Ch. made in 1847 for the future management of the estates and government of the school, it was declared that all boys of the age of eight years and upwards, resident within two miles of the Exchange of the city, should be eligible for admission to the school, and to partake of all the benefits thereof.

And it was provided that besides the learned languages there should be taught mathematics, algebra, arithmetic, writing, reading, general English literature, geography, composition, and profane history; and such of the modern languages and elements of such of the arts and practical sciences as the trustees should think fit to direct.

And it was declared that each boy should pay during his continuance in the school such sum not exceeding 6*l.* per annum as the trustees of the school should fix.

And it was declared that no master, whether residing

[MAG. C.]

on the school premises or not, should take any scholar of the said school to reside or board with him.

The salaries received by the masters for the year 1859 were as follow: Head master, from the income of the charity, 150*l.*; from the fees paid by the boys, 287*l.* 12*s.* 6*d.*; total, 417*l.* 12*s.* 6*d.* Second master, from the charity, 100*l.*; from fees, 191*l.* 15*s.*; total, 291*l.* 15*s.* Third master, from the charity, 25*l.*; from fees, 144*l.* 6*s.* 3*d.*; total, 169*l.* 6*s.* 3*d.* Fourth master (Latin and German), total salary 139*l.* 12*s.* 9*d.* Fifth master, 120*l.* 17*s.* 6*d.* Sixth master, 99*l.* 18*s.* French master, 87*l.* 14*s.* Drawing master, from fees only, 57*l.* 10*s.* 6*d.* The head master has also a house rent free.

The income of the charity is increasing, and will increase, at the rate of about 30*l.* per annum for several years to come.

There are several exhibitions to the Universities.

The number of boys attending the school at the present time is 200.

The majority of the trustees now seek an alteration of the scheme of 1847 in several particulars, amongst others, to permit the masters to take boarders. This is the only alteration in dispute. In support of their application they urge that since the re-establishment of the school in 1847 the trustees have found that its income has been very inadequate to meet its outgoings, and that they have been obliged to reduce the salaries below what they conceive the services of the masters entitle them to be paid, thus preventing a full development of the school, both in an educational point of view and as to the position it may be justly expected to attain.

They believe that the reputation already acquired by the school will induce a larger number of scholars to resort thereto, if an efficient and sufficient staff of masters can be supported and retained therein.

That the number of scholars is out of proportion to the number of masters, and that the classes are consequently too large, but that another master could not be appointed for deficiency of funds.

That the salaries of the masters are greatly below those received by the masters of kindred establishments, and consequently it is difficult to retain an efficient staff of masters. This is done at present only by allowing the under masters to devote their time out of school hours to private tuition.

That from the inquiries which have been made of the masters of some of the other public schools in England it appears to be the general opinion that the granting permission to the masters to take boarders, not only adds to the *status* of the school, but also increases the number of day boys, and the emoluments of the masters. They set out the opinion of the head master of Rugby school: "A good school requires not only an efficient head master, but really able men for under-masters; they cannot be got without being properly paid. There is no way of paying them so good as that of allowing them to keep boarding-houses. Further, there are no other persons who can equally well be trusted with such houses, and no reform of Dr. Arnold had so good an effect as that which abolished all boarding-houses except those kept by under-masters. They have an authority over the boys which it is not wholesome, even when it is safe, to intrust to others."

The minority of the trustees opposing the alteration of the scheme in this respect, stated as follows:—

That all our local experience of schools, where part of the pupils are on a cheap foundation provided by a charity, and part paid for, more expensively, as boarders, has shown them to have the elements of failure within themselves. This was strikingly exhibited in the present school under two successive masters. At the appointment of Dr. Lee there were ninety-nine scholars. Dr. Lee was permitted to take boarders, and the ultimate result was that no foundation

M

[ROLLS.]

Re THE BRISTOL FREE GRAMMAR SCHOOL.

[ROLLS.]

boys remained. Dr. Goodenough was appointed, and the boys again rose to the former numbers, but by degrees they fell off, finding insult and contumely constantly offered to them, being always designated as "scamps," &c., and for twelve years before the present trustees were appointed no boy had been on the foundation; consequently for twelve years this excellent charity was virtually defunct.

A similar instance occurred in Bath, where we are credibly informed there existed a foundation school for all boys paying 4*l.* per annum. The master was allowed to take boarders and day scholars on his own account, and the consequence was that constant complaints were made to the trustees by the parents of the foundation boys, of insult, indignities and favouritisms, until at length the trustees were compelled to limit the master to eight boarders, when the foundation boys increased from almost none to the full complement; but all men of experience know that when two classes, so widely different as one composed of boys supposed to receive benefit from charity and another self-supported and liberally paid for, are placed in the same school, they will not equally estimate each other, and all the evils we note here, amongst many others, will follow. They also stated they had heard from many parents of children now in the school that they were determined to withdraw them as soon as boarders were admitted.

On the other side it was argued that these arguments do not apply to the Bristol school, as all the boys there pay equal fees. The information obtained by the promoters shows that the great public schools of this country are at present on the now proposed footing, and that the evils alleged to be caused by the mixture of boarders with day scholars do not exist. The class of boys whose influence appears to be dreaded (namely, the sons of persons of higher station than the average) already exists in the school in considerable numbers, without the apprehended ill effects. In the Bristol Grammar School, as in other such schools, the boys are and will be indiscriminately mixed in the several classes.

They stated that, from numerous inquiries, they were perfectly satisfied that there is no cause to apprehend a loss of numbers, but, on the contrary, they confidently expected a considerable increase in the number of scholars from the permission to take boarders.

They denied that the falling off of the number of boys on the two former occasions were attributable to the fact of the masters taking boarders, and stated other reasons for such falling off.

They cited the case of the *Tiverton School*, as having greatly fallen off in numbers when the masters were prohibited from taking boarders.

T. H. Terrell, for the trustees promoting the proposed alterations, cited the case of the *Manchester School*.

C. Hall, for the minority of the trustees dissenting, contra.

Wickens for the Attorney-General.

The following authorities were cited:—*The Attorney-General v. Earl of Devon (Tiverton School)*, 15 Sim. 193; *The Attorney-General v. Earl of Stamford*, 16 Sim. 453; S.C. on appeal, 1 Phil. 737; *The Attorney-General v. The Bishop of Worcester (Worcester School)*, 9 Hare, 328.

THE MASTER OF THE ROLLS.—The perusal of the statements submitted to me, and the consideration I have given to this subject, have induced me to come to the conclusion that I ought not to sanction the introduction of boarders into this school. In coming to this conclusion, I think it necessary to guard against any misapprehension which might arise from the belief that I propose by this decision to lay down any general rule as to the non-introduction of boarders into free grammar schools. I mean to do nothing of the sort; and, accordingly, the evidence laid before me of the answers derived from a large number of free grammar schools,

declaring that such a rule would go far to destroy such schools, has had little or no weight with me in regard to the present application. Each case must, in my opinion, be tried on its own merits. I should consider a man as devoid of sense who should insist that boarders ought not to be admitted at Eton, Harrow and Rugby, and schools of a similar description; but a very different rule applies and different principles suggest themselves in the case of a school situated as the Free Grammar School of Bristol is. The principal argument in favour of giving permission to the masters to receive boarders is very forcible—that by augmenting the income of the masters you tend to raise the character and qualifications of the school and of the class of instructors, and that without this assistance in some places efficient masters could not be obtained. This argument has, no doubt, considerable weight, and the probability resulting from it, that a master might leave the Bristol Grammar School if he could obtain a more lucrative or eligible appointment is indisputable. At the same time, I observe that the head master of the Bristol Grammar School now obtains 430*l.* per annum, besides a house rent-free and kept in repair. I do not doubt that this remuneration will secure a master of very high qualifications, and that on the vacancy of that office the trustees will rather be puzzled which out of the great number of well-qualified persons who would offer themselves as candidates they shall select, than feel any difficulty in obtaining a competent person to accept the situation. I do not, therefore, in the present case, feel the necessity of admitting boarders in order to secure an adequate supply of efficient masters for the sustentation of either the credit or character of the school, or for the instruction of the scholars. Another argument, frequently relied on in favour of the admission of boarders into free grammar schools, is derived from the advantages anticipated to arise from the intermixture of the children of different classes of society in the same school. This was well expressed by Lyndhurst, L.C. in a passage quoted with admiration by Turner, L.J. in the case of the *Worcester Grammar School*: "There is another consideration also connected with these establishments—that they are the avenues by which the humbler classes, by industry, activity and intelligence, can force their way into the highest situations of the State; and by furnishing the means of uniting at an early age the upper and lower classes, they tend to bind together by the strongest ties the whole system of society." Nothing can sound better or more plausible than this language, but it unfortunately does not agree with the result of experience. It is found that the two classes of scholars—viz., those educated at the cost of the charity, or nearly so, and those whose parents pay largely for their instruction, do not coalesce or mix harmoniously together. I have in vain looked for any evidence to that effect. The cases in the books all appear to establish the exact opposite. Either the school becomes a school for the rich—that is, for what may be termed the higher branch of the middle classes—or it becomes a school from which they are practically excluded; and it is in the nature of things that it should be so. The regard paid to wealth in this country gives an unusual degree of importance to boys whose parents are supposed to possess it over those whose parents are supposed to be wanting in that respect. The history of this very school has shown that this result occurred there a few years ago; nor am I aware of any school where a large intermixture of boarders and free scholars, amounting to something like an equal division, works harmoniously and well. The boarders, almost as a matter of course, secure more instruction than the free scholars, and are more subject to the discipline of the master. If the prizes and exhibitions are open to them, they carry them all away; and this circumstance adds to the prestige, if

[BOLLA.]

Re THE BRISTOL FREE GRAMMAR SCHOOL.

[ROLLS.]

the word can be so used, with which they are surrounded, owing to their supposed greater wealth. If the boarders, on the other hand, are excluded from such competition, then an additional evil of another sort is introduced, arising from one class of scholars being excluded from obtaining the due reward of their industry. My opinion is that, so far from the union of classes being promoted by the admixture of boarders and free scholars, it is impeded and checked. If I am right in the observations I have already made, this admixture is likely to engender an ill-feeling in boys which becomes matured and permanent in manhood in a great majority of instances. But, on the other hand, I think that the eventual harmonious admixture of classes is much better obtained by the keeping distinct the schools to which boarders are admitted and those to which free scholars are admitted. I do not mean to say that there are no free grammar schools well conducted where boarders are admitted, but in these cases either the boarders form but a very small portion of the school, or, which is the general case, the free scholars form but a very small minority. In neither case is the character of the school practically affected. Practically, there are no free scholars at Eton, Harrow, and Rugby, or they are in such small proportion as not to affect the character of the school. If the boys in these schools are not all boarders, it is because the parents or near relations of the boys establish themselves in the immediate vicinity of the school for the purpose of obtaining its advantages at a less cost than they could ordinarily be obtained. Practically, the distinction is nothing. So, also, in free grammar schools the free scholars may reside with parents, relatives, or persons living in the town, or with persons attached to the school, and who are permitted by the school to board and maintain them. But these cases again are all alike, and differ in no material respect. The boarding for which permission is applied for by this and similar applications is the boarding of boys with masters attached to the school, by means of which the boys are supposed, and justly so, to be subjected to a more complete discipline, and to obtain a more perfect instruction than if their discipline and instruction were confined to the period of their attendance during school hours. One of my main reasons for believing that the ultimate admixture of classes is promoted by the practical exclusion of boarders from some of the free grammar schools is, that that which materially contributes to the harmony and well-being of society in this country is not merely the perfect and imperceptible gradation of all classes from the lowest to the highest, but the fact that no dignity or honour in the Church or State under the Throne is excluded from any person, however humble may be his origin, provided his abilities and industry enable him to attain them, and that when he has attained them he is accepted by the higher classes, into which he has risen, exactly as if he had been born in the ranks into which he is adopted. But to accomplish this result the means of a liberal, classical and extended education must be open to him; and if there were no free grammar schools open to the lower classes this would be impossible. The child could not obtain the instruction required unless at the cost of associating with other boys of the same age, who would look down on him and treat him as of a class inferior to themselves. Few parents would permit their children to be placed in such a situation; few boys would desire it, and those who were subjected to it would probably imbibe feelings of a deep and implacable character, the power of which subsequent years might mature to a result anything but amiable or to be desired. The existence of the free grammar schools without boarders provides the necessary instruction for the lower class of the community. The existence of free grammar schools

like Eton, Harrow and Rugby, without, or almost without, free scholars, provides the necessary instruction for the sons of the higher classes of the community. The scholars from each class of schools when they become men unite and harmonise together much better than they could do as boys in the same school in early life. The son of a peer may avoid, or be excused from associating with, the son of a small tradesman; but when the son of the tradesman has become eminent in the State, or distinguished for his literary, classical, or scientific attainments, the peer may eagerly seek the acquaintance and friendship of the man who when a boy he would have shunned. It would be better, I admit, if it were possible that the two institutions could be united, and that the scholars of all degrees could associate together on equal terms; but experience has taught us that this is scarcely possible, it being the tendency of the higher classes to exclude the lower where both are mixed together, and to obtain an unjust proportion of those advantages which charity intended should be administered in a spirit of fairness and benevolence, without prejudice or favour. The interests of society will eventually be best consulted and advanced by holding that, into the free grammar schools, which are from their position and neighbourhood well attended by free scholars, boarders should not be admitted, or should be admitted only to such a limited extent as would not interfere with the general character of the school; and when a school has attained a great amount of scholars under either system — viz., that of taking free scholars almost exclusively or boarders almost exclusively — it would, in my opinion, be foreign to the duty or province of this court to interfere with or alter that system. I have made these observations in order to explain the view that I take of cases of this description, and in applying them to the present case, I find that this school is in a large, prosperous and populous city, where its advantages are so well appreciated that the parents of upwards of 200 boys avail themselves of the advantages thereby afforded for the instruction of their children. I find the salary of the head master, combined with the incidental advantages attached to his station, sufficient to obtain the services of a gentleman of great merit and abilities, and well fitted to perform the duties which belong to his difficult and anxious position. I find that there is no want of able under-masters of all sorts, at the rates of salary at present attached to their offices. I find a charity estate constantly and gradually increasing in value every year, and sufficient to provide additional remuneration. I find that this system of things, which I cannot but think very prosperous, has gone on increasing, and is expected to continue for some years. I find that an opposite system some time ago had led practically to the destruction of the free scholars, and that the scheme under which the school is at present conducted was deliberately established by the court only a few years ago. If this were altered, the result might and probably would be that the number of scholars would increase the reputation of the school, and that the school might rise in general estimation; but the character of the school would be changed, and that liberal and classical education afforded by it would no longer, or not to the same extent, be accessible to the poor. Taking all these matters into consideration, I have deliberately, and without hesitation, come to the conclusion that it would be inexpedient to alter the scheme in this respect, or to allow the head or other master of this school to take as boarders any boys who are to be educated in this school.

V. C. S.]

Re DONINGTON CHURCH ESTATE, AND re CHARITABLE TRUSTS ACT 1853.

[V. C. W.]

**V. C. STUART'S COURT.**Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-Inn,  
Barrister-at-Law.

Friday, March 9.

Re THE DONINGTON CHURCH ESTATE, AND re THE  
CHARITABLE TRUSTS ACT 1853.Appeal from an order of a County Court judge—  
16 & 17 Vict. c. 137.

*Where the rents of a piece of land had been regularly paid to the churchwardens of a parish towards the repair of a church, for which purpose the land was supposed to have been given at an unknown date by an unknown benefactor, the proper persons to be appointed trustees were held to be the rector and the churchwardens.*

This was the petition of the Rev. C. M. Wimberley, rector of the parish of Donington-on-Baine, Lincolnshire, presented, by way of appeal, under the 39th section of the above Act, from a decision of the County Court judge of Lincolnshire.

By a certificate of the Charity Commissioners, dated the 2nd Aug. 1859, it was recited that it appeared that there was a piece of arable land in the parish of Donington, containing about eight acres, the rent of which was regularly paid to the churchwardens of the parish towards the repair of the church, for which purpose it was supposed to have been given at an unknown date by some unknown benefactor; that the same was then in the occupation of a tenant, at the rent of 20*l*.; that there were not at that time any legally constituted trustees of the charity; and that disputes had arisen as to its administration. It had accordingly been thought desirable that an application should be made to the proper court for an order appointing trustees of the said charity, and the petitioner and John Fletcher, one of the churchwardens, had transmitted to the board notice of this intention to apply to the County Court judge. The commissioners then proceeded to certify that the board thereby authorised the petitioner and the said John Fletcher to make an application within three months for an order appointing "the rector and churchwardens of the parish, and their respective successors for the time being, or some other fit and proper persons, to be the trustees for the administration of the said charity."

Application was accordingly made to the County Court judge, who, on the 12th Nov. last made an order appointing the petitioner (the rector), the said John Fletcher and Joseph Goy (the churchwardens), the overseers of the poor of the parish and the surveyor of highways, and their successors for the time being, and George Tomline, Esq., a landowner in the parish, to be the trustees of the charity.

The petitioner submitted that Geo. Tomline, Esq., was an improper person to be appointed trustee, inasmuch as his residence was twenty-five miles away from the parish, and that the sexton and churchwardens of the parish were the proper persons to be trustees.

The petition (which was duly certified by the charity board to be reasonable and proper) prayed that the order might be varied, by providing that the rector and churchwardens should be trustees.

The petition alleged, amongst other things, that at the hearing before the County Court judge the solicitor of the petitioner proposed to call and examine him for the purpose of showing that the number of directors in the parish was very large, and that the overseers of the poor and surveyor of the highways would for the most part be Dissenters, but the judge refused to hear evidence on any of these subjects.

It was stated that no church-rate had been levied in the parish for many years; that great differences existed between the rector and his parishioners (500 in number), 100 of whom were Dissenters. Mr. Tomline

was the largest proprietor in the parish, and owned about one-third of it.

Hobhouse supported the petition.

Cotton opposed on behalf of Mr. Tomline and the surveyor of highways, and the overseers of the poor.

The VICE-CHANCELLOR said he could not agree with the view which the County Court judge had adopted. The Charity Commissioners had sanctioned this appeal, and it seemed to him that the rector of the parish and the churchwardens ought to have the care of this property, because the rents and profits of it had been dedicated to the purposes of the church. One of the respondents, who was the largest landed proprietor in the parish, had instructed counsel to appear in support of the view of the County Court judge; and the same counsel had been instructed for the other parties who had been nominated trustees by the order of the County Court. It was satisfactory, therefore, to know that all parties had had an opportunity of stating their case. In his (the V. C.'s) opinion, the Charity Commissioners having sanctioned the appeal, it was his duty to appoint the rector and churchwardens alone to be the trustees. The case was an unfortunate one, because the costs must come out of the estate; unless Mr. Tomline, under the circumstances of the case, should think it right to refund them.

The order was, that the rector and churchwardens were to be the trustees; the petitioner's costs to be taxed and paid out of the rents; the respondents to bear their own costs.

**V. C. WOOD'S COURT.**

Reported by W. H. BENNETT, Esq., Barrister-at-Law.

March 16, 20 and 21.

DUDLEY AND WEST BROMWICH BANKING  
COMPANY v. SPITTLE.

*Forgery—Debt—Trust-deed—Cestui que trust and trustees—Criminal conviction.*

*A. forged the name of S. to a cheque for 550*l*., and obtained the money from the bankers. He was subsequently apprehended for another felony, and indictments for both felonies were preferred against him at the next assizes. To the first (not the plaintiffs') he pleaded "guilty," to the plaintiffs' indictment "not guilty." He was sentenced on the first to four years' penal servitude. The second was not tried, but ordered to stand over, the ends of justice, in the words of the judge, having been satisfied. Previously to the sentence A. had executed an assignment of all his real and personal estate for the benefit of his creditors to S., whose name he had so forged. The bankers claimed to rank under this deed of assignment as creditors for the money of which they had been so defrauded:*

*Held, first, that the money so obtained was a debt due to the bankers;*

*Secondly, that they had done everything which depended upon them to do to bring A. to conviction;*

*Thirdly, that the bankers were entitled to come in under the deed of assignment and rank as creditors.*

This was a bill filed by the Dudley and West Bromwich Bank on behalf of themselves and the other creditors of one Frederick Farley against the defendant John Spittle, who had been a customer of the bank, and had also become the sole trustee under a deed of assignment, bearing date 16th March 1858, for the benefit of the general creditors of the said Frederick Farley.

The plaintiffs have branch establishments as bankers at Dudley, in Worcestershire, and West Bromwich, in Staffordshire.

On the 27th Jan. 1858 a cheque for 550*l*. in favour of one Guest, and professing to be signed by the said John Spittle, was presented for payment at the Dudley

V.C. W.]

DUDLEY AND WEST BROMWICH BANKING COMPANY v. SPITTLE.

[V.C. W.]

branch bank by one Mary Ann Whitehouse. She was there told that Spittle kept his account at the West Bromwich branch. On presenting the cheque at that place, she was paid the amount of it. Soon after the payment of the cheque, the defendant Spittle informed the bank that his name had been forged, and that it had not been drawn or signed by him or by his order.

On the 5th March 1858 Frederick Farley and the woman Whitehouse were apprehended at Birmingham on a charge of forging and uttering another forged cheque on Messrs. Attwood, the bankers at Birmingham, and were committed for trial on that charge at the next Warwick assizes, to be held on the 17th March next following. During the inquiries which ensued, it was discovered that Farley had taken the woman with him to the Dudley branch bank with the first-mentioned forged cheque, and afterwards to West Bromwich, where it was paid, and the amount of it was handed over to him by the woman at the door of the bank there.

The plaintiffs thereupon preferred an indictment at the Warwick assizes against Farley for forging and uttering the cheque for 550*l.* and the woman Whitehouse was admitted before the grand jury as a witness against him. At the same time defendant Spittle deposed before the grand jury that his name had been forged to the cheque. A true bill was found.

At the same assizes Messrs. Attwood preferred an indictment against Farley for forging and uttering the cheque upon them. To the indictment of the Birmingham Bank he pleaded "guilty." To the indictment of the plaintiffs, the Dudley Bank, the defendant pleaded "not guilty;" and thereupon the presiding judge, Coleridge, J., passed a sentence of four years' penal servitude upon Farley, on the indictment to which he had pleaded "guilty;" and he directed the plaintiffs' indictment to stand over and not to be tried, being of opinion that the ends of justice were answered by the sentence passed against Farley on the one indictment.

The plaintiffs alleged that they were at the time ready to proceed with their indictment, and that by reason of the judge, in the exercise of the discretion by law vested in him postponing the trial of their indictment, were unable to proceed further with such indictment.

They also alleged that the 550*l.* received by Farley under the forged cheque was a debt due to the plaintiffs from him.

Farley had been a licensed victualler and maltster, and by an indenture bearing date the 16th March 1858, before sentence, assigned all his real and personal estate to the defendant Spittle, as trustee to convert the same and pay the amount amongst his creditors, and the usual notice was advertised in the *London Gazette* and other papers.

As it was expected that Farley's estate would realise 10*l.* in the pound, and probably more, amongst his creditors, the plaintiffs applied to be admitted to execute the deed as creditors for the 550*l.* This, however, was opposed by the defendant, and the present bill was then filed against him as such trustee, to have the trusts of the indenture of assignment to him of the 16th March 1858 carried into effect, and that the plaintiffs might participate with the other creditors in the division of the proceeds of the estate, and for the usual accounts of the real and personal estate received under the deed of assignment.

*Amphlett, Q.C.* and *Isaac Spooner*, for the plaintiffs, contended that they had complied with the rule of law which prevailed, that everything should be done by a prosecutor to bring an offender in a criminal case to justice, which could be done before a civil process could be instituted against him, his estate, or third parties, in consequence of such criminal act. In the present case, it was not the fault of the prosecutors that Farley had not been convicted. The judge, in his discretion, had

sentenced him to penal servitude on the indictment to which he had pleaded guilty, and had seen the depositions and written evidence in the case upon which Farley had been indicted at the instance of the plaintiffs. The defendant, by appearing before the grand jury and swearing to the handwriting to the cheque being a forgery, had precluded himself from disputing that fact. The judge was the sole arbiter of how the business of his court should be conducted, and the prosecutors in the present case had had no power of obliging him to proceed with the second indictment, the ends of justice, as he (the judge) stated, being satisfied by the consequences of the first. They relied upon *Ex parte Bolland*, Mont. & M. Bank. Rep. 319; *Stone v. Marsh*, 6 Bar. & Cr. 340; *March v. Keating*, 1 Bing. N.C. 198; *Crosby v. Leng*, 12 East, 409. As to the right of parties who had taken all necessary proceedings towards a conviction to proceed against third persons—*White v. Spettigue*, 13 M. & W. 603; *Whickham v. Galliol*, 2 Sm. & G. 353; *Cox v. Paxon*, 17 Ves. 329; *Re Hardwick Willmore*, W. & D. 197.

*Daniel, Q.C.*, *T. H. Terrell* and *Begg*, for the defendant, contended that the plaintiffs had entirely mistaken their course of proceeding. The assignment having been executed by Farley was an act of bankruptcy, and the usual notices by advertisement having been published, the plaintiffs should at the end of three months have proceeded under the 78th section of the Bankruptcy Act to have got Farley declared a bankrupt, and then proved their demand under his estate. The relation of *cestui que trust* and trustee had never been constituted between the plaintiffs and the defendant, the trustee of the deed of assignment, as they had not executed the deed within the three months, the time limited by the deed, and they consequently were not within its provisions. There was no admission of any debt by Farley. They cited *Barough v. White*, 4 B. & C. 325; *Beauchamp v. Parry*, 1 B. & Ad. 91.

No reply was called for.

The VICE-CHANCELLOR said it appeared to him there was a clear admission of a debt, and this before the execution of the deed of assignment by Farley. That being so, the provisions in the deed were as much for the benefit of the plaintiffs as for any other of the creditors of Farley. The cases cited on behalf of the defendant, which had relation to negotiable instruments only, were not applicable to the circumstances of the present case, which was one of criminal delinquency. As to the deed, Spittle himself was a large creditor, and he might have constituted himself, if he had so thought fit, sole *cestui que trust*, as well as trustee, if he had bought up the claims of all the other creditors of Farley, which it appears he had attempted to do. As to the deed not being executed by the plaintiffs, that was no fault of theirs. They offered to execute it, and that in writing, by a letter of the 10th June, but no reply was given to their application, and in that letter they offered to do anything that might be necessary on their part. Their claim, however, was repudiated, when it should have been admitted to rank as that of any other creditor under the deed. The only arguable point was, that the debt having been founded upon a criminal act, the plaintiffs had not proceeded and brought the criminal to conviction. Before *Faulstich's* case it was thought that a debt arising out of a felony was extinguished, but subsequent cases had rectified this. It was clearly a debt; but the right to recover it was suspended until conviction. The principle upon which this proceeded was, that it was against public policy that a compromise should be made of a criminal act by accepting a sum of money as an equivalent or extinguishment of the consequences of such act. Now a conviction could not be assured, but you must do all

you can to obtain one. In the present case the plaintiffs had done everything which depended upon them to obtain it, and it was from no fault of theirs that conviction had not followed. Farley could not be now tried upon the old indictment until after the expiration of his penal sentence, which was four years. The judge must be supposed to have had before his eyes the depositions, and particularly the admission of the woman who had obtained the moneys under Farley's instructions and paid them over to him, in both cases; and it is admitted that he said distinctly, in passing sentence, that he thought the ends of justice would be satisfied by the sentence which he then proceeded to pass upon the prisoner. It would be quite farcical now to go through any mere form to revive the criminal proceedings. The ends of justice could in no way be more satisfied than they had already been.

*Declared, the 550l. a debt due from Farley, and the plaintiffs entitled to be admitted to the benefit of the deed of assignment, with the necessary accounts, and to be paid their costs.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Nov. 19 and Jan. 26.

ROUTLEDGE (appellant) v. HISLOP (respondent).

*A former decision between the same parties in a court of concurrent jurisdiction—Master and servant—A plaint for illegally discharging—A summons for wages.*

*A judgment of a court of concurrent jurisdiction directly upon the point is conclusive between the same parties upon the same matter directly in question in another court. When, therefore, a servant in husbandry, who had been discharged by her master before the proper time, sued him in the County Court for wrongfully discharging her without reasonable cause, whereupon judgment was given for the defendant, and she afterwards at the expiration of her quarter took out a summons before justices to recover her quarter's wages, the same question arising:*

*Held, that the decision in the County Court was a bar to such a proceeding.*

This was a case stated by justices under the provisions of the 20 & 21 Vict. c. 43, upon an order made by them upon the appellant for the payment of 5*l.* wages to the respondent as a servant in husbandry.

It appeared that the respondent Mary Hislop had been hired by the appellant William Routledge as a servant in husbandry on the 1st Aug. 1858, to serve from thence till Martinmas then next, for the sum of 5*l.* wages. She served him till the 7th Sept., when he discharged her. Upon this she entered a plaint in the Penrith County Court, and the cause was tried upon the amended particulars, which were as follows:—"The plain*iff* claims 6*l.* 6*s.* 6*d.* for damages for the breach by the defendant of a contract of hiring made between him and the plain*tiff* on the 1st Aug. 1858, by discharging the plain*tiff* from the defendant's service before the determination of the said contract, without reasonable cause." Upon the trial, the judge, after hearing witnesses on both sides, gave judgment for the defendant. In May following the respondent took out a summons against the appellant, which recited that "information and complaint had been made upon oath, for that you, William Routledge, at Lammas last past, hired or employed one Mary Hislop to be your servant in husbandry from Lammas last past till Martinmas last past, for the wages of 5*l.* That she entered upon the said service and stayed until the 7th Sept. 1858, when she was discharged from the said service without just cause, but that she was always ready to complete her service, and that you refuse to pay her

the wages justly due for the time she was hired, amounting to 5*l.*" Upon the hearing of the summons the appellant's counsel contended that the justices had no jurisdiction, the same question between the parties having already been decided by the County Court, which was a court of competent jurisdiction. For the respondent it was contended that she had additional evidence to show that she was improperly discharged, and that the damage sought to be recovered in the County Court was for breaking her box as well as for being improperly discharged, and that the present summons was not for damages at all, but simply for wages. The justices overruled the objection, heard the case throughout, and decided in favour of the respondent, awarding her 5*l.* as for her wages.

*Welsby* appeared for the respondent.

*Brett* for the appellant.

The following cases and statutes were referred to:—*The Duchess of Kingston's* case, 2 Smith's L. C. 424; *Dunn v. Murray*, 9 B. & C. 780; *Lord Bagot v. Williams*, 3 B. & C. 235; 20 Geo. 2, c. 19, s. 1; 31 Geo. 2, c. 11; 4 Geo. 4, c. 34, s. 5.

COCKBURN, C. J. now delivered judgment.—The question for our determination is, whether the decision of the justices was correct in point of law. We are of opinion that it was not. The matter for their consideration was, in truth, the same identical matter which had been decided by the judge of the County Court, namely, whether the discharge of the respondent by the appellant was wrongful and without just cause. The judge of the County Court had jurisdiction to hear and determine that question, and after he had given his judgment thereon it was not allowable to the respondent, by resorting to a different tribunal, to reopen the question and have it tried a second time. The rule of law is plainly stated by De Grey, C.J., in delivering the opinion of the judges in the *H. of L. in The Duchess of Kingston's* case, namely, "that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court." Applying that rule to the present case, it was open to the justices to inquire whether the County Court had jurisdiction, and whether the judge had determined that the discharge of the respondent was rightful, and not without due cause; but as soon as they had ascertained both those facts in the affirmative, they were bound by law not to allow the dispute as to the discharge being wrongful to be reopened, and to treat the decision of the County Court as conclusive between the parties. It was urged before us by counsel for the respondent that the form of the claim before the justices was different from that made in the County Court, and that the jurisdiction was different; but it was admitted, and indeed could not be denied successfully, that the question raised by the plaint and particulars in the one case and the complaint on oath in the other was the same, namely, whether the discharge of the respondent was without just cause? Varying the form of the claim, where the claim itself is the same, does not prevent the application of the rule of law to which reference has been made. As an illustration of this may be mentioned *Slade's* case, 4 Rep. 94 b, where it is said, "that a recovery or bar in *assumpsit* would be a good bar in an action of debt brought on the same contract." Other instances of the like kind will be found referred to in Com. Dig. tit. "Action," K 3, and in the argument and judgments in *Buckland v. Johnson*, 15 C. B. 145; 23 L. J. 204, C. P. Our judgment will therefore be for the appellant.

*Judgment for the appellant.*

Thursday, Jan. 26.

CLARK v. HAGUE.

*Cruelty to animals—Cock-fighting—Aiding or assisting at—12 of 13 Vict. c. 92, s. 3.*

Q. B.]

CLARK v. HAGUE.

[Q. B.]

*The 12 & 13 Vict. c. 92, s. 3, enacts that every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other animal, shall be liable to a penalty not exceeding 5*l.* for every day, &c. And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, &c., cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence:*

*Held, that aiding or assisting at the fighting or baiting must occur at a place kept or used for the purpose, to constitute an offence under the above section.*

Case stated under 20 & 21 Vict. c. 43.

At a petty sessions in and for the division of Loughborough, in the county of Leicester, on the 7th April 1859, before two of her Majesty's justices of the peace in and for the said county, an information in writing, preferred by Samuel Hague, of Loughborough, licensed victualler, hereinafter called the respondent, under sect. 3 of 12 & 13 Vict. c. 92, was heard and determined, in which information it was alleged that the appellant Clark, on the 2nd March then last past, at the parish of Loughborough, did encourage, aid and assist at the fighting of two cocks then being fought in a certain place (to wit), a bowling-alley there in the occupation of the said appellant, then kept and used for the purpose of fighting cocks, contrary to the provisions of the said statute, intituled "An Act for the more effectual prevention of cruelty to animals." And upon such hearing the appellant was duly convicted, "for that he the said appellant, on the said 2nd day of March, at the parish of Loughborough aforesaid, did encourage, aid and assist at the fighting of two cocks then and there being fought, contrary to the provisions of the said Act, intituled "An Act for the more effectual prevention of cruelty to animals." And the said appellant, for his said offence, was adjudged to forfeit and pay the sum of 10*s.* to be paid and applied according to law, and also to pay to the said respondent the sum of 1*s.* for his costs in that behalf, and that if the said several sums should not be paid forthwith, the said appellant should be imprisoned in the House of Correction at Leicester, in the said county, for the space of fourteen days, unless the said several sums should be sooner paid.

And the said appellant being dissatisfied with such determination upon the hearing of the said information, as being erroneous in point of law, did, pursuant to sect. 2 of 20 & 21 Vict. c. 43, apply in writing, within three days after the said determination, to the said justices to state and sign a case setting forth the facts, and the grounds of such our determination as aforesaid, for the opinion thereon of the Q. B.

At the hearing of the aforesaid information it was proved on the part of the informant, the respondent in this appeal, that on the 2nd March, at a bowling-alley belonging to the appellant's licensed victualling house at Loughborough aforesaid, two cocks were fought by the appellant and one John Taylor. We were of opinion on the evidence produced before us that the said appellant and the said John Taylor did resort to the said bowling-alley with the intention of causing the said cocks to fight together there, and that they did encourage, aid and assist at the fighting of the said two cocks at the said place, but it was not proved before us that in any other instances had cocks been fought there.

Upon the hearing of the said information it was contended on the part of the appellant that there was no offence committed within the intent and meaning of the 3rd section of the 12 & 13 Vict. c. 92, inasmuch as the said section only applied to encouraging, aiding, or assisting at the fighting of cocks in any place regularly kept or used for that purpose, as mentioned in

the first clause of the said section, viz., a place so kept or used for the purpose of fighting any cocks, as to subject the keepers thereof to the penalty fixed by the said section, and that it did not appear that the said bowling-alley was a place so kept or used.

We, however, were of opinion that the words "every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.*," contained in the concluding clause of the said 3rd section, applied to the encouraging, aiding, or assisting at the fighting of cocks in any place, and that the words "as aforesaid" meant "other animals as aforesaid," and not, as was contended by the appellant, "the place as aforesaid," namely, a place kept or used for the purpose of fighting any bull, bear, badger, dog, cock, or other kind of animal, as mentioned in the first clause of the said section; and being also of opinion that the evidence given before us brought the case within the concluding clause of the said 3rd section, we convicted the said appellant of encouraging, aiding and assisting at the fighting of two cocks at Loughborough, considering, according to our construction of the Act as above stated, that the portion of the information which alleged that they were fought in a place kept or used for the purpose of fighting cocks was not a material allegation, and consequently might be treated as irrelevant matter.

The question of law arising on the above statement is, whether it is an offence within the intent and meaning of the 3rd section of the said statute, to encourage, aid, or assist at the fighting of cocks in any place, or only in a place so kept or used for the purpose of fighting cocks as to subject the keeper thereof to the penalty prescribed in the first clause of the said section.

*Hayes, Serjt.* for the appellant.—It is no offence under the 12 & 13 Vict. c. 92, s. 3, to fight cocks, unless in a place kept for that purpose. The object of the Legislature was to put down places kept for bull-baiting and cock-fighting, and it does not meet the case of fighting cocks on premises not kept or used for that purpose. [*HILL, J.*—If a person in his own poultry-yard encouraged two cocks to fight, would he be within the enactment?] No. Statutes referred to, 3 & 4 Will. 4, c. 19, and 5 & 6 Will. 4, c. 59.

No counsel appeared for the respondent.

*Cur. adv. vult.*

*BLACKBURN, J.*—This is a case stated under the 20 & 21 Vict. c. 43, for our opinion on a question of law, stated to be, whether it is an offence within the intent and meaning of the 3rd section of the 12 & 13 Vict. c. 92, to encourage, aid, or assist at the fighting of cocks in any place, or only in a place so kept or used for the purpose of fighting cocks as to subject the keeper thereof to the penalty prescribed by the first clause of the section. The 3rd section enacts, "that every person who shall keep or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid, provided always that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof." So far the meaning of the Act is plain; it creates a substantial offence, that of keeping or using a place for the purpose of baiting animals. The Act proceeds in the same section: "And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall



forfeit and pay a penalty not exceeding 5*l.* for every such offence." The Legislature here employs words apt, if intended to describe the accessories to the offence stated previously in the section, but not apt if intended to create a fresh offence. It cannot be supposed that the Legislature intended that those who were the principals in fighting the animals should be exempt from the penalty imposed on those who encourage, aid and assist therein; and treating it in this way, we are much confirmed by looking at the former Act, 5 & 6 Will. 4, c. 59, s. 3, for which the present enactments are substituted, and which clearly only affected those who frequented such places. We think, therefore, the intention of the Legislature was, that the penalty should be imposed on those who were aiding or assisting at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid," that is, "at any place so kept or used for any of the purposes aforesaid."

Conviction quashed.

Saturday, April 21.

GEORGE D. WHEELER (appellant) v. THE CHURCHWARDENS AND OVERSEERS OF BRIMINGTON (respondents).

*Appeal*—20 & 21 Vict. c. 43—*Appeal at special sessions against an assessment to a poor-rate—Non-application of the statute.*

The 20 & 21 Vict. c. 43, does not apply to a decision of justices at a special sessions for hearing appeals against poor-rates upon an appeal against an assessment.

This was a case stated under the provisions of the 20 & 21 Vict. c. 43.

It appeared that the appellant was rated to the poor-rate of the parish of Brimington, Warwickshire, in respect of his occupation of the appropriate tithe rentcharge of that parish; and at a special sessions for hearing appeals against such poor-rate the appellant appealed and claimed several deductions, some of which were allowed and others disallowed, subject to the opinion of this court upon the present case, which the appellant required the justices to state. The question stated for the court was: "Is the appellant entitled to have his assessment reduced by the amount of the stipend paid by him to a curate under the circumstances stated in the case, or by any other proportionate part of such stipend?"

*Phipson*, who appeared for the respondents, took a preliminary objection that this was not a matter in respect of which a case could be stated under the 20 & 21 Vict. c. 43, s. 2, for that the justices were sitting in special sessions under the 6 & 7 Will. 4, c. 96, s. 6, to hear appeals merely against inequality, unfairness, or incorrectness in valuation, their decision being binding and conclusive on the parties, unless within fourteen days, notice of appeal to the quarter sessions shall be given; that it had been deemed desirable by the parties to have a case stated for the opinion of this court, it should have been stated under sect. 11 of the 12 & 13 Vict. c. 45, whereby the facts would have been stated in a manner more satisfactory: (*Walker v. The Great Western Railway Company*, 29 L. J. 107, M.C.) [CROMPTON, J.—The appeal to the justices in special sessions is only for the purpose of getting the amount properly settled. HILL, J.—Why will not the parties agree to state a case under the 12 & 13 Vict. c. 45?] The respondents are willing to do so, they are dissatisfied by the way in which it is at present stated; under the 12 & 13 Vict. c. 45, the case will be mutually settled by the litigating parties, whilst under the 20 & 21 Vict. c. 43, it is settled by the justices only. [COCKBURN, C.J.—You say that this is in effect an appeal against a poor-rate, and that they cannot get

rid of the assessment except by an appeal to the quarter sessions in the regular way.]

F. M. WHITE, for the appellant, contended that the words of sect. 2 of the 20 & 21 Vict. c. 43, are sufficiently large to include this case, the words being "after the hearing and determination . . . of any information or complaint . . . either party to the proceeding . . . if dissatisfied with the said determination as being erroneous in point of law," &c., and that it is not because there is a power of appeal to the quarter sessions that a case may not be granted, for the statute contemplates cases where there is such a power, for the 14th section provides that appellants under the Act shall lose their right of appeal to the quarter sessions. [BLACKBURN, J.—Is this within the words of the Act, either as a complaint or an information?] It is a complaint.

COCKBURN, C.J.—We are of opinion that the statute does not apply to such a case. You had better assent to a case being stated, as proposed by the other side. Appeal dismissed.

HORLEY (appellant) v. ROGERS (respondent).

*Vagrant Act*, 5 Geo. 4, c. 83—*Leaving wife chargeable to the parish—Apprehension of husband without a warrant.*

By sect. 3 of the 5 Geo. 4, c. 83, the Vagrant Act, every person who is able to maintain his family refusing or neglecting to do so, whereby they become chargeable to the parish, is to be deemed an idle and disorderly person; and, by sect. 6, any person whatsoever may apprehend any person found offending against the Act, and deliver him to any constable to be taken before some justice of the peace; and in case any constable shall refuse to take any such offender into his custody, it shall be deemed a neglect of duty in such constable, for which he may be punished upon conviction.

This summary power of apprehension does not apply to the case of a man who is charged under the above section with having neglected to support his family, whereby they have become chargeable to the parish.

Where, therefore, the wife of A. had become chargeable to the parish under circumstances, as it was alleged, that brought him within the meaning of an idle and disorderly person in the 3rd section of the above Act, and the relieving officer having met with him, gave him in charge to a constable, who, however, refused to take him into his custody, and an information having thereupon been laid against him for a neglect of duty:

Held, that the constable acted correctly, for that A. was not found offending within the meaning of the Act.

This was a case stated under the 20 & 21 Vict. c. 43. It appeared that a summons had been taken out before Mr. Combe, one of the metropolitan police magistrates, by Horley (the appellant), charging Rogers (the respondent), who is one of the metropolitan police constables, with "unlawfully refusing to take into his custody from him, the said Horley, one James Whistler, who was found by him offending against the Act of Parliament made and passed in the 5th year of the reign of his late Majesty King George the 4th," entitled "An Act for the punishment of idle and disorderly persons, and rogues and vagabonds in that part of Great Britain called England," and was apprehended for so doing by Horley. The only witness examined was the complainant, who stated as follows:—"I am relieving officer of Christchurch district, in St. Saviour's Union. There was a person of the name of Charlotte Whistler in the workhouse receiving relief. On the 17th November last I went, from information I received, to a house, No. 121, Waterloo-road. I found the husband of the woman who was chargeable. He was removing goods. I believe he was residing at

Q. B.]

HORLEY v. ROGERS—THE LUTON BOARD OF HEALTH v. DAVIS.

[Q. B.]

that house. I charged him with neglecting to support his wife, and I said I was the relieving officer of Christchurch. He said she was quite able to support herself, as she could earn ten shillings per week, and she had not been faithful. I said that was a question that must be settled by the magistrate. I sent for a constable, and defendant came and I told the constable I was relieving officer of St. Saviour's Union; that Whistler's wife was chargeable, and I wished him to convey Whistler to the police court. He at first said he would. Whistler said he didn't see why he should support her—she went with other men. The constable said to me, "I suppose you have a warrant." I said "I had not," and he said "his orders were, not to take such a charge," and he refused to take the man. I said, "You observe the man is removing away," and I asked the man for his address, and the man refused to give it to me. I have not seen the man since.

Cross-examined.—I had not taken any pains to ascertain before I sent for a constable whether the man was able to support his wife. I did not know the constable. When the constable refused to take the man I said, "I shall take your number, as I wish to have the point settled." Whistler did not say he would go to the station."

Re-examined.—The man admitted he earned 15s. per week, in the presence of the constable.

The magistrate was of opinion that the defendant was not bound to take Whistler into custody, inasmuch as he, Whistler, was not found offending against the before-mentioned statute, and he, therefore, dismissed the summons.

By sect. 3 of the 5 Geo. 4, c. 83, it is enacted, "that every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect, he or she, or any of his or her family, whom he or she may be legally bound to maintain shall have become chargeable to any parish, township or place . . . shall be deemed an idle and disorderly person." By sect. 4 it is enacted that every person running away and leaving his wife, &c., chargeable, or whereby she may become chargeable, shall be deemed a rogue and vagabond.

By sect. 6 it is enacted that "it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act, and forthwith to take and convey him or her before some justice of the peace to be dealt with in such manner as is hereinbefore directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended to be so taken and conveyed as aforesaid; and in case any constable or police officer shall refuse or wilfully neglect to take such offender into his custody, and to take and convey him or her before some justice of the peace, or shall not use his best endeavours to apprehend and convey before some justice of the peace any person that he shall find offending against this Act, it shall be deemed a neglect of duty in such constable or other peace officer, and he shall on conviction be punished in such manner as is hereinbefore directed."

Collier, Q.C. (C. Smith with him) appeared for the appellant, and contended that the magistrate was wrong, for that Whistler was found committing an offence under the 5 Geo. 4, c. 83, and ought to have been apprehended by Rogers the constable.

Ellis, for the respondent, was not called upon.

COCKBURN, C.J.—It is perfectly clear that the constable was not justified in apprehending Whistler without a warrant, since he had committed no offence in his presence, or in the presence of the party wishing to give him in charge. It was not the province of the constable to take upon himself to say whether or not any offence had been committed. It is not as where

[MAG. C.]

some offence under the Act had been committed under his own eye—in such a case he may apprehend summarily; but where, as in this case, the supposed offence is dependent upon a variety of particulars, upon which he could only be informed by others, and which, as in this case, might be justified upon the ground of the wife's infidelity, which is a question to be ascertained elsewhere, he is not justified in interfering in this summary way.

CROMPTON, HILL and BLACKBURN, JJ. concurred,  
*Appeal dismissed.*

#### THE LUTON BOARD OF HEALTH v. DAVIS.

*Public Health Act—Assessment to a rate—Enforcing rate—Case stated under 20 & 21 Vict. c. 43.*

*If a rate be good upon its face, the justices ought to enforce it: unless in the cases, first, of the party assessed not having any assessable property; or, secondly, some formalities not having been complied with.*

*Where, therefore, a party was assessed under the 11 & 12 Vict. c. 63 (Public Health Act), to a special district rate, and not having appealed against it, he was summoned for non-payment, whereupon he alleged that the rate was bad, inasmuch as it was made to repay expenses to which it was not applicable:*

*Held, that this was not an objection to which the justices ought to have given effect; but that, the rate being good upon its face and unappealed against, they ought to have issued their warrant to levy it.*

This was a case stated under the 20 & 21 Vict. c. 43.

It appeared that the Luton board of health having done certain paving works in a particular district, in order to pay for the same they borrowed money upon the special district rates, under the powers of sect. 107 of the 11 & 12 Vict. c. 63 (Public Health Act). They afterwards assessed and levied a special district rate for the purpose of repaying the money so borrowed. By sect. 86 it is enacted that whenever any expenses are incurred by the local board in making, enlarging, altering, arching over, covering, or inclosing any sewer, vested in them by the Act, "or in or about any other works, matters and things of a permanent nature, and executed or done for the benefit of any district, or part of a district, the said local board shall make and levy in respect of the premises situate in the district, or part of a district, for the benefit of which the expenses are incurred or to be incurred, a rate or rates, to be called special district rates, of such amount as will be sufficient to discharge the amount of such expenses and interest thereon, within such period not exceeding thirty years as the said local board shall in each case determine." The 87th section provides for the making of "general district rates" for defraying such expenses as are not otherwise expressly provided for. Sect. 135 gives a right of appeal against any rate; and sect. 136 gives the sessions a power to amend any rate, and provides "that, notwithstanding the quashing of any rate appealed against, all moneys charged by such rate shall, if the court before whom the appeal is heard think fit so to order, be levied as if no appeal had been made, and such moneys when paid shall be taken as payment on account of the next effective rate for the purposes in respect of which the quashed rate was made."

The defendant having been assessed to the special district rate, and not having paid it, or appealed against it, he was summoned to show cause why the rate should not be paid, and upon his appearance he objected that the rate was invalid, inasmuch as the work in respect of which it was made was not "of a permanent nature" within the meaning of the 86th section. The justices, being in doubt, declined to issue their warrant.

T. Jones now appeared for the defendant, and con-

N

tended that paving was not a work of a permanent nature, and so not the subject of a special district rate, but should be paid for by a general district rate; that it is a condition precedent to the right to make such a rate that the works should be of a permanent nature within the section. [COCKBURN, C.J.—Is it now open to you to take this objection, not having appealed? The case of *Reg. v. The Justices of Kingston*, 27 L. J. 119, M. C., is against you.] The justices had no jurisdiction to enforce a bad rate.

*Taylor*, for the board of health, and

*Malcome*, for the justices, were not called on.

COCKBURN, C.J.—The justices had no other course open to them than to issue their warrant for the recovery of the rate. The argument of Mr. Jones may or may not have been correct as to the rate itself, but upon that it is quite unnecessary to pronounce an opinion. If the work was of a permanent nature, then the rate in point of law and form is good. Now, before the justices there was nothing to show that the rate was not good. But Mr. Jones says that it was proposed to show that the works were not of a permanent nature. But if this were so, it would have been a good ground of appeal, and then, if he had succeeded, the 136th section may have been resorted to, whereby the sums collected under the rate may have been carried on to the next rate; but by the present proceeding this beneficial enactment is superseded. The objection was ground of appeal, and allowing the appeal to be made to this court in this way would be very inconvenient. The justices ought to have issued their warrant.

CROMPTON, J.—It is very important to adhere to the rule that, where a rate is good upon its face, the justices should enforce it. There are two exceptions only, as I believe, to this—first, where the party assessed has no assessable property in the locality; and, secondly, where certain forms and ceremonies have not been complied with. The justices at petty sessions are not a court of appeal against the validity of the rate.

HILL, J.—I am of the same opinion. As there was no appeal against the rate, and it was correct in form, the justices ought to have enforced it.

*Judgment, that the justices do issue their warrant.*(a)

#### REG. v. THE INHABITANTS OF THE PARISH OF LIVERPOOL.

*Poor-law—Order of maintenance of a lunatic—Service and direction of—Wrong direction—Amendment by the sessions—16 & 17 Vict. c. 97, s. 113-116.*

By a local Act of the 5 & 6 Vict. c. 88, entitled "An Act for the administration of the laws relating to the poor in the parish of Liverpool," the churchwardens and overseers of the poor of the parish, together with twenty-one persons to be elected, are constituted a select vestry, and are to "be deemed to be a board of guardians for the relief and management of the poor." An order of adjudication of settlement, and for the expenses of maintenance, was made with reference to a lunatic pauper, and was directed, "To the churchwardens and overseers of the poor of the parish, township, or place of Liverpool, in the county of Lancaster." Against this the churchwardens and overseers appealed, and at the sessions

*objected that the order was wrongly directed, whereupon, upon the application of the respondents, the sessions amended the order, by striking out the direction as it then stood, and substituting "To the guardians of the poor of the said parish of Liverpool:" Held, first, that the order, as it originally stood, was misdirected; secondly, that the justices had no authority to make the amendment.*

This was a case stated by the quarter sessions of the North Riding of Yorkshire upon an appeal against an order adjudicating the settlement of a lunatic pauper, and ordering the overseers of the poor of the parish of Liverpool (his parish of settlement) to pay certain sums of money for his maintenance, &c. Upon the hearing the order was confirmed, subject to the present case.

It appeared that, by a local Act, passed in the 5 & 6 Vict. c. 88, entitled, "An Act for the administration of the laws relating to the poor in the parish of Liverpool, in the county of Lancaster," the churchwardens and overseers of the parish, with twenty-one persons to be elected, are constituted a select vestry by sect. 1, and "shall be deemed to be a board of guardians for the relief and management of the poor."

The order of adjudication was thus directed: "To the guardians of the York Union and the overseers of the poor of the township of Clifton, in the North Riding of Yorkshire; and to the churchwardens and overseers of the poor of the parish, township, or place of Liverpool, in the county of Lancaster."

By sect. 113 of the 16 & 17 Vict. c. 97 (Lunatic Asylums Act), it is enacted, that "if upon the trial of any appeal against any such order, or upon the return to a writ of *certiorari*, any objection be made on account of any omission or mistake in the drawing up of such order, and it be shown to the satisfaction of the court that sufficient grounds were in proof before the justices making such order to have authorised the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order, and to give judgment as if no such omission or mistake had existed." By sect. 116 it is enacted, that "the decision of the court upon the hearing of any appeal against any such order . . . upon the amending or refusing to amend the order as aforesaid . . . shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari*, or *mandamus*, or otherwise."

One of the grounds of appeal took the objection that the order was made upon the wrong parties, for that it should have been directed to the select vestry of the parish of Liverpool under the local Act, and not to the churchwardens and overseers.

At the trial this objection was insisted upon by the appellants. The sessions overruled the objection, subject to the opinion of this court. The respondents then applied to the sessions to amend the said order under the provisions of sect. 113, in case it should be necessary, by inserting in the said order instead of the words, "The churchwardens and overseers of the poor of the parish of Liverpool," the words, "The guardians of the poor of the said parish of Liverpool." This was objected to by the appellants. The sessions, however, made the amendment, subject likewise to the opinion of this court as to whether they had the power to make any such amendment.

Price and A. W. Simpson appeared for the respondents, and contended, first, that the order was properly directed, for that the churchwardens and overseers of the parish of Liverpool were by the local Act a portion of the select vestry. [CROMPTON, J.—That objection was clearly a good one, and I think you very properly applied for an amendment. You must address yourself to that.] Secondly, this error was not only amendable under the Lunacy Act, but under the old law: (*Reg. v. Ambloek*, 4 B. & C. 757; *R. v. Bingley*, 4

(a) This is an important case, for it helps to relieve justices from some of the difficulty in which they find themselves when an objection is taken to the validity of a rate. Clearly, they should not enforce the payment of an invalid rate. But are they first to determine its validity or otherwise? The Q. B. says "No." All that the justices have to do is to see that the rate is good upon the face of it, and if so, to enforce it. In this case it was objected that the rate was bad, inasmuch as it was made to pay past expenses. That was not a question for the justices then to decide. The rate was not informal, and there was no appeal against it, and therefore the justices should have issued their warrant to levy it. The rule is equally applicable to church-rates and all other rates.

Q. B.] KNOWLES v. DICKINSON—*Ex parte* THE LATE CHURCHWARDENS, &C. OF FLEETON. [Q. B.]

R. & Ad. 567; *Reg v. Hellingley*, 28 L. J. 167, M.C.; *Reg v. Heaton*, 28 L. J. 181, M.C.) [HILL, J.—You ought to have shown that the party cited is the proper party, but that is not so here.] It is the same locality that is affected. Thirdly, but however this may be, the decision of the sessions by virtue of sect. 116 is final, and not liable to be reviewed by any court. [CROMPTON, J.—That is where you amend the old order. Here you make a new order on other people. It is not a mistake or omission, but the order is wrong in substance. You are substituting one body for another.] If the justices at petty sessions had had the local Act before them, they would have made the order free from the mistake; there would have been sufficient grounds in proof before them to have enabled them to have made a correct order.

*Pickering*, Q.C., for the appellants, was not called upon.

CROMPTON, J. (a)—The first point is quite clear, that the order was made upon the wrong parties. There were several bodies in the parish, and the order was made on the wrong one. There was no very great hardship upon the respondents, for when they were informed of the error, it was very easy for them to have abandoned the order and have procured a fresh one. But they go to the sessions, and there they ask to amend. Now it seems to me that this is making a new order on different parties, and is not within the meaning of the Act. I do not see where we are to stop if new parties may be made in this way of persons who are not before the court. This is not an omission or mistake within the Act. My notion is, that this Act does not go so far as to authorise the justices to make a fresh order against other parties. This was not a mistake, for the order was in fact directed to the parties intended. I think the quarter sessions could not make such an amendment with reference to parties not before the court.

BLACKBURN, J.—The order is clearly bad. The 97th section points out upon whom the order should be made. This order should have been made upon the guardians under the local Act, and not upon the churchwardens and overseers. If the select vestry had been the body actually served with the order, but misnamed, that may have been different.

*Order of sessions quashed. (b)*

KNOWLES (appellant) v. DICKINSON (respondent.)  
*Coal Mines Inspection Act*—18 & 19 Vict. c. 108—

*Constant ventilation*—*Meaning of*—*Conviction*.

The 18 & 19 Vict. c. 108 (*Coal Mines Inspection*) directs that certain rules shall be observed in every coal mine, rule 1 being that "an adequate amount of ventilation shall be constantly produced at all collieries to dilute and render harmless noxious gases to such an extent as that the working places of the pits and levels of such collieries shall, under ordinary circumstances, be in a fit state for working;" and sect. 11 imposes a penalty for a breach of the rule whilst any mine is being worked:

*Held*, that the mine is still being worked within the meaning of the Act on a Sunday, although nothing is being done there, and that it is a breach of the rule to discontinue the ventilation on that day.

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction under sects. 4 and 11 of the 18 & 19 Vict. c. 108 (*Coal Mines Inspection Act*), for not adequately ventilating a coal-mine.

(a) Cockburn, C.J. and Hill, J. had left the court.

(b) The power of the sessions to amend is, therefore, not infinite. Strictly it is only to do what the word means in common use. The Court may amend an order; but not make a new one; and certainly to change the parties to whom the order is directed is not to cure a defect in an order, but to make a new one on different parties. This distinction will be easily remembered and readily applied in practice.

It appeared that, upon the discontinuance of work on the Saturday afternoon, the ventilation was discontinued and remained so during the Sunday and until the engineer and others were sent down early on Monday morning to prepare the mine for the colliers, when, in consequence of the accumulation of foul air, an explosion took place and personal injury was sustained.

By sect. 4 of the 18 & 19 Vict. c. 108, the following rule is directed to be observed: "An adequate amount of ventilation shall be constantly produced at all collieries to dilute and render harmless noxious gases, to such an extent as that the working places of the pits and levels of such collieries shall, under ordinary circumstances, be in a fit state for working." Sect. 11 imposes a penalty for the breach of the rules in any mine that is being worked.

*Manisty*, Q.C. for the appellant, contended that the words in the rule, "an adequate amount of ventilation shall be constantly produced," must mean to apply to such time only as the pit is being worked, and will not include, as in the present case, the Sunday, when the pit is not being worked.

*Welsby*, for the respondent, was not called on.

The COURT were of opinion that the pit must be considered at work for the purposes of the Act even during the necessary intervals of night and Sunday, and that it could only be considered as not being worked when the use of the pit for working purposes is discontinued.

*Conviction affirmed.*

Monday, April 23.

*Ex parte* THE LATE CHURCHWARDENS AND  
OVERSEERS OF FLEETON.

*Costs*—*Appeal*—*Poor-rate*—*New officers*.

A poor-rate was appealed against, the rate having been made by churchwardens and overseers who had gone out of office. The new officers did not defend the rate, and the sessions quashed it, ordering the respondents to pay full costs. No effort was made to enforce payment of the costs till the day on which these officers quitted office, and they had not paid them previously:

*Held*, that these officers could not apply to set aside the order of sessions, on the ground that they apprehended the appellants might seek to make them individually liable for the costs.

*Held*, also, that the orders were good.

*Field*, on behalf of Core, Marriott and another, moved to set aside an order of quarter sessions of April 4, 1859, and an order of Crompton J., of 12th March 1860, under 12 & 13 Vict. c. 45, s. 18, for the purpose of enforcing the order of sessions. It appeared that on the 22nd Sept. 1858 a poor-rate had been assessed upon the Eastern Counties Railway Company's station, against which they appealed. At the quarter sessions held in Jan. 1859, the overseers not being ready to try the appeal, got it adjourned till the 4th of April, and the court ordered them to pay full costs occasioned by the adjournment. On the 26th March, finding that they could not maintain the rate, they gave notice to the company that they should not defend it. On the 29th March, Core, Marriott and others were appointed churchwardens and overseers; and at the sessions on the 4th April, as no one appeared to support the rate, the sessions quashed it and made an order that the respondents should pay the company full costs. These costs were afterwards taxed, and also the costs of the adjournment, and amounted to 125*l.* 3*s.* 4*d.*; and the order of sessions of April 4, when drawn up, specified 125*l.* 3*s.* 4*d.* as the amount of costs ordered to be paid. In December a formal demand of payment of these costs was made on the new overseers, but no attempt was made to force payment till the 12th March last, a few days before the overseers went out of office, when Crompton, J.'s

Q. B.] HORNSBY AND ANOTHER v. THE VESTRY OF THE PARISH OF ST. LUKE, CHELSEA. [Q. B.]

order was made to bring the order of sessions into this court to be enforced. By the 11 & 12 Vict. c. 91, s. 1, it is enacted, that if overseers contract debts on account of the parish within three months of the termination of their year of office, their immediate successors shall discharge the same. And sect. 2 enacts, that bills of costs for legal proceedings on account of the parish shall be payable out of the poor-rates within the space of one year next following the termination of the proceedings, but not afterwards, unless the Poor-law Commissioners shall so order. Here the appellants made no demand of payment until December last, and they ought to have been more prompt. Besides, the order of the 4th April improperly includes the costs of the adjournment ordered at the preceding January sessions. [HILL, J.—No; the order of the 4th April is for full costs of the appellants, and includes the interlocutory costs of January, which are the same as costs in the cause.] Here it is difficult to see how the parish can be made to pay these costs, as a retrospective rate would be necessary, and the individuals who went out of office in March 1860, fearing that the railway company are going to proceed against them personally, desire to have these orders quashed, which it is submitted are bad. Cases cited: *It. v. Hyde*, 21 L. J. 184, M. C.; *R. v. Hellier*, Ib. 3; and *Reg. v. Hussey*, 3 E. & B. [By the COURT.—There the objections appeared on the face of the orders, and were therefore open, although the orders could not be brought up by *certiorari*.]

COCKBURN, C.J.—I am of opinion that no rule should be granted. The facts are these:—A poor-rate was made and appealed against by the railway company, and while the appeal was pending a change took place in the churchwardens and overseers, and the parties applying for this rule then came into office. After they came into office the appeal was determined and disposed of, and costs awarded to the appellants. The appeal being directed against the parish by the general name of the churchwardens and overseers, and the order of sessions and also the order of Crompton, J. being in the same form, they might be treated as operating against whosoever might be the parish officers for the time being. It appears that there might be a difficulty in enforcing the orders against the present officers, because they would have to make a retrospective rate to provide the necessary funds; but to say that it could not be enforced against the existing officers because they took no part in the appeal, would lead to so much inconvenience that it could not be maintained for a moment. The present applicants knew of the orders being made, and they allowed them to stand without bringing them up by *certiorari* within six months, the period allowed for doing so. Application was made to them for payment, and they allowed the time for making a rate for that purpose to expire; and they have thereby put the appellants in this position, that there is no party against whom they can sue for payment. I therefore think we ought not to grant them this rule.

CROMPTON, J.—The order made by me at chambers was *ex parte*, and the parties are now in the same state as if they had come to oppose that order. The real question is, whether that order ought to have been made. Except in one point of view, the parish could not stir a step without getting rid of the order of sessions. For the purpose of this application, we must assume that the order of sessions was rightly made; but still, if it is bad on the face of it, or the appellants have been guilty of laches in enforcing it, this court would not interfere to enforce it. It appears that the order of sessions is right in itself, because the churchwardens and overseers were the proper parties before the court. We cannot go into any question about the taxation of the costs, whether they are right or not in point of amount. We must now treat this as

a good order of sessions, and not impeached by *certiorari* or want of jurisdiction. If the appellants had stayed their hands upon it until the last day, when the churchwardens and overseers were going out of office, this might have been a grievance; but it rather seems that the laches are not on the side of the appellants, but of these parties, for when the order is made they do not pay, and then it became necessary to make an application to them for payment before they went out of office. I see, therefore, no ground for this rule.

HILL, J.—I am of the same opinion. I wish to be understood as not expressing any opinion that the railway company will be able to have any effective execution under the order in question. It appears that in Jan. 1859 the hearing of the appeal was adjourned to the following quarter sessions, on payment of full costs by the churchwardens and overseers, and that in March 1859 the individuals on whose behalf the present application is made came into office, and the appeal then came on and was determined, and judgment given in favour of the appellants, with full costs to be paid by the respondents; that is, by the churchwardens and overseers in their official capacity, and not as individuals. The railway company take no steps to enforce the order until the December following, when they serve it on the individuals now moving, and nothing further is done until the 12th March 1860, when the order of Crompton, J. was obtained, on a demand of payment, and refusal by parties who have gone out of office. This application is to set aside the orders of quarter sessions and Crompton, J.; but the order of quarter sessions is a perfectly valid order, and even if there are any objections to it *ultra* what appear on the face of it, this court cannot go into them now; and the order of Crompton, J. is also a good order; therefore this application cannot be granted. The judgment of the quarter sessions is not against these parties *qua* individuals, but as officers of the parish. If the railway company seeks to enforce the orders against them as individuals, this court may possibly say that they should have acted more promptly.

BLACKBURN, J.—I am of the same opinion. I confine my judgment to the same point as my brother Hill. I consider these orders unobjectionable. Mr. Field said that the last order for costs was partly made up of interlocutory costs; but that is an objection to the taxation, into which we cannot now enter. If this order is sought to be enforced against the wrong persons, they must apply at the proper time. As this is an application to set aside the orders, it cannot be granted.

*Rule refused.*

Tuesday, April 24.

HORNSBY AND ANOTHER v. THE VESTRY OF THE PARISH OF ST. LUKE, CHELSEA.

*Contract to water streets, &c.—Construction.*  
*Plaintiffs covenanted with defendants to furnish and supply, when required so to do by defendants' surveyor, horses, harness, carts and able-bodied men, at certain rates, from 25th March 1858 to 25th March 1859. Defendants covenanted with plaintiffs that they the plaintiffs observing their covenant, defendants would pay monthly to plaintiffs the sum due in accordance with the said rates for the works so ordered and done. The contract then contained provisions that in case plaintiffs did not supply men, horses, &c., the surveyor of the defendants might hire of other parties the number of men and horses not so supplied, or, if he should disapprove of any of the men, horses, &c., he might dismiss them at once, without notice, and provide other men, horses, &c., and charge the expense incurred thereby to plaintiffs, which should be deducted from any moneys due or to become due to them. And if the watering was not well and sufficiently done, the said surveyor might dismiss any of the men and horses and hire*

Q. B.] HORNSEY AND ANOTHER v. THE VESTRY OF THE PARISH OF ST. LUKE, CHELSEA. [Q. B.]

*others, and the said plaintiffs should pay on demand the costs thereof to defendants. Plaintiffs then agreed not to assign or underlet the contract, and that, if they did not in all things well and truly perform the several matters therein contained, or if they should become bankrupt or insolvent, it should be lawful for the defendants at any time, on giving three days' notice, to declare the agreement null and void :*

*Held, that the contract contained an implied covenant on the part of the defendants to employ the plaintiffs and no others for the performance of the works therein referred to during the specified time.*

This was an action brought by Thomas William Hornsey and Charles Hornsey against the vestry of the parish of St. Luke, Chelsea, for breach of contract. The declaration stated that by articles of agreement duly signed and sealed, after reciting that the plaintiffs had proposed to the defendants to supply men, horses and carts, if the case should be so, for the purpose of watering or cleansing the carriage-ways of, and for the cartage of materials to, the roads, streets and places within the said parish, for the time and upon the terms and conditions thereafter mentioned; and that the defendants had accepted such proposal, and that James Hunter Tuck and James Hornsey had consented to become sureties for the plaintiffs for the due performance by them of the several matters and things therein-after by them agreed to be done and performed; it was witnessed and agreed, and the plaintiffs, for themselves, their heirs, executors and administrators, did thereby covenant and agree with the defendants that they the plaintiffs, their executors and administrators, should and would furnish and supply, when required so to do by the surveyor of the defendants for the time being under his hand, good and well-conditioned horses, carts and men, upon the terms therein set out, from the 25th March 1858 to and including the 25th March 1859; and the defendants did thereby covenant and agree with and to the plaintiffs, their executors and administrators, that they the plaintiffs, their executors and administrators, duly executing and performing all and every the articles, covenants, agreements and things on their parts to be observed, done and performed according to the true intent and meaning of the said agreement, they the defendants would pay monthly to the plaintiffs, their executors or administrators, the sum which might be due in accordance with the thereinbefore-mentioned rates for the said watering and scavenging and cartage so ordered and done as aforesaid, and that in case the plaintiffs, their executors or administrators, should not supply the number of men and horses, or men, horses and carts, as the case might be, at the time and of the description in the said agreement agreed to be supplied with the necessary harness and tackle, it should be lawful for the surveyor of the defendants to hire of other parties the number of men and horses, or men, horses and carts, as the case might be, not so supplied by the plaintiffs, their executors or administrators, or if the said surveyor should disapprove of any of the men, horses and carts so supplied by the plaintiffs, their executors or administrators, he should be at liberty to dismiss the same at once, without being obliged to give notice to the plaintiffs, their executors or administrators, and provide other men, horses and carts, and charge the expense incurred thereby to the plaintiffs, their executors or administrators, which should be deducted from any moneys then due or thereafter to become due to the plaintiffs under the said contract or agreement, and that in case the plaintiffs, their executors or administrators, should use any of the water-carts belonging to the defendants in watering the roads of any other parish, or for any other purpose than watering the roads of the said parish of St. Luke, Chelsea, the plaintiffs, their executors or administrators, should forfeit the sum of 5*l.* of lawful British

money for every cart so used, and for every occasion on which the same should be so used, such sum or sums to be deducted from the contract moneys of the plaintiffs, their executors or administrators, in manner aforesaid, and that if the watering of the said carriage-ways, or any part thereof, should not be well and sufficiently done, in manner and within the times of the said agreement mentioned for that purpose, it should be lawful for the said surveyor, from time to time, forthwith to dismiss all or any of the men and horses, as the case might be, of the plaintiffs, their executors or administrators, and hire other horses and men to perform the watering left undone, or insufficiently or ineffectually done, or not done in manner and at or within the times mentioned in the said agreement for the doing thereof, and that the plaintiffs, their executors and administrators, should pay on demand the full amount of the costs and expenses thereby to be incurred, unto the defendants or their surveyor; if any complaint should be made at any meeting of the said vestry, of any misconduct, neglect or default of the plaintiffs, their executors or administrators, in the performance of the said contract or agreement, they should and would forfeit and pay to the defendants such sum not exceeding 5*l.* of lawful British money, as in the judgment of the defendants should seem reasonable, and which the defendants should accordingly order for every such misconduct, neglect or default, which sum or sums, as all expenses to be incurred for watering left undone or insufficiently done, or not done in manner and at the times aforesaid, should and might be deducted and retained out of the moneys that might then be due, or thereafter become payable to the plaintiffs, their executors or administrators, in pursuance of the said agreement or otherwise; and that, if any water-carts or pumps belonging to the defendants should be damaged by the misconduct or negligence of any of the men, or by the unfitness of any of the horses supplied by the plaintiffs, their executors or administrators, such damage might also be deducted and retained out of any moneys due or to become due to the plaintiffs, their executors or administrators as aforesaid; and that the plaintiffs, their executors or administrators, should not assign or underlet the providing of men and horses, or of men, carts and horses, as the case might be, under or in pursuance of the said agreement; and that if the plaintiffs, their executors or administrators, should do so, or should not in all things well and truly perform the several matters and things in the said agreement contained, on their parts to be done and performed, or if the plaintiffs should become bankrupt or publicly insolvent, it should be lawful for the defendants at any time thereafter, on giving three days' notice to the plaintiffs, their executors or administrators, to declare the said agreement and every matter and thing therein contained null and void; and that the plaintiffs had by the said agreement, and did thereby bind themselves, their heirs, executors and administrators, jointly and severally to the defendants, for the due and full performance by the plaintiffs, their executors or administrators, of all and singular the covenants and agreements in the said agreements contained on their parts to be performed, fulfilled and kept according to the true intent and meaning therein expressed, in the sum of 100*l.* of lawful British money, to be paid to the defendants. Second breach;—and the plaintiffs further say, that during the period of the said contract they were ready and willing to provide and supply certain men, horses and carts, which were necessary and required for watering and cleansing the carriage-ways and for the cartage of materials mentioned in the said contract in that behalf during the period of the said contract, and which by their contract they were bound to have ready, whereof the defendants always had notice; but the defendants wholly neglected and refused to employ the plaintiffs to do the said watering

Q. B.]

FOLLIT v. KOETZOW.

[Q. B.]

and cleansing the said ways, or to carry the said materials, and wrongfully employed others to do so during the period of the said contract. And the plaintiffs further say, that after making the said deed, and after the 25th March 1858, and before the 25th March 1859, the defendants wrongfully put an end to the said agreement, and treated and declared the same to be as null and void, although the plaintiffs had not, nor had either of them, become bankrupt or publicly insolvent, without giving the plaintiffs three days' or any notice of their intention to do so, &c.

Demurrer and joinder in demurrer.

The cause had been tried, and a verdict for the plaintiffs returned, since which the defendants had obtained a rule nisi for a new trial. The rule and demurrer came on for argument together.

Lush, Q.C. (*Keane* with him), for the defendants, contended that they did not covenant to employ the plaintiffs to do such cartage, &c. as might be necessary and required, but only to pay them after certain rates if the case should be so that the defendants did employ them; that the defendants only covenanted to pay for what should be ordered and done, and not that something should be ordered and done to be paid for; that the proposal of the plaintiffs must be taken to be one for doing such cartage, &c. as and when the surveyor should, by writing under his hand, order of them, and that the defendants accepted a proposal in those terms and no other; that the contract is not one for the watering, &c. of the parish of Chelsea, but for supplying so many horses, or so many men and horses, or so many men, horses and carts as might be ordered in writing by an officer of the defendants, and for such length of time only as he might fix beforehand; that the contract is not that the plaintiffs should always have men and carts ready provided, but that they should provide on requisition, that is on reasonable notice, and that the terms of the contract show that such notice exceeds three days; that on the true construction of the deed the defendants are at liberty not to order cartage, &c. of the plaintiffs, or to revoke and annul an order employing them on giving three days' notice in certain cases: (*Smith v. The Mayor of Harwich*, 26 L. J. 257, C. B.; *Pilkington v. Scott*, 15 M. & W. 657; *Emmens v. Elderton*, 4 H. of L. Cas. 624; *Aspden v. Austin*, 5 Q. B. Rep. 671; *Dunn v. Styles*, Ib. 685, were cited.)

Geo. Francis (*Murray* with him), for the plaintiffs, contended that the defendants did covenant with the plaintiffs to employ them, and not to employ others to do the work mentioned in the second breach; that such a covenant was to be implied from the defendants' acceptance of the plaintiffs' proposal from the power reserved to them to employ others in the plaintiffs' default, and to put an end to the agreement; that the effect of the deed is, that the plaintiffs shall do all the watering, &c., required in the parish during the period mentioned in the agreement, and the defendants, by not employing them and employing others, prevented them from performing the contract. The contract is only for work done, and the defendants would not be bound under the contract to pay for work ordered but not executed, since the order might be rescinded. [They were stopped by the court.]

COCKBURN, C.J.—I think Mr. Francis has hit the right nail on the head. I think there was an implied covenant on the part of the defendants to employ the plaintiffs and not others. Much of this contract would be unnecessary and superfluous if it had been contemplated to put an end to it at any time. It cannot be supposed that one side intended only to be bound without an equivalent binding on the other. The court will not by implication draw a conclusion which does not arise; but whenever you can see an intention of the parties that an implication should be drawn, we are then to draw such implication as may

fairly arise. Then to apply that rule to the present case: defendants might, as and when they pleased, cease to employ plaintiffs on giving them three days' notice. That clearly shows that the contract meant something more than to bind the plaintiffs to find men, horses and carts, and leave it open to the defendants to employ them or not as they pleased. The defendants, by employing other parties, have not performed their contract, and the plaintiffs are entitled to judgment.

CROMPTON, J.—I am of the same opinion. We must first see what is within the four corners of the contract. Mr. Lush says there are no express words to bind the defendants; but let us see: the plaintiffs are to furnish and supply, when required so to do by the surveyor of the said vestry for the time being under his hand, good and well-seasoned horses and scavengers' and other carts, and able-bodied men, at certain prices therein mentioned; then there are stringent covenants on the part of the plaintiffs to do the work, and the defendants covenant to pay plaintiffs monthly during the continuance of the contract. It was clearly contemplated then, it seems to me, that both parties should be equally bound; and further it is strong evidence that we find that, if the horses supplied were not sufficient and the defendants were dissatisfied with the men, they might employ others; that I think is conclusive. I think it means that the defendants may in such case employ other persons and charge the cost to the plaintiffs. But besides, there is an express power, if the work is not properly done, to set the contract aside on three days' notice; that would not be necessary if the defendants' construction is right. By saying parties could do certain things in certain events, it is saying they cannot do them in certain other events. I think, therefore, our judgment should be for the plaintiffs.

*Judgment for plaintiffs on demurrer—Rule for new trial discharged.*

Wednesday, April 25.

FOLLIT (appellant) v. KOETZOW (respondent).

*Bastardy—Affiliation order—Contract by mother to receive money in satisfaction—Right of child—7 & 8 Vict. c. 101.*

*A putative father, before the mother's applying for an affiliation order under 7 & 8 Vict. c. 101, contracted with the mother to pay her 5s. per week for the support of the child, and paid two years' amount in advance, and afterwards contracted with her to pay, and did pay her 10l. to release him from all future payments:*

*Held, no bar to the mother's afterwards applying for, and the magistrate's making, an affiliation order under 7 & 8 Vict. c. 101:*

*Held, also, that the magistrate was bound to consider such contract along with all the other circumstances to guide his discretion in adjudicating.*

This was an application made by the said Susannah Koetzow for an order under the 7 & 8 Vict. c. 101, to compel the said George Follit to maintain a certain bastard child, of which the said Susannah Koetzow had been delivered on the 24th Jan. 1856, and of which child the said G. Follit was alleged by her to be the putative father.

Upon the hearing of a summons issued by me on the 28th May 1859, calling upon the said G. Follit to show cause why he should not be adjudged the putative father of such child, the complainant S. Koetzow swore that he was the father of such child, and that the defendant had made payments to her for the maintenance of such child within twelve months of its birth, which facts were admitted by the said defendant; and I thereupon made the usual order to pay 2s. 6d. per week for the maintenance of such child.

The defendant's attorney then contended that the defendant was not liable to maintain such bastard child, and that no order could be made for the maintenance

[Q. B.]

FOLLET v. KOETZOW.

[Q. B.]

of such child for the reason that the said defendant had previously to the 23rd Oct. last past, contracted to pay to the said complainant the sum of 5s. per week for the support of the said child, which contract he alleged he had performed up to the 23rd Oct. last past, and paid her in advance sufficient to maintain the said child for two years then to come, and also that the said defendant had on such last-mentioned day paid to the said complainant the further sum of 10l., in consideration of which the said complainant had, as he stated, agreed to release the said defendant from all future payments in respect of the said child. And I thereupon stated my opinion to be, that such contract was void as against public policy, and I could not entertain it; but I promised to consider the point, and give judgment on the 14th June last past.

On the said 14th June last past the defendant's attorney again appeared before me and urged that, even if such contract was not binding between the parties, yet I could exercise my own discretion in the matter, inasmuch as the Act of Parliament required me to decide "after considering all the circumstances of the case," and that I might be influenced by the fact that the father had paid more than double what I had power to order for the next four or five years. Being of opinion that I had no discretion in the matter, as the defendant was proved to be the father of the said child, I refused to alter my determination. I felt strengthened in that determination by it seeming to me clear that all the clauses relating to bastards in the 7 & 8 Vict. c. 101, have but one object, namely, the maintenance and protection of the child; and therefore this contract to pay, or having paid, a sum of money to the mother, which may be expended or lost long before the child reaches the age when the weekly payments under a magistrate's order cease, is of no avail. The mother is only the guardian of the child, and, under circumstances, another guardian may be appointed. It seemed to me that the child and the parish to which it might become chargeable ought to be my first consideration, and that the payment of a sum of money to the mother was no answer to my assuming jurisdiction. I therefore made the order.

The question for the opinion of the court is, had I any discretion under the Act of Parliament to entertain the said contract attempted to be set up by the said defendant, as aforesaid, the paternity of the said child having been proved to my satisfaction.

P. BINGHAM.

Police-court, Marlborough-street, 8th Nov. 1859.

*Coleridge* for the respondent.—This contract is considered to be valid, and not void on the ground of being against public policy: (*Pope v. Sale*, 7 Bing. 477.) Yet, though a valid contract, it is no bar to the magistrate proceeding to make an order on the putative father under the 7 & 8 Vict. c. 101: (*Middleham v. Bellamy*, 1 M. & S. 310. [COCKBURN, C.J.—It is put that, although under the old law the parish officers might intervene, yet, since the 7 & 8 Vict. c. 101, it is entirely optional with the mother to institute proceedings; and that this is a right given to her for her own protection.] The application to a magistrate for an order under 7 & 8 Vict. c. 101, might possibly deprive her of her rights under the contract; but it does not preclude her from applying to the magistrate: (*Crowhurst v. Laverack*, 8 Ex. 209; *Jennings v. Brown*, 9 M. & W. 496.) The mother cannot effectually release the putative father from the statutory obligation. The maintenance of the child is specifically referred to by the Legislature: (sects. 5, 7, 8.) No doubt the magistrate may take the agreement into his consideration, and see whether the bargain is an improvident one or a fair one. [COCKBURN, C.J.—Suppose, after an order is made for payment of a weekly sum, the mother takes a lump in satisfaction, or, in other words, discounts the weekly payments, and afterwards becomes lunatic, or

dies, then it is clear from sect. 5 that the parish officers might intervene for the maintenance of the child.] Yes. The policy of the statute is to protect the parish and to provide for the maintenance of the child. [HILL, J.—The statute contemplates only one species of contract, viz., the mother's marrying another man, as putting an end to the liability of the putative father.]

*Parry*, Serjt. (*Gibbins* with him).—By the 4 & 5 Will. 4, c. 76, s. 71, the burden of maintaining a bastard child is entirely thrown on the mother; and the 7 & 8 Vict. c. 101, imposes the liability of the putative father to this order for the relief of the mother only, and it is declared that relief to the child shall be deemed in law relief to the mother. The obligation of the father to this liability is a civil one, and he is admissible therefore as a witness on his own behalf. Therefore, on the maxim *quilibet potest renunciare juri pro se introducto*, the mother is competent to make a contract to release the putative father from the obligation. [BLACKBURN, J.—If this is the mother's right, and the weekly payments are to be her money, why, under sect. 5, should they cease to be made to her when she is in prison?] It is only when the mother is under legal incapacity that the parish officers can interfere; but now the mother is making the application, and the question is, how is her right affected? Until an order is made, the mother is the mistress of the whole transaction, and cannot be compelled to apply, and if after an order she deserts her child, the money does not cease to be payable to her.

COCKBURN, C.J.—As regards the main question, I am of opinion that what took place between the mother and the putative father was not sufficient to oust the magistrate of his jurisdiction to make the order under the 7 & 8 Vict. c. 101, s. 3. The statutable right given to the mother to apply for the order, and to the magistrate to make it, is of a peculiar character. No doubt it is entirely in the choice and discretion of the mother to apply for the order, and if she does not choose to apply, neither the parish officers nor any other person can compel her to do so. At first sight it would seem to be a personal right for her own benefit, but when the object of the Legislature and the language of the statute are looked at, that view cannot prevail. The intention of the Legislature was, that when once the application has been made and the order obtained, the weekly payment is to be not merely for the relief of the mother, but the main object was to be the maintenance of the child. The first section of the statute speaks of it as an order for the maintenance of the bastard child, showing that something was intended beyond the mere relief of the mother. The magistrate held that the agreement between the mother and the putative father was void; but he was going too far in determining that, for the question now to be decided is, whether the agreement takes from the magistrate his discretionary power, "having regard to all the circumstances of the case," to make an order on the putative father. Now, looking at the policy of the statute, I do not think that a bargain of this sort between the mother of a bastard child and the putative father ousts the magistrate of his discretionary power to make an order. If by such an agreement before making an application the mother can oust the jurisdiction of the magistrate, she may also by such an agreement annul the effect of such an order after it has been made. I am, however, of opinion that she cannot do so, and under all the circumstances I think the case should go back to the magistrate to exercise his discretionary power, taking this very material agreement into his consideration along with the other facts to guide him.

CROMPTON, J.—I am of the same opinion. First, was this agreement a bar to the magistrate's proceeding to make an order on the putative father? and secondly,



Q. B.]

MACKAY v. FORD—HODGES v. BENNETT.

[Ex.]

had the magistrate a discretion to consider this agreement in making the order? There are no words in the statute that meet a case like this. The magistrate is to look at all the circumstances of the case. The order is to be for weekly payments by the putative father. He is to consider whether an arrangement of this kind would not defeat that. The case is put on the maxim *quilibet potest renunciare juri pro se introducto*, and it was urged that this was given as relief to the mother, and she might release it. But is this a mere right of the mother, and is it not also for the benefit of the child? The words of the statute are for the support and maintenance of the child, and sect. 7 shows that this is clearly not the right of the mother merely, for after the mother's death or incapacity, as enacted, the payment is to be enforced by the board of guardians, and made to some person appointed by the justices. The object of the statute, then, might be defeated if the mother, for an insufficient, or what perhaps is worse, a lump sum, might contract with the putative father to oust the discretion of the magistrate under the statute. I therefore think that this agreement was no bar to the magistrate's proceeding, and that the case must go back to him.

HILL, J.—It is admitted that the agreement by which the mother agreed to take upon herself the maintenance of the child, and to forbear to apply for an order on the putative father, is a good agreement, but the question is, whether it takes away the power of the magistrate to make an order on him. It is necessary to see what power the magistrate has for this purpose. He has a power, first, absolutely and without any discretion to adjudge the man to be the putative father; and secondly, to make an order, if he sees fit, having regard to all the circumstances of the case, on the putative father for the payment to the mother of a sum of money weekly, &c. The statute treats it as a matter entirely for the discretion of the magistrate under all the circumstances. Therefore, the utmost such an agreement as this can come to is, that it is to be treated as a strong fact for the consideration of the magistrate in adjudicating as to making an order. I think that there has been a miscarriage in this case, and that the agreement is a valid one, and that the magistrate ought to have taken it into his discretion and exercised his discretion upon all the circumstances as to making an order.

BLACKBURN, J.—I am of the same opinion. There is no enactment that the mother may release or bar her right to apply for such an order. If the order had been for her sole exclusive benefit, I should have inclined to act on the maxim *quilibet potest renunciare juri pro se introducto*, and to hold that, as she had released her right, she was precluded from applying for the order. But the order is not for her sole personal benefit at all: it is partly for her benefit and partly for the benefit of the child. Sect. 5 shows that it is not for her personal benefit, but as a means to enable her to maintain the child. It is called an order for the maintenance of the child. That being so, the mother ought not to be able to renounce the right given by the statute. The justices may in every case, if they see fit, proceed to make an order on the putative father. That is what the Legislature intended, and what it has said. The case must go back to be reconsidered. *Case remitted accordingly. (a)*

(a) Hard and unjust as is this decision towards the father, it would be still more unjust towards the public had it been decided otherwise, for the mother might then have obtained a handsome bonus from the father, spent it, and afterwards thrown upon the parish the charge which she had received money to defray. The weekly payment effectually prevents this wrong being done.

## COURT OF EXCHEQUER.

Reported by F. BAILEY, and JOHN DUNBAR, Esqrs.,  
Barristers-at-Law.

Monday, April 16.

MACKAY v. FORD.

*Action of slander against an attorney for words used by him when acting as an advocate at a police-court in defence of a client summoned to attend here.*

This was an action of slander, tried at Chester, before R. Gurney, Esq., commissioner. The defendant was an attorney, and the action was brought against him for words used by him when he attended before a police-court to appear as an advocate for certain persons who had been summoned there. The plaintiff had been employed by one Mr. Jones to sell wines, &c., for him upon commission, and that he was to hold the Albion vaults upon the terms agreed to. Jones afterwards assigned his goods and the premises to assignees for the benefit of his creditors; and men, then acting under the direction of the assignees, turned out Mackay by force, who then summoned them to the police-court for it, and the defendant appeared there on their behalf. In the course of his observations it was stated that he said, "Mackay claims certain rights under the agreement produced by Mr. Bridgman, and of which he has read an abstract; but I think we have sufficient reason to terminate the connection therein referred to. Mr. Jones has been plundered by this man to a frightful extent." A verdict was found for the plaintiff for 20*l.*, with leave reserved to the defendant to move to set it aside and enter it for defendant.

Gifford now moved accordingly pursuant to leave reserved, on the ground of misdirection, and that the verdict was against evidence. No action will lie for words spoken under these circumstances. [MARTIN, B.—That depends upon whether they were properly relevant to the subject-matter of the inquiry. BRAMWELL, B.—It is not correct to call it misdirection where the learned judge at the trial gives leave to move for the point reserved to be determined by the court.] The learned commissioner should have determined the point himself, and not have left it to the jury. In *Hodgson v. Scarlett*, 1 B. & Ald. 232, it was decided that an action for defamation will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue.

Rule nisi.

Wednesday, April 25.

HODGES (appellant) v. BENNETT (respondent).

*Bastardy appeal—Summary proceedings before Justices Act, 20 & 21 Vict. c. 43—Corroborative evidence.*

*The mother of an illegitimate child summoned the putative father before the justices, and proved, by her own oath, that he had, within twelve months from the birth of such child, paid money for its maintenance, and the justices made an order upon him to contribute to its support, without the evidence of the mother upon that point being corroborated at all; the putative father appealed:*

*Held, that the Act of Parliament, 7 & 8 Vict. c. 101, did not require the mother's evidence to be corroborated in this particular, and that the justices were right.*

This was an appeal under the 20 & 21 Vict. c. 43 (the Summary Proceedings before Justices Act), against the determination of justices in petty sessions, making an order of affiliation upon the appellant. The appellant had been summoned by the respondent as the alleged putative father of her illegitimate child, after the birth of such child, under the 7 & 8 Vict. c. 101; the information in the first instance, it appeared, although in writing, was not upon oath. The summons was issued, and on its return the woman, by

[Ex.]

HODGES v. BENNETT—BIGNOLD v. CLARKE.

[Ex.]

her testimony only, proved that the appellant had, within twelve months from the birth of her child, paid money for its maintenance, and the justices thereupon, without having her evidence corroborated in that particular, granted the order, her evidence having been corroborated in other respects, against which the reputed father appealed.

**D. D. Keane** for the appellant.—The first question is whether the information in the first instance should have been upon oath; but perhaps, after the decisions in *R. v. Berry*, 1 Bell's Cro. Cas. 46; and *R. v. Johnson*, 168, that point will not be argued. The 2nd section enacts that any single woman who may be the mother of, or who may be delivered of a bastard child after the passing of the Act, or who has been delivered of a child within the period of six calendar months before the passing of this Act, may, either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of such child; and if such application be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father of such child, and such justice of the peace shall thereupon serve his summons to the person alleged to be the father of such child to appear at a petty sessions to be held after the expiration of six days, at least, for the petty sessional division, city, borough, or other place in which such justice usually acts. Sect. 3. That after the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at the last place of abode, six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child, &c. The proof before the justices was, that the appellant had within the twelve months next after the birth of such child paid money for its maintenance. This was proved by the oath of the respondent alone, uncorroborated by any other testimony upon that point. The other question in the case was, whether the evidence of the mother should not have been corroborated in that respect by other testimony. The justices made an order upon the appellant, fixing the paternity of the child upon him, and ordered him to pay a sum of money weekly to the respondent for its maintenance upon that uncorroborated evidence of its mother the justices acted. If this were correct, the father of an illegitimate child may, ten or twelve years after its birth, go before a justice and depose to a person having within twelve months after the birth of her child paid money for its maintenance, and upon her oath alone, uncorroborated by any other testimony, give the jurisdiction.

No one appeared on behalf of the respondent.

**POLLACK, C.B.**—The only question for us to determine is, whether the respondent was bound to produce before the justices corroborative evidence of the payment of the money by the appellant, which she proved to their satisfaction that he had paid for the maintenance of her illegitimate child within twelve months next after the birth of such child. I think not; and that the justices were right.

**MARTIN, B.**—I also think the justices were clearly

[Mag. C.]

right. There is nothing whatever in the 2nd section to show that the woman is to have her evidence corroborated upon the subject of payment of money by the man towards the support of the child within twelve months of its birth, nor a word in the Act of Parliament about this confirmatory proof. [The learned Baron read the 3rd section.] The evidence of the mother to be corroborated in some material particular by other testimony, to the satisfaction of the said justices, has reference to what takes place at a much earlier period; when, where, and under what circumstances the parties have been seen, enabling the justices to determine as well as they can after hearing the evidence on both sides, on which side it is the truth lies. I see nothing in the Act that induces me to think corroborative evidence of the woman's testimony is required upon the point here raised.

**BRAMWELL, B.**—The first question raised in this case I understand to be given up; and we need not answer it. As to the second, the justices were right in not being obliged to require corroborative evidence of the mother's testimony as to the payment of money by the alleged putative father within twelve months of the birth of the child, under the Act of Parliament.

**WILDE, B.** expressed a similar opinion.

*Appeal dismissed with costs. (a)*

Tuesday, April 17.

**BIGNOLD v. CLARKE.**

*Distress—Damage feasant—Duty of distrainer to provide a proper pound.*

*A distrainer is bound to provide a proper pound; although he place the distress in the manor pound, he is liable to any injury to it, unless the pound was in a proper condition when he placed it there.*

This was an action for abusing a distress. The declaration alleged that the distress was placed in a pound which was improper and insufficient, as the defendant well knew. The case was tried at Westminster during the sittings, after last term, before Martin, B.; it appeared that eighty sheep had been distrained damage feasant and placed in the manor pound of the manor of Twickenham. A number of the sheep afterwards died. The learned judge left the question to the jury, whether or not the pound was improper and insufficient? The jury found in the affirmative, and returned a verdict for the plaintiff.

**Chambers, Q.C.** now moved for a rule to set aside the verdict as against the evidence, and also on the ground of misdirection. The learned judge ought to have told the jury that the distrainer was not responsible for the state of the pound; he had placed the distress in the manor pound, which was the proper place. The declaration in this case contains an allegation that the defendant well knew the pound was improper and insufficient; there was no proof of any such knowledge, and the case is therefore distinguishable from *Wild v. Sheer*, 8 Ad. & Ell. 547; (Doctor & Student, Co. Litt. 47; Bacon's Abr. tit. "Distress.")

**POLLACK, C.B.**—I think there ought to be no rule. The learned judge was quite right in his direction to the jury; the distrainer is bound, at his peril, to provide a fit and proper pound. If the manor pound is not convenient and sufficient he must find another.

**MARTIN, BRAMWELL and WILDE, BB.** concurred.

*Rule refused.*

(a) The corroboration required is of some material particular in the proof of connection—such as being seen together in suspicious places, communications in the nature of confessions and such like. Payment of money is made substantial evidence of the paternity by express words, without reference to corroboration, and the corroboration required by the Act is limited to the general proof thereby required, and does not extend to the special evidence.

[SCOTLAND.]

BANNATYNE v. MACLULLICH AND FRASER—SCANNELL v. FRENCH.

[IRELAND.]

## Scotland.

## HIGH COURT OF JUSTICIARY.

BANNATYNE v. MACLULLICH AND FRASER.

*Night Poaching Act—Complaint.*

The complainer, a shoemaker at Rothesay, was charged, in a complaint at the instance of the defenders, who are procurators-fiscal there, with an offence under the Night Poaching Act. Their complaint averred that Bannatyne and another person did—(1) "unlawfully enter with one or more nets, engines, or other instruments for the purpose of taking or destroying game, in or upon one or more outlets, gates of, or upon the public road," in a locality there described, near a certain field, "and did then and there kill or destroy a hare; (2) or otherwise, time above libelled, unlawfully enter in or upon the said field above libelled, with one or more nets, engines, or other instruments, for the purpose of taking or destroying game." The justices convicted Bannatyne of unlawfully entering," &c., and of "unlawfully killing" the hare, and also of the second offence: and sentenced him to three months' imprisonment with hard labour. The suspender pleaded that the complaint was informal, in respect that the essential word "unlawfully" was applied not to the killing of the hare, but to the entering upon the public road, which was not an unlawful act, and also because the suspender was convicted of both offences cumulatively, which were only charges as alternative in the complaint. Lord Ardmillan thought there were two objections conclusive against this conviction. He was not for giving effect to the objection as to the date of the warrant, as no objection had been taken at the time. But the first fatal objection to the regularity of the procedure was, that the complainer had applied the word "unlawfully" to entering upon the public road, which could never be unlawful, and had omitted it as to the killing of the hare, which might be an unlawful act. The justices had inserted the word "unlawfully" to apply to the killing of the hare, but neither in reason nor in grammar could that be done. The second objection was, that the charge was laid alternatively, and the finding of guilty was cumulative. He held it as settled that where a public prosecutor says in his complaint—"You did one thing or you did another thing," that the finding that the one thing was proved excluded the finding of the other proved; and the justices had no more right to convict of both these alternative offences than they would have had to convict of an offence which was not charged at all. The other judges concurred, the Lord Justice-Clerk observing that it was difficult to say whether the complaint or the conviction was the most objectionable. The complaint was drawn in a most slovenly manner, and it showed that the person who wrote it had not been at the pains to read and understand the statute. The conviction was disconform to the charge, and showed an attempt on the part of the justices to amend in the conviction a plainly irrelevant complaint, and also so great an ignorance of the usual forms of criminal courts as to give a cumulative finding of guilty on an alternative charge.

BIRREL v. JONES.

*Day Poaching Act—Apprehension.*

The complainer was convicted, under the 8th section of the Day Poaching Act, by the Annan Justices, of assaulting John Affleck, gamekeeper to Colonel William Graham of Mossknowe, when trespassing in pursuit of game, on Dornoch Moss, he having been convicted immediately before of trespassing in pursuit of game on the 1st section of that Act. He contended that, to make a relevant charge under the statute, it was necessary to state that he was in the pursuit of game

without the leave of the proprietor; and also that the gamekeeper had no right to apprehend any one unless he had required the person forthwith to quit the land, and also to tell his name. The Lord Justice-Clerk said that the objection that it was not stated that the complainer was trespassing without leave was answered by this, that a trespass can't take place at all unless without leave. The other objection, that this complainer was not asked his name, surname and place of abode, would land the construction of the statute in inextricable absurdity. The true rule of construction evidently was *applicando singula singulis*. Whoever refuses to tell his name when required is an offender, and he who refuses to quit the land when required to do so is an offender also. Going through the gamekeeper's catechism in the manner proposed, would be both difficult and absurd. Before the gamekeeper has got through half his questions, the man would of course run off. In its first and rough form the conviction was defective, and might not have stood; but it was corrected in the second form, and he was far from holding that justices, if they found a conviction bad before anything was done on it, might not put it in the fire and have one drawn in correct form. The other objection, that one justice only signed, was one on which he had as yet no opinion, and there was a need for further argument and for information concerning the statutory history of the constitution of J. P. Courts. The further consideration of the case was accordingly postponed.

## Ireland.

## COURT OF QUEEN'S BENCH.

Reported by JOHN HEKLET and WILLIAM BARLOW, Esqrs., Barristers-at-Law.

Friday, Jan. 20.

SCANNELL v. FRENCH.

*Summary Jurisdiction Act, s. 9—Removal of obstruction to the flow of water off a public road—Construction.*

*The owner of land contiguous to a public road stopped up a gap in the ditch separating his land from the road through which gap the water off the public road had been accustomed to flow:*

*Held, that this was not an obstruction which he could be called upon to remove under the 9th section of the Summary Jurisdiction Act, 14 & 15 Vict. c. 92.*

This was an appeal brought under the 20 & 21 Vict. c. 43, against an order made by the magistrates of the county of Cork, and upon a case stated for the opinion of the court. This case depended upon the construction of the 9th section of the Summary Jurisdiction Act, 14 & 15 Vict. c. 92. It appeared from the evidence given before the magistrates at the petty sessions of Douglas, in the county of Cork, that the land of the appellant Scannell bordered on the public road leading from Cork to Kinsale; that the portion of this road adjoining the appellant's land was subject to be overflowed in rainy weather, and that, previously to the obstruction complained of, the water so accumulated flowed off the road through a gap in the ditch separating the road from the appellant's land, and over his ground; and that this gap was used by the appellant for taking manure into his land. In Oct. 1859, the appellant finding his land was injured by the overflow of the water, stopped up the gap, and so caused the obstruction complained of. On 19th Nov. the respondent French, the contractor for the repair of that part of the road where the obstruction took place, served a notice upon the appellant under the 9th section of the Summary Jurisdiction Act, requiring him to remove "any matter or thing obstructing or preventing, or in any way whatsoever causing the ob-

[IRELAND.]

REG. v. SAMUEL RIALI, &amp;c.

[IRELAND.]

struction or prevention of the full, free and uninterrupted course or flow of the water running in, upon, or through and over his lands and premises." The obstruction not having been removed, pursuant to this notice, the appellant was summoned to appear before the justices of the peace, at the petty sessions of Douglas, and show cause why such obstruction was not removed; and witnesses having deposed to the facts more detailed, the magistrates, on the 15th Dec. 1859, made an order requiring the appellant "to remove the obstruction to the passage of the water off the high road complained of, within ten days, as required by the notice of the 19th Nov., according to sect. 9 of the 14 & 15 Vict. c. 92." Against this order the present appeal was brought; and the case stated by the magistrates under the 20 & 21 Vict. c. 43, s. 2, was as follows:—"We ground our decision on the evidence, as taken on the hearing of the case, a copy of which is herewith forwarded; that the defendant John Scannell's house and garden adjoins the road at the lowest part of it; that the water flooding the road opposite his house always ran through the ditch into his land, and through his ground into Mrs. Landers'; that there is no other way for taking it off the road, when flooded in rainy seasons, and at such times the road must remain flooded if the passage into defendant's land is not left open as heretofore; and our decision was grounded on the jurisdiction given to the magistrates under the 14 & 15 Vict. c. 92, s. 9, and was unanimously signed by six magistrates."

*Sullivan, Q.C.* and *H. Jellett* appeared for the appellant.

*H. Jellett*.—This order was made under the 9th section of the Summary Jurisdiction Act, 14 & 15 Vict. c. 92. The 1st clause of the 9th section is as follows:—"Any owner or occupier of any lands contiguous to any public road, who shall omit to scour any ditch or drain leading from any such road, so as to allow the water to pass away, within ten days after notice shall have been given to him so to do by the county surveyor, or by the contractor for the repair of such road, or who shall suffer the passage of the water to be obstructed by making or leaving any way or passage from any road into the adjoining lands, or into his house, without a sufficient pipe, sewer, or gullet underneath it, shall be liable to a fine not exceeding twenty shillings." There are two classes of offences for which the magistrates have jurisdiction to impose a penalty: the first for omitting to scour a ditch or drain; and the second for suffering the passage of the water to be obstructed, by making or leaving any way or passage from any road into the adjoining lands, without a sufficient pipe underneath it. At the investigation before the magistrates, the witnesses agreed that there was no ditch or drain from the road through the appellant's ground; and consequently this case cannot come under the first class; nor can it come under the second class, as that branch of the class does not contemplate offences of this nature at all. [*O'BRIEN, J.*—You contend that you are entitled to stop the flow of the water from the ditch of the road into your land, except in cases where there is a ditch or drain leading from the ditch of the road through your land, but not to prevent the flow of the water parallel to the road?] Certainly; the notice and the summons being for the removal of an obstruction, must point to an obstruction under the second branch of the clause; and this does not fall under the first of obstructions contemplated by that part of the section. [*HAYES, J.*—The word "underneath" in that section confirms your view of the case.]

*W. O'Brien* for the respondent.—This Act should receive a liberal construction; and in interpreting this section we should adopt a rule of interpretation which has been followed from the time of Lord Coke—that an Act of Parliament is to be construed so as to advance the remedy, and not to defeat the object of the

Act. [*HAYES, J.*—Is not this a penal statute, which must be construed strictly?] We are now dealing with the Act in its remedial, and not in its penal character. The notice and the order of the magistrate, taken together, comprise every offence falling within the 9th section. Any objection to the formality of the proceedings is cured by the 24th section of the Summary Jurisdiction Act.

*Sullivan, Q.C.* was not called on to reply.

By the COURT.—The 9th section of the Summary Jurisdiction Act is specific as to the nature of the obstruction which an owner of land contiguous to a public road can be called on to remove. We consider that the obstruction complained of in this case does not fall under the class of obstructions specified by that section. We are therefore of opinion that the order of the magistrates below should be reversed.

Jan. 23 and 24.

REG. v. SAMUEL RIALI and WILLIAM H. RIALI, AND re JOHN FETHERSTON (a Lunatic.)

*Committal of a lunatic—Habeas corpus and certiorari by the father of a lunatic—Warrant of justices, and order of Lord Lieutenant—Delay—Costs—* 1 & 2 Vict. c. 27, s. 1; 8 & 9 Vict. c. 107, s. 10.

*To warrant the committal of a person as a dangerous lunatic, by justices of the peace, the informations must strictly comply with the provisions of stat. 8 & 9 Vict. c. 107, s. 10.*

*Where an application is made for a certiorari, as auxiliary to a habeas corpus, to quash the proceedings under which a party is in custody, the certiorari will not be granted unless it appear necessary for the purposes of the habeas corpus. The proper remedy is by the latter writ, upon the return to which all the proceedings will appear before the court.*

*The father of a person committed to gaol as a dangerous lunatic, by justices of the peace, has no locus standi in this court, so as to entitle him to apply for a certiorari to quash the proceedings by the justices, unless it be applied for as auxiliary to a habeas corpus, and it appear to be necessary for the purposes of the latter writ.*

*To entitle a party to a writ of certiorari, it must appear that due diligence has been used in bringing the matter before the court. This court will make delay a ground of refusal.*

Nov. 2.—*Harris, Q.C.* obtained a conditional order for a writ of *certiorari* calling on Samuel Riall and William H. Riall, two of her Majesty's justices of the peace for the county of Tipperary, to show cause why "all and singular the informations, depositions, warrants, committals, orders, and all other matters and things taken or made before said justices, of and concerning one John Fetherston, an alleged lunatic, on or about the 14th day of January 1859," should not be removed into this court for the purpose of being quashed, "on the grounds that the committal signed by the said justices, on the 14th January 1859, was not warranted by any information sworn before the said justices, as required by the statute in that case made and provided." On the same day another conditional order for a writ of *habeas corpus* was obtained, directed to the governor of the Clonmel district lunatic asylum, "commanding him to have before this honourable court the body of John Fetherston, together with the day and cause of his detention," &c., unless cause shown.

It appeared that on the 14th Jan. 1859 John Fetherston had been committed to Clonmel gaol, as a dangerous lunatic, by Samuel Riall and William H. Riall, two of the justices of the peace for the county of Tipperary, upon informations sworn by Ralph Bernal Osborne and Patrick Ryan; and that by a warrant of the Lord Lieutenant, dated the 14th March

[IRELAND.]

REG. v. SAMUEL RIALI, &amp;C.

[IRELAND.]

1859, the said John Fetherston had been transferred to the Clonmel district lunatic asylum, where he still remained; and it was upon the insufficiency of the informations to warrant the committal that the present application for a writ of *certiorari* and for a writ of *habeas corpus* was grounded. The informations of Ralph Bernal Osborne and Patrick Ryan were as follows:—

"The information of Ralph Osborne, of Newtown—who saith, on his oath, that the complainant was walking in his demesne at Newtown, in the county of Tipperary, with Sir John Keane, Bart., and others, when the defendant John Fetherston, on being asked to leave the grounds he was trespassing on, refused, saying, at the same time, he was the lawful possessor; on assistance arriving, which I sent for, he again refused to leave the ground, and on Patrick Ryan and the gardener arresting him, he violently assaulted both, and kicked Ryan in the mouth; he also threatened complainant. And said informant binds himself to attend," &c.

"The information of Patrick Ryan, of Derinlain, in the county of Waterford, employed by Ralph Osborne, Esq., at Newtown, in the county of Waterford, who, being sworn, saith, that on this day, the 14th Jan. 1859, he was at his employment at Newtown, above mentioned, when Mr. Osborne called upon him to remove a man named John Fetherston, who had come into said grounds at Newtown, and would not leave the premises when called upon so to do; that the said Fetherston refused to leave, and informant then quietly caught hold of him, to remove him; that the said Fetherston then assaulted informant by striking him with the heel of his shoe in the mouth."

The committal warrant directed by the magistrates to the governor of Clonmel gaol, was in these terms:

"Whereas Ralph Osborne has sworn informations before us, stating facts from which it appears that John Fetherston has been discovered and apprehended under circumstances denoting a derangement of mind, and a purpose of committing an indictable crime—that is to say, on this day he went to Newtown, in the county of Tipperary, the property of said Ralph Osborne, and claimed the same as his own, and threatened to injure the said Ralph Osborne and the gardener, and did assault Patrick Ryan and the gardener; and whereas we have called to our assistance John M. Dowsley, Esq., being a legally qualified surgeon and M.D., and on view and examination of the said John Fetherston, and on the informations of the said Ralph Osborne and Patrick Ryan, we are satisfied that the said John Fetherston is a dangerous lunatic."

The affidavit of George Fetherston, the father of John Fetherston, on which the two conditional orders were obtained, after setting forth the facts above detailed, stated that in the month of June 1857 his son John Fetherston received a severe injury in the head, and that shortly afterwards he appeared to labour under a delusion that the property of the said Ralph Osborne was forfeited by him; and that his said son sometimes walked about the demesne of the said Osborne, which he was permitted to do until twelve months ago, when he was stopped by the gardener of the said Ralph Osborne; that ten days afterwards, viz., in the month of Oct. 1858, he was arrested in deponent's house, and brought before the justices on a charge of being a dangerous lunatic; that at the hearing of the said case, John M. Dowsley, surgeon and M.D., was examined, and stated that deponent's son was quite harmless, though he laboured under a delusion, which time would wear away, and that imprisonment would have a dangerous effect; and that on the evidence of the said John M. Dowsley the complaint was dismissed. The affidavit further stated that the deponent, ten days after the committal of his son, employed a solicitor to take the necessary proceedings to have the matter brought forward at the

next spring assizes, but, by the neglect of the solicitor, no proceedings were taken; and that in the month of April following deponent employed another solicitor, but from the expensive mode of the proceedings which he was adopting, deponent apprehended his inability to bear the expense of the same, and was obliged to discontinue those proceedings; that deponent forwarded two memorials to the Lord Lieutenant, and having received a reply to the latter which was unsatisfactory, deponent saw the necessity of taking proceedings in the Superior Courts; that from deponent's close application to his business he was unable to take these proceedings sooner, and that he has done everything in his power to have the necessary steps taken with as little delay as possible. The affidavit also contained imputations against Ralph Osborne and the governor of the lunatic asylum, which were refuted in their affidavits.

Jan. 23.—*Brewster, Q.C., Lane, Q.C., and Ch. Shaw*, showed cause, and cited *Reg. v. Gourlay*, 7 E. & Cr. 669; *Reg. v. Clarke*, 3 Burr. 1363; *Grady and Scotland's Practice of Queen's Bench*, 151; *Reg. v. Bowen*, 5 T. R. 156; *Reg. v. The Commissioners of Sewers for the Tower Hamlets*, 7 Jur. 1169.

*Whiteside, Q.C. and Harris, Q.C.*, in support of the motion, cited *Shelford on Lunacy*, 679; *Ex parte Fell*, 3 Dowl. & Lownd. 373; *Reg. v. Dunn*, 12 Ad. & Ell. 599; *Reg. v. Turlington*, 2 Burr. 1115; *Ex parte Carpenter*, Sm. & Bat. 81; and the case of the *Hottentot Vehm*, 13 East, 195.

*Lawson, Q.C. and Barry, Q.C.*, for the Crown, cited *Reg. v. Turlington*, 2 Burr. 1115; and *Ex parte Carpenter*, Sm. & Bat. 81.

*Brewster, Q.C.*—The statutes authorising the committal of lunatics by justices of the peace, are stat. 1 & 2 Vict. c. 27, and stat. 8 & 9 Vict. c. 107. The first section of the former statute enacts, that "if any person shall be discovered or apprehended under circumstances denoting a derangement of mind, and a purpose of committing some crime for which, if committed, such person would be liable to be indicted, it shall be lawful for any two justices of the peace before whom such person shall be brought to call to their assistance any legally qualified physician, surgeon, or apothecary, and if upon view and examination of the said person so apprehended, or from other proof, the said justices shall be satisfied that such person is a dangerous lunatic or a dangerous idiot," they are empowered to commit him. The stat. 8 & 9 Vict. c. 107, s. 10, after reciting the 1st section of the former Act, provides, "That it shall not be lawful for the said justices to commit such person to gaol, unless information on the oath of one or two credible witness or witnesses shall have been made before the said justices, stating facts from which it shall appear that such person was discovered and apprehended under circumstances denoting a derangement of mind and a purpose of committing some crime for which, if committed, such person would be liable to be indicted, and that such person is a dangerous lunatic or a dangerous idiot; and such justices shall, if they shall so think fit, bind the person or persons so making such information, to appear at the next commission or assizes, or general or quarter sessions of the peace, whichever may first occur, which information shall be returned to the clerk of the peace or crown." This section does not repeal the first section of the former statute, but is supplemental to it. Everything that could be done by the justices under the former statute, can be still done under the latter; but there is this additional provision, that the evidence before the justices must be by information—and further, the informations must fulfil three conditions: they must state facts from which it shall appear that the person was apprehended under circumstances denoting, first, a derangement of mind; secondly, that he had a purpose of commit-

[IRELAND.]

REG. F. SAMUEL RIALI, &amp; C.

[IRELAND.]

ting an indictable crime; and thirdly, that he was a dangerous lunatic. The words "under circumstances denoting" apply to these three conditions equally. This section was purposely framed from a consideration of the peculiar nature of the investigation. These informations satisfy all the conditions required. The facts stated show that John Fetherston was apprehended under circumstances denoting a derangement of mind. This was not the first time that John Fetherston had been brought before the magistrates, and therefore they did not consider it necessary that the informations should be so full on this point as if it had come before them for the first time; and further, the affidavit of George Fetherston, the present applicant, admits that his son had been for some time labouring under a derangement of mind. Then the informations contain a statement of the commission of an assault for which John Fetherston would have been liable to be indicted. This is a stronger statement than that he had a purpose of committing an indictable crime: *a fortiori*, therefore, the informations are sufficient on this point. If, then, the facts stated show that John Fetherston was apprehended under circumstances denoting a derangement of mind, and that he had a purpose of committing an indictable crime, the necessary inference from the facts must be, that he was a dangerous lunatic. The duty imposed upon the justices, of calling in to their assistance a legally qualified physician, is not taken away by the latter statute; they have availed themselves of his assistance in this case. This court is not so strict in the case of committals under these statutes as in the case of committals under convictions. In the case of *Rez v. Gourlay*, which was a commitment under stat. 39 & 40 Geo. 3, c. 94, an English Act, similar in its provisions to stat. 1 & 2 Vict. c. 27, Lord Tenterden says: "This is not a commitment in execution, but is a commitment for safe custody, in order to secure the party, and prevent mischief to his Majesty's subjects. That being the object, I think the warrant ought not to receive the same strict construction as a warrant in execution. If we required the same certainty in this as in other cases, we might render the provisions of the Act nugatory." With respect to the application for a writ of *habeas corpus*, the case of *Rez v. Clarke* is an authority that, in a case where not only the life and safety of the unfortunate individual himself is concerned, but also the lives and safety of all her Majesty's subjects, this court will not be astute in giving a strict interpretation to these statutes, so as to deprive the public of the security of their lives and persons.

*Whitside*, Q.C.—Under stat. 1 Vict. c. 27, the justices were empowered to commit upon view and examination; they might call in to their assistance a medical man, who was to act in the capacity of an assessor and was not required to give a certificate, and no informations were necessary. With regard to the state of the law under that statute, and the necessity for an alteration, it may be mentioned that the commissioners for the inspection of lunatic asylums in their 23rd report use the strong expression that at that time lunatics were "manufactured." The provisions of the stat. 8 & 9 Vict. c. 107, s. 10, are negative. After reciting the 1st section of the former Act, it proceeds to enact that it shall not be lawful for the justices to commit unless upon information on oath. The informations must comply strictly with the provisions of this statute, and state facts in the face of them, from which it shall appear that the person was arrested under circumstances denoting a derangement of mind, a purpose of committing an indictable crime, and that he was a dangerous lunatic. Do they state circumstances that denote that John Fetherston was deranged in mind? The only allegation that at all approaches such a statement is, that John Fetherston, upon being asked to

leave the grounds of Mr. Osborne, said that he was the lawful possessor. This is no circumstance necessarily denoting a derangement of mind: many persons in as unlikely a position as John Fetherston have laid claim to estates as extensive as those of Mr. Osborne, and succeeded in establishing their claims. Again, do the informations state a purpose of committing an indictable offence? The circumstance denoting this purpose, as stated in the informations, is, that John Fetherston, upon being arrested by Patrick Ryan and the gardener, kicked Ryan in the mouth. Is an assault of such a nature as this, arising in an accidental scuffle, to be construed into a purpose of committing an indictable offence? It has been argued that the statement of the commission of a crime is even stronger than of the purpose of committing a crime. The object of the statute is not to commit to prison persons who may have been guilty of assaults similar to this; but to protect the Queen's subjects from persons going about with a purpose of committing indictable offences. In the case of *Rez v. Gourlay*, cited by Mr. Brewster, Lord Tenterden gives two examples of a purpose such as is contemplated by this section. "The case of a man in high excitement running through a street with a knife in his hand intending to murder any person he may meet with, or with a firebrand in his hand intending to set fire to any house." It has been contended that, if the informations satisfy the two first conditions, they must necessarily satisfy the third; that if the circumstances denoted a derangement of mind and a purpose of committing an indictable crime, they must also denote that the person was a dangerous lunatic. The Act, however, is express that the informations must satisfy the third condition; it cannot be supplied by inference. [LEFROY, C.J.—The affidavit of George Fetherston admits the lunacy of his son, we are called upon to supply the deficiency of the informations from this affidavit. Can we not do so?] The defect of the informations cannot be supplied from anything outside them; they must stand or fall by what is on the face of them: (*Reg. v. Dunne*.) The case of *Rez v. Gourlay* is no authority in the present case. That case was decided by Lord Tenterden on a statute similar to the 1 & 2 Vict. c. 27. There is no doubt that under that statute this committal would have been warranted. The committal warrant states that the justices called in Dr. Dowsley to their assistance; but he has not given a certificate, nor made any statement upon oath. [LEFROY, C.J.—The statute does not require that the physician should give a certificate; there is not a word about giving a certificate in either of the Acts.] The object of the latter statute evidently is, that every circumstance upon which the justices ground their decision should be upon oath. Counsel cited Shelford on Lunacy, 679, and *Ex parte Fell*.

*Lawson*, Q.C. and *Barry*, Q.C. for the Crown.—Under this code of laws it is the duty of the Lord Lieutenant, before issuing the order for the transfer of a lunatic from the gaol to the district lunatic asylum, to be satisfied that such person still continues insane, and a certificate of two physicians to that effect is necessary. That certificate was obtained in this case. Before this court grants a writ of *habeas corpus*, they should be satisfied as to the present state of this person's mind: (*Rez v. Turlington* and *Ex parte Carpenter*.) Should the court be of opinion that they have not sufficient matter before them to enable them to come to a decision in this case, the Government are ready to afford every assistance to the court in any inquiry that they may direct.

*Harris*, Q.C. contended that the informations were bad on the face of them, and that consequently both the writ of *certiorari* and the writ of *habeas corpus* should be granted. [LEFROY, C.J.—You call upon us to issue a writ of *habeas corpus* in a case where

[IRELAND.]

REG. v. SAMUEL RIALI, &amp;c.

[IRELAND.]

the statute is express as to the particular way in which the party is to be discharged.] The order of the Lord Lieutenant being grounded on the committal of the justices, must stand or fall by that committal; if the committal is bad as not being warranted by the informations, the order of the Lord Lieutenant is bad also. [LEFROY, C.J.—Supposing at the time of the service of the conditional order this party was a dangerous lunatic, surely, upon a defect in the informations we are not now to discharge him.] There should, at least, be some inquiry instituted as to the state of this person's mind: (*Rez v. Turlington and Ex parte Carpenter.*)

LEFROY, C.J.—I think it will answer your purpose, if we direct an inquiry as to the state of this person's mind. The inquiry will be, whether John Fetherston is now a dangerous lunatic. We will give you an opportunity of naming a competent medical man. The Government have a right to nominate another, as they are concerned in the committal of this person. We think that both of these medical men should be persons who have had access to the party already, as they will be more competent to form an opinion on the state of his mind, than a person who will merely see him for the first time. The commission will also include another properly qualified medical man, who will be nominated by both parties.

Harris, Q.C. proceeded to argue in support of the motion for the writ of *certiorari*. [LEFROY, C.J.—Has the present applicant any *locus standi* in this court, to entitle him to call upon us to grant a writ of *certiorari*?] He appears in the character of next friend. In the case of the *Hottentot Venus* the application was made by a stranger. [LEFROY, C.J.—That was the case of a *habeas corpus*. We would admit a father, or even a stranger, to apply for a *habeas corpus*, but the question is with regard to the *certiorari*.] It is necessary that this writ should be granted for the purpose of the *habeas corpus*.

Lane, Q.C. in reply.—It is impossible to bring up these informations as required by the conditional order. They are now in the hands of the clerk of the Crown, to whom they have been returned under the provisions of 8 & 9 Vict. c. 107, s. 10. The party is not now in custody under any of the proceedings before the justices, but under the order of the Lord Lieutenant. And even if it was possible to comply with the terms of the order, the object of this application would be gained by the writ of *habeas corpus*, under which every document must be brought up: (Scotland and Grady's Practice of the Queen's Bench, 137; *Rez v. Bowen*.) It is in the discretion of the court to grant a writ of *certiorari*, and as no object will be gained by it in this case, it ought to be refused. The applicant has been guilty of inexcusable delay in not coming to this court sooner. The committal was in January, and both the Quarter Sessions and the Spring Assizes, the proper courts of appeal, intervened between the date of the committal and the time when John Fetherston was transferred to the lunatic asylum: (*Rez v. Commissioners of Sewers for the Tower Hamlets*.) After the party is so transferred, the statute is explicit as to the way by which he is to be discharged. The applicant has not pledged his belief that there was any unwillingness on the part of the Government to act in the matter. The explanation given of this delay in the affidavit of George Fetherston is quite insufficient.

LEFROY, C.J.—This case comes before the court upon a motion to make absolute a conditional order for a writ of *habeas corpus* to bring up the body of John Fetherston, an alleged lunatic; and a conditional order for a writ of *certiorari* to quash a committal warrant and order under which this person has been committed to gaol and sent to a lunatic asylum, where he still remains. The circumstances of this case are such as naturally and properly to form the grounds

of these conditional orders. The committal warrant of the justices under which John Fetherston has been committed to gaol is grounded on two Acts of Parliament, 1 & 2 Vict. c. 27, and 8 & 9 Vict. c. 107. And we are clearly of opinion that a committal in order to be valid must be in strict compliance with the provisions of both these statutes; and that, under the provisions of these statutes the evidence on the face of the informations must show, first, that the party was labouring under a derangement of mind; secondly, that he was discovered under circumstances denoting a purpose of committing a crime for which, if committed, he would be liable to be indicted; and, thirdly, the evidence must be such as to show that the party was a dangerous lunatic. It is not enough that there should appear on the face of the informations facts from which it may be inferred, that the circumstances under which this person was apprehended may possibly have been such that the justices might have been warranted in committing him. The second Act seems to have been passed for the purpose of protecting the subject from this mischief, that he might be apprehended and committed to gaol without knowing or having an opportunity of knowing on what grounds the warrant of committal may have been made. This Act has made provision against what would have been otherwise an intolerable grievance. In this case we are clearly of opinion that there does not appear sufficient on the face of these informations to satisfy us that the provisions of this statute have been complied with. If the case turned simply on the validity of this committal we should have no difficulty. But then there is an application for a writ of *certiorari* for the purpose of quashing these proceedings; an order for such a writ is not granted as of course, even though it should appear that the warrant of the justice was illegal. We are to consider here whether it is necessary for the purpose of the *habeas corpus* that these proceedings should be quashed. No such necessity appears to us to exist, nor does this appear to be the proper course of proceeding under the authority of the case of *Rez v. Bowen*, where Lord Kenyon, though he permitted counsel to argue the point, was of opinion that under the writ of *habeas corpus* the party would have obtained relief if he had been entitled to it, and that the proceeding by the writ of *habeas corpus* was the proper mode of obtaining it. The applicant in this case should have moved, not for a *certiorari*, but for a writ of *habeas corpus*, in the return to which the warrant of the justices, the order of the Lord Lieutenant, and all the other proceedings would appear before the court. Again, there are other grounds upon which we are satisfied that this application for a *certiorari* should be refused. It is not necessary for the purpose of obtaining the liberty of this person. He is now confined in the lunatic asylum under the order of the Lord Lieutenant, and if his state of mind is such as to entitle him to his discharge, he can obtain it under the provisions of these Acts of Parliament without coming to this court. There are other reasons which we have not yet mentioned upon which we refuse this motion, and we think it our duty to state them in order that it may be clearly understood upon what grounds the court acts. This application has been made by a person who, with respect to the *certiorari*, has no *locus standi* in this court; if the grant of the *certiorari* were necessary for the purposes of the *habeas corpus*, we would receive this application from any one. But we know of no authority which allows a party to come into this court for a *certiorari* on behalf of another, unless it were necessary for the purposes of a *habeas corpus*. Again, the delay that the present applicant has been guilty of in not bringing this matter sooner before the proper tribunals for investigating it is an additional reason why we should refuse this motion. The magistrate's warrant must have been returned to the

[IRELAND.]

DOBBIN v. AIKIN.

[IRELAND.]

clerk of the Crown previous to the spring assizes, and John Fetherston's name must have appeared on the judge's calendar at those assizes; this applicant would then have had an opportunity of getting rid of this illegal order, and it would have been the duty of the judge to have discharged it. Another opportunity occurred at the quarter sessions. Then the Lord Lieutenant, in discharge of his duty, exercises the authority given to him, of removing this person to the lunatic asylum. The first application is made to this court in November, and what occurs in the mean time? This order is allowed to stand as a legal order, no application is made to any of those tribunals to which the present applicant might have had access; and after having allowed this matter to stand over for such a length of time, we are now asked to issue a *certiorari* for the return of this committal warrant and order, and thereby express our opinion that the Lord Lieutenant has acted unadvisedly in this matter, his order being grounded on an illegal warrant. This case strongly instances the great inconvenience that may arise from delay in bringing forward such an application as the present. And as delay has been made on other occasions the ground of refusal, this consideration, taken along with the circumstance that the present application has been made by a person who has no *locus standi* in this court, leaves no doubt on our minds that this motion should be refused. This disposes of the question with regard to the *certiorari*. But then, the affidavits show that the evidence before the justices disclosed facts which have been defectively put on the face of the informations, and, looking at these documents, there cannot be a doubt that the jurisdiction of the justices has been defectively and carelessly exercised; and, as they have not discharged their duty with that diligence and precision which the statute requires, we will not give them costs; they have, by the defective exercise of their jurisdiction, given grounds for these parties to come into this court. With regard to the application for a *habeas corpus*, we have made such provision as we hope will be satisfactory to all parties; the report of the commission will be, whether John Fetherston is at present a dangerous lunatic.

O'BRIEN, J.—I concur fully in the judgment delivered by my Lord Chief Justice. I shall only add, that the informations do not, from beginning to end, state a single fact from which it would appear that John Fetherston is a lunatic at all. Besides, this *certiorari* is not necessary for the purposes of the *habeas corpus*, and such a writ has never been granted on the application of a third party. I am, therefore, clear that this motion should be refused.

### COURT OF COMMON BENCH.

Reported by WILLIAM B. KATE and J. D. ROBINSON, Esqrs.,  
Barristers-at-Law.

Monday, Nov. 14.

(Before the FULL COURT.)

DOBBIN v. AIKIN.

*Weavers Act*—*Appeal from the decision of the magistrates thereon.*

*Held, that weavers may, without violating the provisions of the 3 & 4 Vict. c. 91, enter into special contracts with their employers.*

This was a case submitted, at the desire of the magistrates of Newtownards, for the opinion of this court. The terms of the case were as follow:—"At the petty sessions held on the 14th June 1859, complainant summoned defendant, who was agent to Messrs. J. Muir and Co., Glasgow, manufacturers, for the sum of 6s. 4d., balance of wages due to him for weaving a web. Of this sum 1s. 4d. was admitted to be due, and was duly tendered to the complainant; but the remaining 5s. were kept as a fine, or set-off, for detention of work, being one halfpenny per ell on the

whole web of 120 ells. A ticket was produced, setting forth the particulars in accordance with 3 & 4 Vict. c. 91, s. 16. It is to be observed that this ticket is not in exact accordance with the above-recited section, the price being named by the ell instead of by the yard; but as no exception was taken to it on that score, the magistrates confined themselves to the point in dispute. The time allowed for finishing the web was five weeks; it was, however, five weeks and three days before the last cut or portion was brought in, so that, allowing eight days of grace according to the 18th section of the above recited Act, the work was detained three weeks beyond the stipulated time. At the bottom of the ticket is a condition in writing that should the work not be finished within the specified period of five weeks, only 4½d. per ell was to be paid, and if not within six weeks, 4d. per ell instead of 4½d., as mentioned in the body of the ticket. At the hearing of the case, complainant admitted that he did not expect to be paid in full, in consequence of the work being detained so long after the stipulated time. On the back of the ticket is another condition, signed by the complainant, whereby he agrees to refer all matters in dispute between him and his employer to arbitration, and hence it was contended by the defendant that this case ought not to have been brought before the court of petty sessions for adjudication. Having heard the facts as above detailed, the magistrates were unanimously of opinion that the conditions subjoined to the ticket given to the complainant were calculated to supersede the power of the court of petty sessions to measure and award the amount of penalty for the failure, by complainant, to complete the work within the time agreed on, which power is specially vested in the magistrates by the 18th section of the Act above referred to, obviously with the intention of providing protection to the employed against any attempt on the part of the employer to impose arbitrary fines or penalties, and which power the magistrates consider they have hitherto fairly and impartially exercised, by uniformly awarding to the employers, on the hearing of complaints for the detention of work, fair compensation for any loss or damage which may have been proved to result from the defaults of the employed. In this particular case, as the defendant relied on the validity of the condition appended to the ticket to deduct the full penalty specified therein, and as for the reasons above given, the magistrates would recognise no condition which went virtually to supersede and nullify the powers given to them by the Act, they were precluded from entering on the question of compensation for loss and damage caused by detention, and felt obliged to decide in favour of the complainant for the full amount claimed. With regard to the arbitration condition on the back of the ticket, the magistrates considered that before either party could be bound to abide by arbitration, the magistrates themselves should, according to the Arbitration Act (5 Geo. 4, c. 96), hear the cause of complaint, and decide whether it was a subject for arbitration or not, and that the condition on the back of the ticket was in direct contravention of the meaning and intent of that Act."

Arthur Close (with him W. J. Sidney) for the manufacturers.—The question involved in this case is of great importance to the manufacturers of the North of Ireland. Where the web has been detained more than nine weeks, the employers are not, in such case, bound to pay more than 4d. per yard; in other words the special contract is not made under the 16th section of the Weavers' Act. There are no decisions in the reports upon the construction of this Act, but there can be nothing inconsistent in making such a contract as this with the terms of the Act. The decision of the magistrates is plainly bad, and ought to be reversed.

William Andrews and Hugh Law contra.—The Act confers mutual benefits on the employer and the em-



[IRELAND.]

THE AMAZON.

[IRELAND.]

ployed. In the 18th section reference is made to particular and specified times, within which the cloth must be returned; no time is fixed for this by the terms which appear in the ticket; the weaver might not, therefore, if he should detain his web for a lengthened period, be entitled to any remuneration. The decisions on the analogous Acts in England may be referred to. The cases all show that actions would not lie when brought upon contracts made in violation of any special Act of Parliament. There being no standard measure referred to in this contract, it is on that ground void under the provisions of the 5 Geo. 4, c. 74, s. 15. The following cases were cited:—*Cope v. Rowlands*, 2 M. & W. 149; *Little v. Poole*, 9 Bar. & Cres. 192; *Watts v. Friend*, 10 Bar. & Cres. 446; *Cundell v. Dawson*, 4 C.B. 376; *Tyson v. Thomas*, 1 M.C. & Young, 128.

MONAHAN, C.J.—We entertain no doubt but that the construction put upon this Act of Parliament by the magistrates is erroneous. There is nothing in the Act itself to prevent the weavers from entering into special contracts with their employers. The party having raised only one point, we confine our judgment exclusively to that point; we reverse the decision of the magistrates, but without costs.

### COURT OF ADMIRALTY.

Reported by WM. G. CHAMPNET, Esq., Barrister-at-Law.

#### THE AMAZON.

*Salvage—Appeal from magistrates—Costs.*

*The Court of Admiralty has full jurisdiction, and will review the decision of magistrates in a salvage case heard before them, and may either increase the remuneration awarded below, if insufficient, or decrease it if excessive.*

*If the appeal is by the owners of the vessel salvaged to decrease the salvage award, and the Court of Admiralty decrees in favour of the appellants, the order will be made without costs, as the respondents—the unsuccessful parties—could not expect to get them, and should not be compelled to pay them, as they appeared to support the award of a competent tribunal.*

*In this case the property saved was worth 8000l.; the magistrates awarded to the salvors 1698l., and the Court of Admiralty reduced that sum to 1007l.*

This was a salvage appeal instituted against the brig *Amazon*, of Liverpool, 237 tons burden (James Steele, master). It appeared by the pleadings and evidence that she had got ashore on the Arklow Bank on the 4th June 1858, on her outward voyage from Liverpool to Brazil, and a certain portion of her cargo having been discharged into smacks, was by them conveyed to Arklow, and subsequently to Liverpool, where it was sold, realising a net sum of 8000l. The rest of the cargo, iron and coal, was, with the vessel, lost. The claims of the salvors were left to the decision of two magistrates at Arklow, Messrs. Courtenay and Edwards, and the value of the property salvaged being then stated at 10,190l., they awarded one-sixth, or 1698l. Against this award the owners appealed on the ground of excess. The case was, by consent, heard *viva voce*, and the facts appear in the judgment of the court.

Gibbon, LL.D. and Elrington, LL.D. for appellants, and

The Solicitor-General, LL.D. (with Townsend) for the respondents.

KELLY, J.—This is an appeal by owners against an award of salvage made by two justices of the county of Wicklow, who awarded to the salvors one-sixth of the property saved, and the only ground of appeal alleged is the excess of the sum awarded. The facts are shortly these. Early in the morning of the 4th June, this brig, the *Amazon*, 237 tons register, with a master

and ten hands, and having a valuable general cargo on board, bound from Liverpool to Para, in South America, got on the Arklow Bank, the dangers of which are well known. The weather was fair, and there was a quiet sea, and the mainland distant about seven or eight miles. The smack *Peter*, of Arklow, arrived shortly after, and five or six of her crew got on board the brig, informed the captain of his danger, and advised him to lighten his vessel, an advice which he did not think fit then to follow, as he had hopes of getting her off. The coast guard, under Lieutenant Dunsterville, arrived in a short time, and a kedge anchor being got out, it was hove on, with the purpose of warping the vessel off the ground. After some time, however, the warp broke, and the attempt was abandoned. Meanwhile, seven or eight boats more arrived, but the evening being advanced to eight or nine o'clock, it was thought too late to commence the discharge, the more so as the boats in attendance were but few. On the next morning, the 5th, at daybreak, the discharge was begun, when Lieutenant Warren and the coast guard from "Jack's Hole" station arrived, and that officer took charge of the vessel, and under his orders and directions every possible portion of the cargo was discharged. This gentleman remained the whole day and until late in the evening, and under his control and superintendence no less than forty-seven smacks were loaded with the cargo of the ill-fated vessel. It should have been stated that about three o'clock on that day, on the rising tide, another attempt was made to heave the vessel off, but without success, and the discharge, which had temporarily ceased, was resumed and completed—the whole cargo being discharged, with the exception of some coals and heavy machinery. This service was one under peculiar circumstances—a vessel in good condition got on a bank; two efforts to get her out of that critical state failed; and it was to be remarked that these efforts were made by the coast guard and the crew of the vessel, and that the Arklow fishermen did not contribute to it in the slightest degree. All they did was under the orders of the proper legal authority of the coast guard, who exercised a control and supervision of the entire service, and whatever skill was shown on the occasion was shown by the senior officer before referred to—Lieutenant Warren. The usual elements of salvage were wanted in this case. No skill could be claimed by the salvors before the court. No danger could for a moment be suggested—as the slightest risk to life or limb did not occur. The only element of salvage in the case was its success. The conduct of these Arklow fishermen, the salvors before the court, has been properly put forward by their advocates, and must be noticed by the court. Lieutenant Warren tells it, that his orders were obeyed by this numerous assemblage of nearly 500 men; that the smacks came alongside, loaded and departed, as directed by him, and that all the goods were safely given up, and it was not suggested by the appellants that a single article, even of the most trivial value, was not forthcoming. It might be that this good conduct urged the magistrates in their decision, and it would also weigh with that court; but the court must remind these fishermen that the law must be respected, and that its penalties must be enforced, were dishonesty attempted. The only element of salvage, then, in this case was the element of success, and no doubt the services in question had been successfully performed, when it was borne in mind that in the short space of four-and-twenty hours, property of such great value had been rescued. Still the court cannot consider this as a pure salvage service, but rather as a meritorious service. The smacks and crews in question were employed under authority, and were not really "voluntary salvors." They came and went under the control of others. It was a case of great merit, but not of pure and volun-

Q. B.]

OVERSEERS, &amp;c., OF CLAPHAM v. OVERSEERS, &amp;c., OF ST. PANCRAS.

[Q. B.]

tary salvage. Now as to the question of reward. These little vessels were employed from Friday to Tuesday, and some to Wednesday, until their lading was discharged. The usual amount earned by them in fishing was but small, and the property saved was of great value, in all amounting to 8000*l*. The justices have awarded 1698*l*, and this court was required by the owners to review that award. Looking then to the interest of the owners, which the court must consider, and recollecting that this property had been saved for restoration as well as reward, and must not all be swallowed up by that reward, the court was bound to express its opinion that the award was excessive, and must be reduced. It considered that the sum of twenty guineas was a fair and sufficient remuneration for each of the *smacks* employed, which for forty-seven makes the sum of 987*l*. In addition to this the court would give the sum of 1*l*. each to the twenty men who were engaged in pumping the *Amazon*, in all the sum of 1007*l*, and would decree the magistrates' award to be reduced accordingly. With regard to the costs the salvors could not expect them, nor could the appellants seek them from the salvors, who come to support the award of a competent tribunal. Let each party bear their own costs.

Proctor for appellants, Mr. John T. Hamerton.

Proctor for respondents, Mr. Wm. Richardson.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Wednesday, April 25.

OVERSEERS, &c. OF CLAPHAM (respondents) v. OVERSEERS, &c. OF ST. PANCRAS (appellants).

*Poor—Settlement—Apprenticeship—Articled clerk.*

*An articled clerk to an attorney is such an apprentice as may acquire a settlement in a parish, for the purposes of relief to the poor, under the 3 & 4 Will. & M. c. 11, s. 8.*

The short point in this case, which was stated after an appeal to the Surrey Epiphany Quarter Sessions, 1860, was whether an articled clerk to an attorney, bound in the usual way by articles, was an apprentice within the meaning of 3 & 4 Will. & M. c. 11, s. 8, which enacts, "If any person shall be bound an apprentice by indenture according to law, and inhabits in any town or parish, such binding and inhabiting shall be adjudged a good settlement."

*Knap (Needham with him)* for the respondents.—An articled clerk is not within the 3 & 4 Will. & M. c. 11, s. 8. At the time of that Act an apprentice was a well-known relation, and had been described by the 5 Eliz. c. 4, and was connected with the mysteries and trades there specified. *Ex parte Prideaux*, 3 Myl. & Cr. 327, was a decision of Lord Cottenham's, that an articled clerk was not an apprentice within the Bankrupt Act, 6 Geo. 4, c. 16, s. 49. Could it be said that the 20 Geo. 4, c. 19, ss. 3, 4, giving justices jurisdiction upon complaints by and against apprentices, would be applicable, if the premium did not exceed 5*l*? Cases cited: *Ex parte Gill*, 7 East, 376; *S. C. Reg. v. St. Petroz*, Burr. 248; *S. C. R. v. St. Mary, Lincoln*, Burr. 728.

*Le Breton (Murray with him)* for the appellants.—An articled clerk to an attorney is an apprentice: (1 Black. Com.) In *Ex parte Frankard*, 3 B. & Ald. 257, Bayley, J. uses the word apprentice when speaking of an articled clerk: (*R. v. Laindon*, 8 T. R. 383; *R. v. Whitechurch*, Set. Cas. 166; *Cuff v. Brown*, 5 Price, 297.)

Cockburn, C.J.—I am of opinion that a settlement was gained by apprenticeship in this case, so as to satisfy the statute. We must look at two things: first was there such a binding as would come within the [Mag. C.]

legal acceptance or definition of apprenticeship? Secondly whether, under the statute, such an apprenticeship can be considered sufficient to gain a settlement? As to the first, there can be no doubt that an apprentice is one who is bound to serve for the purpose of learning a business or profession, and the relation is of that nature that the master engages to teach the apprentice, and he engages to serve the master in order that he may learn the business or profession. An articled clerk to an attorney comes strictly within that definition; he binds himself to serve the attorney that he may be taught, and that he may learn his profession. The 3 & 4 Will. & M. c. 11, s. 8, is couched in the most general language, "if any person shall be bound an apprentice by indenture according to law, and inhabit in any town or parish, such binding and inhabiting shall be adjudged a good settlement." Suppose immediately after the passing of that statute a person had come to settle in a parish, and to serve under such an indenture as this, would he have been removable? This section seems to engraft the exception (among others introduced) that where an apprentice is bound and inhabits in any parish he shall not be removable. It also protects the parish against a clandestine residence. There is no reason therefore to think that this case would not have been within the protection of the statute. Our attention, however, has been called to the statute 5 Eliz. c. 4; but that was directed to certain classes of trades merely. It was next said that the Legislature has always dealt with articled clerks to attorneys by the name of articled clerks, and not of apprentices. That, however, would not make them the less apprentices if in other respects they come within that description, or be any reason why we should deal with them otherwise than as they are. It is not necessary to impugn the decision in the case in bankruptcy. The question now arises on the statute of 3 & 4 Will. & M. c. 11, and I am of opinion that this is a species of apprenticeship that statute intended to protect against liability to removal.

CROMPTON, J.—The term "apprentice" has been defined very often, and the relation of master and apprentice is well known in point of law. The essence of the relation is, that the apprentice is to serve the master, and learn his business, and that the master shall teach the apprentice. Then what is the meaning of the term in the stat. 3 & 4 Will. & M. c. 11? The cases cited for the appellant show that such an apprentice as this is within it, and that its meaning is not to be confined to the mysteries, arts and trades enumerated in the stat. of 5 Eliz. c. 4. The only difficulty presented to us is the case in bankruptcy. There could not have been the argument in the time of 3 & 4 Will. & M. that there is a series of statutes calling them articled clerks, as those statutes are since that date. I therefore think the appellants are entitled to our judgment.

BLACKBURN, J.—The question turns on the construction of the stat. 3 & 4 Will. & M. c. 11. An articled clerk is bound to serve the attorney for the purpose of being taught the trade of an attorney. The statute of Elizabeth was passed to forward certain views of political economy which are now exploded. Taking the words of the 3 & 4 Will. & M. in their natural interpretation, I can see nothing to exclude an apprentice to an attorney. As to the bankruptcy case, that judgment is entirely untouched by anything in this decision. If the language was wide enough in the time of William and Mary to include an articled clerk, we must so construe it now. I am of opinion that it was.

*Judgment for the appellants.*

Friday, April 27.

THE GUARDIANS OF THE POOR OF THE PORTSEA ISLAND UNION v. WHILLIER.

*Principal and surety—Bond for security of poor-rate*

collector—Change in duties of office—Liability of surety.

By an order of the Poor Law Commissioners, the guardians of a union were empowered to appoint one or more collectors of the poor-rates of the several parishes in the union. The guardians appointed four for parish A., to each of whom was assigned a separate district of the parish for collection, and they subsequently resolved to appoint a fifth for the collection from owners of small tenements: (13 & 14 Vict. c. 99.) There being vacancies they advertised that they would appoint two persons to be collectors of the poor-rates of parish A., "to one of whom will be assigned a collection of such rates from the owners of small tenements under the 13 & 14 Vict. c. 99." W. became a candidate, and was one of the two elected, and the entry in the minute-book of the guardians was, that he was appointed for the purpose of collecting the rates from the owners of small tenements. He and two sureties gave the usual bond, which recited in the condition the order of the Poor Law Commissioners, and that W. was appointed to be a collector under the said order. After some time one of the other collectors having died, W. was assigned the collection of his district, and gave up the small tenements collection:

Held, that the sureties were liable on the bond for W.'s defaultations arising during the collection of the new district.

Special case for the opinion of the court as to the liability of the defendant for the defaultations of a poor-rate collector on a bond as one of the sureties.

Collectors for the poor-rates of the Portsea Island Union are appointed by the guardians of the poor by virtue of an order (Aug. 9, 1836) of the Poor Law Commissioners "to appoint one or more fit and proper persons to be the collector or collectors of the poor-rates of such of the several parishes comprised in the union as the guardians may deem to require a collector; and after death, resignation, or removal to appoint successors. Among the duties of the collectors enumerated in the order, were, first, to assist the churchwardens and overseers of the several parishes for which they shall be appointed collectors in making up the assessments, filling up receipts, keeping all books and making all returns which relate to the collection of rates payable on account of the poor.

In 1852 there were four collectors of poor-rates for the parish of Portsea, to whom particular districts of the parish were assigned for collection. There was a vacancy by the resignation of one of the four collectors, and it had been resolved to appoint a fifth collector, to whom was to be assigned the collection of rates from the owners of small tenements within the parish, the 13 & 14 Vict. c. 99, having been adopted by the parish.

An advertisement was published by the guardians that they would appoint two persons to be collectors of the poor-rates of the parish of Portsea, "to one of whom will be assigned a collection of such rates from the owners of small tenements under the 13 & 14 Vict. c. 99."

Mr. J. W. Whillier applied for one of the appointments, and offered the names of the defendant and another person as sureties in case of being elected. He was elected. In the minute-book the entry of his appointment was made "for the purpose of collecting the rates from the owners of small tenements," and also that the sureties nominated, were approved of.

The Poor Law Board sent a letter of approval of the appointment of Mr. Samuel Haslett (the other person appointed) and Mr. J. W. Whillier as collectors of poor-rates in the parish of Portsea, &c.

The bond given by J. W. Whillier and his sureties was in this form:—"They jointly and severally bound themselves to the guardians in 400*l*." The condition of the bond recited the poor-law order of Aug. 9, 1836,

and that J. W. Whillier was appointed to be a collector under the said order, and then proceeded, "that if the above-named collector should during his continuance in the office of collector, and whether the district, parish and places for which he is appointed to act be or be hereafter not changed, or diminished, or enlarged, or in any wise altered, duly, &c., discharge the duties thereof," &c.

The said J. W. Whillier thereupon entered upon his duties, and collected the rates from the owners of small tenements in the parish up to June 1855, when he was transferred by the guardians to one of the four districts collected by the other four collectors. He collected the rates of that district down to Nov. 1858, when he was discovered to have committed defaultations to the amount of 55*l*. 3*s*. 10*d*.

No new bond was given by J. W. Whillier in 1855 or at any other time.

*Lush* (V. Harcourt with him).—The terms of the bond show what Whillier's appointment was, viz., that he was appointed a collector of the poor-rates under the order of the Poor Law Commissioners, recited in it. The office was a freehold one, subject to removal only by the Poor Law Commissioners. He was appointed collector for the parish generally, and the resolution of the guardians does not limit that appointment, for it cannot do that. They had no authority to appoint a collector for any other purpose than that specified in the poor-law order: (*Stewart v. M'Kean*, 24 L. J. 144, Ex.) The orders of the Poor Law Board define the duties of the office, and the bond is general and binds the sureties for all defaultations as collector of the parish generally.

*Joyce* for the defendant.—The poor-law order is dated before the passing of the Small Tenements Act. Whillier, by the resolution of the board of guardians, was expressly appointed for the purpose of collecting under that Act; and the change to collecting from the owners of other tenements was such a change in the office as to discharge the sureties. The effect was to alter the remuneration and increase the risk, and if the risk is increased, the sureties are discharged: (*Pybus v. Gibb*, 6 E. & B. 910.)

*Lush* was heard in reply, and referred to *Fruzek v. Edwards*, 8 Ex. 214.

COCKBURN, C.J.—The first question is, whether the appointment as collector was as collector of the rates of the parish generally, or the rates payable under the Small Tenements Act exclusively. If it was for the latter purpose only, then by the subsequent Act of the guardians in employing the collector for an entirely different purpose, and his default therein, his surety, according to all the authorities, would not be liable for such default. Then, what is the real nature of the appointment? The question is not free from doubt; but, upon the whole, I think that the appointment was as collector of the rates of the parish generally. In the first place, the order of the Poor Law Board directs the appointment of collectors for the parish generally; in the next place the advertisement which led to the application of Whillier for the appointment describes the office as collector for the parish; and then Whillier applies by letter to be appointed as one of those collectors. Then comes the bond, in which he is treated as having been appointed a collector of the rates of the parish generally. That being so, there is sufficient evidence that his employment was treated as in effect arising from his appointment as collector of the rates of the parish generally, and not as collector of the rates for the more limited and special purpose. It is true that the resolution on his appointment is couched in language referring to the more limited character of the appointment; but, looking at the whole, one must not attach too much importance to that circumstance. Suppose the guardians were to choose to transfer a collector from

Q. B. REG. THE INHABITANTS OF HECKMONDWICK v. THE INHABITANTS OF THORNTON. [Q. B.]

one district to another, I cannot see that he would be justified in refusing to obey the orders to that effect. It seems to me that it is competent to the guardians to point out to which district or set of duties any particular collector is to be assigned. On the whole, therefore, I construe the appointment to be that of general collector of rates to the parish.

CROMPTON, J.—I have entertained considerable doubt upon the question, and am not yet entirely free from doubt, but the inclination of my mind is to agree with the rest of the court, upon this ground, that it is not sufficiently made out that this was a special appointment, and that to construe this as a general appointment for the entire parish is more consistent with the order of the Poor Law Commissioners. In the case of one of the collectors dying, I think Whillier might have been put to the duty of collecting part of the rates of the district belonging to such deceased collector. Then the appointment recites the order of the Poor Law Board, and that is a strong fact in favour of the construction adopted by the court.

BLACKBURN, J.—I also think that the plaintiffs are entitled to recover. I have not been free from doubt during the argument, but upon the whole I think the plaintiffs entitled to our judgment. The law on this subject was settled in *Pybus v. Gibb*, 6 Ell. & Bl., that where the duties and liabilities of an office are essentially changed, and the risk of the sureties increased, the sureties are discharged from liability on the bond. What then was the nature of the office for which the defendant became a surety in this case? Looking at the bond and the recital in the condition, I think that he was appointed as one among several collectors of rates for the parish generally, which shows strongly that the duties of collecting the rates of the parish were to be divided among them by the arrangement of the guardians as to the different departments each was to execute from time to time. I think, therefore, that the office which Whillier took upon himself was that of collector of the poor-rates of the parish generally. If the original appointment had been that he was to be collector of rates from owners of the small tenements only, and he had afterwards been made a collector from the other ratepayers, that would have been a change in his office; but it seems to me that his original appointment was collector of the poor-rates generally.

*Judgment for the plaintiffs.*

*Saturday, April 28.*

REG. on the prosecution of THE INHABITANTS OF HECKMONDWICK (respondents) v. THE INHABITANTS OF THORNTON (appellants).

*Order of removal—Settlement by estate—What a sufficient estate.*

*The pauper married a woman who at the time was renting a cottage, for which she paid 1s. per week. The pauper and his wife continued to occupy it, he paying the same rent (without any fresh arrangement) for seven years:*

*Hold, that he had thus acquired a settlement by estate.*

This was a case stated for the opinion of this court under sect. 11 of the 12 & 13 Vict. c. 45, upon an appeal against an order of removal.

It was admitted between the parties that the appellant parish was the parish of settlement, unless they could successfully show that the pauper had acquired a subsequent settlement by estate. The facts connected with this subsequent settlement are these:—The pauper James Walker married a woman of the name of Mary Collins, who at the time of marriage resided in a cellar cottage, for which she paid 1s. per week rent. It did not otherwise appear what were the terms of her holding, but from the time of his marriage the pauper continued to live with her in the same cottage for the period of seven years, there being no fresh arrangement with the landlord, and he paying the weekly rent.

*Pickering, Q.C.*, for the respondents, contended that these facts would not support the settlement of the pauper by estate, for that whether or not such a holding by the wife was such an estate as would confer a settlement, yet the marriage put an end to it: (*R. v. Halifax*, 24 L. J. 64, M. C.)

*Maule*, for the appellants, contended that the tenancy of the wife at the time of marriage was such an estate as gave the husband (he having resided under it for forty days) a settlement; that the payment of 1s. per week rent was not even inconsistent with its being a yearly tenancy. [COCKBURN, C.J.—This curious state of things may exist in the case, that whereas the wife could gain no settlement before her marriage in respect of her holding, inasmuch as it was not of sufficient value, yet a man marrying her gets a settlement by estate.] No particular value need exist in the case of an estate settlement. Here the estate of the wife was not determined by any act of the parties.

COCKBURN, C.J.—The real interest of the woman is from week to week until it is determined. That being so on the marriage, the husband comes into the estate. He remains in it forty days. There is no evidence upon which we can say that there was any surrender of the estate. There must be judgment therefore for the appellants.

*Judgment for the appellants.*

*Ex parte THE OVERSEERS OF SPOTLAND.*

*Poor law—Auditor's disallowances—Rent of house for conducting business—Duplicate appointment of overseers—Jurisdiction of this court.*

*Bristowe* moved for a rule for a *certiorari* to bring up an order made by the poor-law auditor for the districts of Cheshire and South Lancashire, whereby he had disallowed certain payments in the accounts of the overseers of Spotland in the parish of Rochdale, with a view to such disallowances being quashed. The disallowances complained of were one sum of 8s. paid for half-year's rent of a small house taken to facilitate the execution of the office of overseer, and in which the business of the township was transacted, and where the books and papers were deposited, which had been disallowed because the auditor considered that there was no authority in law for such expenditure; and eight shillings for duplicates of appointment of overseers, which he had disallowed because he considered duplicate appointments unnecessary. An appeal had on a former occasion been made to the Poor Law Commissioners, who said they thought the auditor was right, but they allowed the items, and suggested that the appellants should put into operation the provisions of the Act of Parliament; but the ratepayers feeling that that would be a costly proceeding, desired to ascertain the opinion of this court as to whether the disallowances referred to were legal or not: (17 Geo. 2, c. 38; 7 & 8 Vict. c. 101; 13 & 14 Vict. c. 101; *R. v. Reeves*, 17 Q. B. were referred to.) [CROMPTON, J.—Is not this detail? Suppose the auditor objected to and disallowed what he deemed an excess of gruel provided. Are we to say whether too much has been administered or not? BLACKBURN, J.—The Act does not give them authority to hire a place to carry on the business, only to provide a place to deposit books and documents in; they don't want gas and fire for that purpose.

COCKBURN, C.J.—It is for you to show us that there is something illegal in the disallowance. You have made out no case. *Rule refused.*

*Wednesday, May 2.*

QUICK (appellant) v. THE CHURCHWARDENS AND OVERSEERS OF ST. IVES (respondents.)

*Town council—Lighting Act, 3 & 4 Will. 4, c. 90—5 & 6 Will. 4, c. 76, s. 88—Adoption of Lighting Act by town council—Relinquishing their powers.*

Q. B.]

QUICK v. THE CHURCHWARDENS AND OVERSEERS OF ST. IVES.

[Q. B.]

*The Lighting Act, 3 & 4 Will. 4, c. 90, was adopted by the parish of St. Ives. Subsequently the town council of St. Ives took upon themselves the powers of inspectors under that Act. They afterwards relinquished their powers, and the vestry of the parish again adopted the Act and levied a rate under it: Held, that the town council having adopted the Act, they had no power to relinquish it, and that the rate made was bad.*

This was a case stated under the provisions of the 20 & 21 Vict. c. 43, upon an order made by the justices of St. Ives, Cornwall, upon the appellant, for the payment of a lighting rate made under the provisions of the 3 & 4 Will. 4, c. 90.

It appeared that after the passing of the Act it was adopted by the parish of St. Ives, which continued to be lit under its provisions down to the year 1837, when the town council of the borough decided upon taking upon themselves the powers of the Act pursuant to sect. 88 of the 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), which section enacts, "That if the council of any borough chosen under this Act shall . . . declare . . . they will take upon themselves the powers given to inspectors named" in the said Act of the 3 & 4 Will. 4, c. 90, "so far as the same relates to the lighting the whole or any part of any borough . . . the council of such borough shall after the day named . . . have the same powers and duties as belong to inspectors under the said last-recited Act, in regard to lighting and to levying rates for the purpose of lighting such part of the borough. . . . Provided also that it shall not be lawful in such case for the inhabitants of such part of the borough at any time to determine that the provisions of the said recited Act shall cease to be acted upon." Subsequently the town council relinquished their powers under the Act, and the vestry accepted such relinquishment, and have since lighted the parish under the first-mentioned Act. A lighting rate having been made by the parish officers pursuant to the Act, the appellant was summoned before justices to show cause why he should not pay the said rate. At the hearing the appellant objected (*inter alia*) that the rate was unlawful, inasmuch as it was made by parties having no lawful authority to make it; for that, inasmuch as the town council had adopted the Act, they could not afterwards divest themselves of their powers, and that the vestry had no power to accept their relinquishment of their powers with which they had invested themselves. The justices decided against this objection, and ordered payment of the rate.

*Kearlake* appeared for the respondents, and contended that the rate was good as made by a lawful authority, and that it was competent to the town council to relinquish their power to carry out the Lighting Act. [COCKBURN, C.J.—How do you get over the provision at the end of the 88th section, that when the town council adopts the Act, the inhabitants shall have no power to determine that the provisions of the Act shall cease to be acted upon? This shows that the decision of the town council is final.] That proviso has reference to the old Act, there being a provision in sect. 15 enabling the parishioners at the expiration of three years to determine that the Act shall no longer be acted upon. [CROMPTON, J.—When the town council have once taken the Act upon themselves, may they renounce it, and afterwards again adopt it, and so go on continually? Is it not a general rule, that when once a public body makes an election they must abide by it? There are many Acts of Parliament giving inhabitants and others powers to adopt such Acts; can they in any such cases renounce their powers? BLACKBURN, J.—It is a general principle, that if a party makes his election he does so for ever.] The town council, it is submitted, are not bound to continue to be inspectors under the Act for ever.

[CROMPTON, J.—It would be very extraordinary if these bodies could elect and renounce, and elect and renounce, and so go on. This construction has never been adopted.]

COCKBURN, C.J.—If the town council once take upon themselves the office of inspectors under the Act, the optional power of the inhabitants is at an end, and the town council must continue their functions.

HILL, J.—If the town council make their election, it must be taken that they make it with all its legal incidents, one of which is, that they cannot afterwards renounce their powers.

CROMPTON and BLACKBURN, JJ. concurred  
*Judgment for the appellant.*

#### THE CLERK OF THE PEACE FOR MIDDLESEX v. ALL SAINTS, POPLAR.

*Pauper lunatic—Order of settlement and maintenance may be made upon the parish at whose instance pauper sent to county asylum.*

By the 16 & 17 Vict. c. 97 (*Lunatic Asylum Act*), s. 98, "if any lunatic pauper be not settled in the parish by which he is sent to an asylum, and it cannot be ascertained in what parish he is settled, two justices may adjudge the pauper to be chargeable to the county; and by sect. 99, if afterwards such county procure such lunatic to be adjudged to be settled in any parish, it shall be lawful for two justices to make an order of maintenance upon such parish."

A lunatic pauper in the parish of A. was sent by an order of justices under sect. 98 to the lunatic asylum of the county of M. The county of M. subsequently obtained an order adjudging his settlement to be in the said parish of A.:

*Held, that the first order was no bar to the making of the second order, and that such second order might well be made in the parish of A., notwithstanding the first order was made upon the supposition that the pauper was not settled in such parish.*

This was a case stated under sect. 11 of the 12 & 13 Vict. c. 45, upon an order of justices adjudicating the settlement of a lunatic pauper, and ordering payment for his past and future maintenance.

It appeared that the pauper William Baker became chargeable as a lunatic to the parish of All Saints, Poplar, in 1839, whereupon he was sent to Hanwell Asylum. On the 16th Oct. 1858 (ten days' notice having previously been given to the clerk of the peace for Middlesex) an application was made by the parish officers of All Saints for an order adjudging the pauper to be chargeable to the county, on the ground of his parish of settlement being unknown. All parties having attended, the order was accordingly made. On the 8th of the following February, the clerk of the peace applied for an order of settlement and maintenance upon the said parish of All Saints, as being the parish of the pauper's settlement, and the justices accordingly made the order, which is the subject of the present case.

By sect. 98 of the 16 & 17 Vict. c. 97 (*Lunatic Asylums Act*), it is enacted that "if any pauper lunatic be not settled in the parish by which . . . he is sent to any asylum . . . and it cannot be ascertained in what parish such pauper lunatic is settled," upon ten days' notice being given to the clerk of the county in which such lunatic was found, "it shall be lawful for two justices . . . to inquire into the circumstances of the case, and to adjudge such pauper lunatic to be chargeable to such county, and to order the treasurer of such county to pay," &c., &c.

By sect. 89 it is enacted that "if after any pauper lunatic has been sent to an asylum . . . and has been adjudged to be chargeable to a county, such county procure such lunatic to be adjudged to be settled in any parish, it shall be lawful for any two justices . . . to make an order upon the guardians of the union to

Q. B.]

REG. v. THE OVERSEERS OF LACKMANSTONE—COLE v. COULTON.

[Q. B.]

which such parish belongs, or of any such parish . . . for payment to the treasurer of the said county of all expenses and moneys paid by such treasurer as hereinbefore is provided," &c.

*Poland* appeared in support of the order, and argued that the order was rightly made upon the parish of All Saints, notwithstanding the pauper was originally made chargeable to the county, upon the ground that he was not chargeable to All Saints; there being no power of appeal against such former order, and it being merely an interim order until the settlement of the pauper could be finally ascertained.

*Metcalf*, contra, was called upon, and contended that, although it was competent to the justices to have adjudicated upon the settlement of the pauper in any other parish than All Saints, yet that, as regards that parish, the original order of the 16th Oct. 1858, which could only have been made upon the ground that the pauper was not settled in that parish, was a bar to any subsequent adjudication of settlement in that parish, particularly as the county had an opportunity, when the first order was made, of showing that All Saints was the parish of settlement.

*COCKBURN, C.J.*—The powers of the 98th section appear to be sufficiently wide to enable us to hold that, notwithstanding the former order, the county may at any time after ascertain in what parish the pauper is settled, and to hold that there is no such power would be an anomaly. I think, therefore, that we ought to decide that the second order was good, and that the first order, being merely an interim order, is not conclusive on the parties.

*CROMPTON, J.*—I am of the same opinion. It is quite contrary to rule that an order made without a power of appeal should be conclusive against the parties. The first order was not a final order which would prevent the justices from making another order when the parish of settlement is, in fact, found out.

*HILL, J.* concurred.

*BLACKBURN, J.*—If it had been intended that the first order should have been final with reference to the parish, the statute would have given a power of appeal.

*Order affirmed.*

#### REG. v. THE OVERSEERS OF LACKMANSTONE.

*Police-rate*—2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88—*Application to certain liberties and franchises.*

*The police-rate made and assessed under the provisions of the 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, is assessable upon the district of Romney Marsh.*

This was a case stated for the purpose of taking the opinion of the court as to whether or not the district of Romney Marsh is liable to contribute to the police rate of the county of Kent under sect. 3 of the 3 & 4 Vict. c. 88.

By the foregoing section, after enacting that so much of the 2 & 3 Vict. c. 93, as provides that the expenses of putting the said Act into execution, shall be paid out of the county rate shall be repealed, it is enacted that "for the purpose of defraying the expenses of the said Act in any county in which, or in any part of which the said Act shall be put in force, the justices of such county in general or quarter sessions assembled, shall make a fair and equal police-rate, and for that purpose shall assess and tax the whole district for which the constables are appointed rateably and equally according to a certain pound rate of the full and fair annual value of all messuages, lands, tenements and hereditaments liable to the county rate, or which, if the whole of the said district were, to all intents and purposes, within their county, would be liable to the county rate therein, including all detached parts of other counties, and also all liberties and franchises (except as hereinafter excepted) which are locally situated in such county, or wholly or partly surrounded by such county, and de-

clared by the said Act to be considered as forming part of such county for the purposes of the said Act; but excluding . . . all incorporated boroughs which are or shall be within the provisions" of the 5 & 6 Will. 4, c. 76, &c. By the former Act, the 2 & 3 Vict. c. 93, s. 27, it is enacted, "that for the purposes of this Act all detached parts of counties, and also all liberties and franchises (other than such incorporated boroughs as aforesaid) shall be considered as forming part of that county by which they are surrounded," &c.

The district of Romney Marsh was incorporated by a charter of James the First, in the year 1604, and ever since then has been exempt from the jurisdiction of the county justices, having its own rate in the nature of a county rate, maintaining its own constables, and having a gaol and court of quarter session.

*M. Smith, Q.C.* and *Russell* now appeared in support of the rate, and contended that the district was not exempt from being assessed to the police-rate of the county. [*CROMPTON, J.*—It certainly appears to be within the enacting clause, and not within any of the exceptions.]

*Hayes, Serjt.*, contra (*Deeds* with him), was called upon, and contended that the statutes were not intended to apply to such a case as this; that under the first Act, the 2 & 3 Vict. c. 93, the funds for the maintenance of the constables were obtained from the county rate, which clearly did not extend to the present district, and it was only when by the 3 & 4 Vict. c. 88, a police-rate was substituted, that it was sought to include the district, and that there could be no reason for applying the Police Acts to the district which was already provided with full powers for police arrangements.

*COCKBURN, C.J.*—I think this case is tolerably clear. The first Act empowers counties to establish a police force, in which are included all liberties and franchises (with certain exceptions) which are situated within the body of the county, and to assess the county to a county rate. But it seems that this did not work satisfactorily, for a county rate could not be assessed in certain liberties. Therefore we have the second Act, and then a police-rate is substituted for the county rate; and by the 6th section a special provision is introduced to obtain contribution from such liberties and franchises. It is clear, I think, that the Legislature intended to include such liberties and franchises. No doubt this is a very extensive liberty, but that shows the necessity of having an efficient police establishment.

*CROMPTON, HILL* and *BLACKBURN, JJ.* concurred.  
*Judgment for the Crown.*

*COLE* (appellant) v. *COULTON* (respondent).

*Information—Who may lay—Alehouse-keeper harbouring prostitutes*—10 & 11 Vict. c. 89, s. 35—*Police Clauses Act.*

*The clerk to the commissioners under a local Act, without any special authority, laid an information for an offence under that Act:*

*Held, well laid.*

*The 35th section of the 10 & 11 Vict. c. 89 (Police Clauses Act) applies to an alehouse-keeper as well as to other persons.*

This was a case stated upon a conviction by justices of the appellant (who was an innkeeper), under the King's Lynn Improvement Act, for harbouring prostitutes.

It appeared that the King's Lynn Improvement Act incorporates the Police Clauses Act, 10 & 11 Vict. c. 89, the 35th section of which imposes a penalty not exceeding 5*l.* upon "every person keeping any house, shop, room, or other place of public resort, within the limits of the special Act, for the sale or consumption of refreshments of any kind, who knowingly suffers

Q. B.]

OVERSEERS, &amp;c. OF EVERTON v. OVERSEERS OF SOUTH STONEHAM.

[Q. B.]

common prostitutes or reputed thieves to assemble at and continue in his premises."

The information was laid by a person of the name of Coulton, who was clerk to the commissioners, and at the hearing the appellant objected that the informant had no express authority from the commissioners to lay it; but, upon reference being made to a handbill published by him by the direction of the commissioners, giving notice that after a certain day the Act would be strictly enforced, the bill being signed, "By order of the commissioners, John James Coulton," the justices overruled the objection. It was also objected that an alehouse-keeper was not within the 35th section.

Field now appeared for the respondent, and contended that neither objection was sustainable.

Keane was called upon, and argued that both objections were conclusive against the conviction.

COCKBURN, C.J. said he was of opinion that the conviction must be affirmed. The arguments of Mr. Keane had raised considerable doubts in his mind as to whether there was any sufficient authority in the party laying the information to lay it on behalf of the Paving Commissioners. But the authority of the commissioners was not necessary, because the matter was not one which came immediately and necessarily within the scope and power of the Paving Commissioners. It was merely an advantage given to them by the Act of Parliament that they should receive the penalties, and they might act or abstain from acting, as they thought proper. If the authority of the commissioners were a necessary element in deciding this matter, Mr. Coulton had distinctly admitted that he had no express authority, nor any implied authority, except so far as it might be implied from the publication of the printed notice. That notice might have been intended to act merely as a general warning to persons offending against the Act of Parliament. I must acknowledge, therefore, that upon the question, whether there was any authority from the commissioners, express, implied, or understood, I was in doubt. It is not necessary, however, to decide the case upon that ground. It seems to me that, independent of any authority from the commissioners, Mr. Coulton was quite competent to lay the information, so long as the information professed to be based upon the principle that the penalties were for the benefit of the Paving Commissioners. The matter was not one of individual grievance as to which provision was made, for the protection of individual rights by the sanction of penalties imposed by Act of Parliament. It was for the protection of the morals of the public, and the general Act of Parliament gave a general authority to lay an information to whosoever should think proper; the local Act engrafted upon that the special provision that in the case of any information against parties offending the provisions of the general statute, the penalty, instead of being awarded to the informer, should be awarded to one of two sets of commissioners; and that the information should be laid on behalf of one or other of those bodies. And so long as the person laying the information alleged that he claimed the penalty on behalf of one of those bodies, there was nothing to prevent him from doing so. The case is analogous to that of a common informer, where the penalty went half to the informer and half to the Crown, where no authority from the Crown was necessary in order to lay the information. With regard to the contention of Mr. Keane, that beerhouses were under separate legislation, and that this Act did not apply to them, I think possibly that might have been the intention of the Legislature; but they had not guarded their intention by excluding licensed houses from the operation of this local Act, and in the absence of words to that effect it must be held to apply to them. The conviction must, therefore, be affirmed.

CROMPTON, J.—I am of the same opinion. I take this to be an information which this person issues on behalf of this body, and the adjudication is made that the penalties shall be awarded to them. It is said that there was no express authority to lay the information. What we are to look at is, whether it is taken on behalf of either of these bodies, and therefore it is not necessary to show any special authority. But if it were, I am inclined to think there would be sufficient. He is asked, "Have you any express authority?" He says, "No, I have no express authority to lay this particular information, but I am the clerk to the commissioners and suppose myself generally authorised; and here is a handbill published by order, which says that on and after the 11th May these penalties will be strictly enforced." That does appear to me to be some evidence that the commissioners were in earnest and really intended to enforce the penalty. I do not think it is necessary to show authority in every particular case. Therefore upon that point on all grounds the conviction must be affirmed. The other point hardly requires any notice. It appears to me that the clause takes in all houses of refreshment, and upon that ground also the conviction must be affirmed.

BLACKBURN, J. concurred. *Conviction affirmed.*

April 25 and 28.

OVERSEERS, &c. OF EVERTON (appa.) v. OVERSEERS OF SOUTH STONEHAM (resps.)

*Settlement—Payment of poor-rate—Watch-rate.*

*A. became tenant and occupier of premises in township E. on 28th Sept. 1857, and continued till Nov. 1858, when he left. On the 10th April 1858 the usual annual poor-rate was made, to which A. was assessed at 1l. 4s.; of this sum he only paid 14s., the proportion of the rating year for which he occupied. The premises remained vacant, and there was no one from whom the overseers could recover the remainder of the poor-rate under the 17 Geo. 2, c. 38, s. 12.*

*The township E. is in the municipal borough of L., which also comprises other parishes. The overseers of the township made a watch-rate for it separately, to which A. was charged 5s. 41., and which he paid. The watch-rate is levied by virtue of the Corporation Act, 5 & 6 Will. 4, c. 76, s. 84:*

*Held, that A. did not acquire a settlement in township E. by payment only of a part of the poor-rate to which he was charged, but that he did acquire such settlement by payment of the watch-rate.*

Case for the opinion of this court as to the settlement of Matilda Wadham, wife of Benjamin Bruffit Wadham.

The pauper's husband, Benjamin B. Wadham, *bona fide* rented from Geo. Nicholson a dwelling house in Clarence-grove, in the township of Everton, a township maintaining its own poor, at 16l. a-year for the term of one whole year, which house was held and occupied under such yearly hiring, and the rent for the same paid for the term of one year at the least by the said B. B. Wadham.

Such renting and occupation commenced on the 28th Sept. 1857, and continued until Nov. 1858.

The overseers of the township are in the habit of making only one rate for the relief of the poor in each year, and they had before the commencement of the above-mentioned renting and occupation, that is to say, on the 27th March 1857, at which time the house in question was in the occupation of Edwd. Hughes, made a rate for the relief of the poor, in which the said E. Hughes was rated; and he on the 7th July 1857 paid the entire amount of the rate, 1l. 2s. 6d.

On the 10th April 1858 the overseers made a rate for the relief of the poor of the said township, in which the said B. B. Wadham was charged with and assessed to the same in respect of the said house in the

[Q. B.]

OVERSEERS, &amp;c., OF EVERTON v. OVERSEERS OF SOUTH STONEHAM.

[Q. B.]

sum of 1*l*. 4*s*., which sum was duly demanded from him, but of which rate he paid 1*s*. only, being the proportion for the period during which he was in occupation subsequently to the making of such rate, and being the whole amount which at the time of such payment was demanded of him by or on the behalf of the overseers of the said township.

When B. B. Wadham left his house, it remained empty until after the making of the poor-rate made next after he so left, so that there was no tenant from whom the 10*s*., being the balance of the rate of the 10th April 1858 which remained unpaid, could be recovered under the provisions of the 17 Geo. 2, c. 38, s. 12.

The township of Everton is wholly within the borough of Liverpool, which also comprises the parish of Liverpool, the township of Kirkdale, and portions of the township of Toxteth-park and West Derby. After the passing of the resolutions, and the making of the order and warrants set out in the several documents hereunto annexed, the overseers of the said township of Everton made and collected a pound rate upon and from the occupiers and possessors of all property assessable to such rate within such township, for the amount of the watch-rate in such documents referred to and chargeable on the said township. Such rate has no title other than the printed heading (as in the extract annexed). "Watch-rate" was at the top of each page.

The declaration and allowance at the foot of such rate are as follows:—"We, Thos. Bird, Geo. McConnell and Joseph Caferata, the persons specially appointed to act, execute and perform the duties of overseers within and for the township of Everton, for, in and about the making, laying and raising and collecting therein the watch-rate for the year ending on the 31st of March 1859, do declare the several particulars specified in the respective columns of the foregoing rate of the district No. 2 to be true and correct so far as we have been able to ascertain them, to the which end we have used our best endeavours.

"THOS. BIRD, } Overseers  
"GEO. MCCONNELL, } of the township  
"JOSEPH CAFFERATA, } of Everton."

"We, Richard Shiel and Samuel Holme, Esqrs., two of her Majesty's justices of the peace for the borough of Liverpool (one whereof is of the quorum), do consent and allow of this assessment. Witness our hands this 23rd day of Oct. 1858.

"RICH'D SHIEL,  
"SAM'L HOLME."

The rate is made in three parts, or districts, and the foregoing declaration and allowance appear at the foot of the book of each part or district.

The overseers, by whom the said watch-rate was made and levied, were the overseers of the poor of the township of Everton, appointed under 43 Eliz. c. 2, s. 1, and the 13 & 14 Car. 2, c. 12, s. 21, or one of them; and they as such overseers were the proper officers, under the statutes relating to the levying of watch-rates in boroughs, to make and levy the said watch-rate. The statement contained in the declaration, signed by the overseers at the foot of the said watch-rate, that they were overseers specially appointed for the purpose of making, levying and collecting the said rate, was not the fact, but was an incorrect statement. B. B. Wadham is charged and assessed in such watch-rate with and in the sum of 5*s*. 4*d*., which sum he paid on the 17th Nov. 1858.

The overseers of the poor of the township authorised and employed the collector of the poor-rates to collect the said watch-rate on their behalf, and which he did. An extract from the poor-rate books for the years 1857 and 1858, and of the watch-rate of 1858, are herewith annexed, and may be referred to as part of this case. The said B. B. Wadham resided in the said

township of Everton, in a house in Conway-street, in the said township, for forty days and upwards after he had paid the said proportionate part of the said poor-rate of the 10th day of April 1858, and the said watch-rate; but his tenancy of the said house in Clarence-grove had expired, and he had ceased to be the occupier thereof prior to the completion of such forty days' residence.

Upon the above grounds, or some of them, the pauper was ordered to be removed from South Stoneham to Everton, and the latter township having appealed against the order, the parties agreed to state this case.

The question for the opinion of the court is, whether the pauper's husband acquired a settlement in Everton. If he did acquire such settlement, then the order is to be confirmed; if not, it is to be quashed.

*Huddleston* (Field with him) for the respondents.—The first question is, whether the pauper's husband gained a settlement in Everton by the payment of the poor-rate. The law remains the same as when enacted by the 3 Will. & M. c. 11, s. 6, viz., the inhabiting in a parish and paying his share towards the public taxes or levies of the parish will confer a settlement, with this addition imposed by the 6 Geo. 4. c. 57, that the payment must be in respect of renting a tenement. But one poor-rate for the year is made in Everton, and of that year the pauper's husband remained in the occupation of the tenement seven months only, and the parish officers recognise his occupation by the act of charging him only fourteen shillings out of the twenty-four shillings, being the proportion for the period of his occupation. This is sufficient to gain a settlement: (*R. v. St. Marylebone*, 15 Q. B. 399; *S. C.* 19 L. J. 201, M. C.; *R. v. Bromley*, Burr. S. C. 75.) [*CROMPTON, J.*—Can we say upon the words of the 3 Will. & M. that he has paid what he was charged with? *COCKBURN, C.J.*—As to this first point, this poor-rate was payable *in præsentia*, and the pauper's husband did not pay it, but only a part, and therefore no settlement was acquired by such payment.] The second question is, whether the payment of the watch-rate, with a residence of forty days, is sufficient. The question upon this is, whether the watch-rate is a rate within the meaning of the words "public taxes or levies of the said town or parish," in sect. 6 of the 3 Will. & M. c. 11. The watch-rate is levied under sect. 84 of the 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), and 7 Will. 4 and 1 Vict. c. 81, and for the purposes of the borough being collected by the parish officers: (*R. v. Christchurch*, 8 B. & C. 663.)

*Aspinall* (Temple with him) contended that the payment of the watch-rate did not give a settlement.

*COCKBURN, C.J.*—I think that no settlement was gained by the payment of the poor-rate. The rate was one made for an entire year, and was payable by one payment *in præsentia*. Instead of so paying it the husband of the pauper waited seven months, and then paid a part only by some arrangement with the overseers. Now that will not do under the statute. He must pay the whole rate as his share. But I think that he did gain a settlement by payment of the watch-rate. I do not agree, that if a man is assessed to two rates entirely distinct, and he pays the one and not the other, that he is not entitled to his settlement. The main question is, whether this watch-rate is a parochial tax? After some consideration, I think that it is. The town council are to make a rate on the borough to meet the expense of watching. They make a resolution that such a rate is to be made, and they call upon the overseers to levy it. Then the Act requires that the overseers shall make and levy the rate. Now it seems to be admitted that if that rate, levied by the usual officers, had been to levy over the whole borough, it would have been a parochial tax. It is essentially a parochial tax, to be levied by parochial officers, and is a public tax of the town or



parish within the statute of William and Mary. The only difficulty is in the fact that the rate is not to be wholly levied on the whole of the borough. But does this make any difference? I think not. The object of the statute was to prevent a person coming into a parish clandestinely, and gaining a parish settlement. It makes no difference whether the whole borough contributes or only a portion.

CROMPTON, J. concurred.

HILL and BLACKBURN, JJ. were absent.

Order confirmed.

Saturday, May 5.

REG. v. GEO. PRICE LLOYD AND OTHERS.

*Quo warranto*—Relator—Question of existence of corporation.

*The court will grant a quo warranto information at the instance of a private relator when private rights are interfered with, although the result may be that the existence of the corporation may be called in question.*

This was a rule calling upon Geo. Price Lloyd, Owen Richards and John Jones to show cause why an information in the nature of a *quo warranto* should not be exhibited against them to show by what authority they claimed a right to exercise the offices of mayor and bailiff of Bala, in Merionethshire. The rule had been obtained on the ground that Bala was not a corporation. It appeared by the affidavits that a meeting was held at Bala in 1859, when certain old charters some centuries old were produced and read, and it was then determined to revive the borough, and Geo. P. Lloyd, Owen Richards and John Jones were respectively elected the mayor and bailiffs, and an officer was appointed to collect tolls in the market and public streets.

V. Williams now showed cause against the rule.—The only act alleged in the affidavits is the collecting of tolls, but the payments referred to were in the nature of stallage, not tolls. Notice was given that persons occupying stalls in the public streets would be called upon to pay in proportion to the space they occupied: such a charge is legal: (*Mayor of Northampton v. Ward*, 2 Strange, 1238.) [COCKBURN, C.J.—The payments were taken as of right of the supposed corporation—is the soil in them?] If a wrong is done to an individual the person injured has his remedy. [COCKBURN, C.J.—The thing is too plain for discussion. They say the right in us is as a corporation.] The relator Price states that he lives within a mile of Bala, and that he is the owner of land in the town, and of land adjoining thereto; he is not a burgess or inhabitant of the town. If his property is affected he has his remedy, but this taking of stallage is in no way detrimental to his property. It is discretionary with the court to grant or withhold a *quo warranto* information, even where a good objection to the title is shown: (*Rees v. Parry*, 6 Ad. & Ell. 810.) [CROMPTON, J.—We must be careful we do not let any stranger interfere, but Mr. Price cannot be said to be a stranger. HILL, J.—Are we on a motion for a *quo warranto* to try disputed facts? They must be put on the record and tried. COCKBURN, C.J.—An old charter may be good, or it may be mere moonshine; surely that is a question to be tried.] Not at the instance of a private individual; it may be the duty of the Attorney-General. [HILL, J. referred to *Rees v. Ogden*, 10 B. & C. 230. *Walsby* referred to *R. v. Carmarthen*, 2 Burr. 869.] An information in the nature of a *quo warranto* will not lie in a case such as this: (*R. v. Maresden*, 3 Burr. 1812; 1 W. Bl. 579; *R. v. Taylor*, 11 Ad. & Ell. 949.) [HILL, J.—The true test is, whether the franchise claimed is purely of a private nature, or of a right which will interfere generally with the public interest: (*R. v. Ogden*.)] The stat. 9 Anne, c. 20, applies only to corporate offices in corporate places; it must be shown that there is a cor-

poration in existence. Reg. Gen. M. T. 1839; *Reg. v. McKay*, 5 B. & C. 640, were also referred to [COCKBURN, C.J.—May not a corporation be dissolved by the death of the whole of the persons holding office without removal or re-election; and, if so, can any persons come at any time afterwards and say, we are the mayor and burgesses, we are the corporation?]

*Walsby*, contra, was not called upon.

COCKBURN, C.J.—This rule should be made absolute. It is not necessary to decide whether, if a private individual were to come forward to try the right of a corporation as an aggregate body, the court would allow a *quo warranto* to issue without the intervention of the Attorney-General; but precedent and authority clearly show that the right of individuals may be questioned in a case where private rights are interfered with, although the result may be that the existence of the corporation may be called in question. It is quite enough to say that what we now do is quite in accordance with the cases, which fully authorise us to order the rule to go in this case. Here there had been no corporation for several centuries; suddenly persons come forward and say they will reinstate the corporation, and they proceed to exercise the powers and duties of corporate officers. I can't imagine a more fit case for the information. *Rule absolute.*

REG. v. JUSTICES OF WARWICKSHIRE.

*Poor-rate—Occupation—Beneficial—Matter of appeal.*

*The question of occupier or non-occupier of premises rated to the poor-rate may be raised before the justices on application for a distress warrant; but if the person who is the visible occupier objects that his occupation is not beneficial, that is matter for appeal to the quarter sessions.*

HAYES, Serjt. showed cause against a rule calling on the justices of Warwickshire to show cause why a *mandamus* should not issue, directing them to issue their warrant of distress to levy a poor-rate assessed upon Mr. Newsome in respect of a house at Leamington, of which he was the occupier. The rule had been obtained at the instance of the overseers of Leamington, the justices having refused to issue a warrant, being of opinion that there was no beneficial occupation. It appeared by the affidavits that Mr. Newsome was the occupier of a house, orchard and garden. He was the executor of a relation, the Rev. Clement Newsome, on whose death the principal part of the furniture was sold in May, but an old servant was left in the house to take care of it, and certain articles of furniture were selected by him and remained on the premises for his use, but they belonged to Mr. Newsome. There were fruit-trees and vegetables in the garden, which appeared to have been cultivated. The question here is, whether the house was empty or not—was there any occupation? The question, whether the occupation is a rateable occupation or not, is always a matter of action: (*Milward v. Caffin*, 2 W. Black.) The case was heard before the justices, who came to the conclusion that there was no beneficial occupation, and refused their warrant. [COCKBURN, C.J.—This is an occupation surely, whether beneficial or not; the question of rateability is not one for the sessions.] No; the question of amount is only for the sessions. The party rated may show the justices that he is not a rateable occupier: (*Amhurst v. Somers*, 2 T. R. 373; 1 Nolan's P. L. 4th edit. 256.) This court will not interfere where the justices have heard and exercised their judgment upon the application: (*R. v. Morgan*, 618; *R. v. Benn*, 6 T. R. 198.) In such a case the court will not grant a *mandamus* to compel them to decide differently and issue warrants. If the justices had not heard the case, the proper application would have been that they should hear and adjudicate. [COCKBURN, C.J. referred to *Marshall v. Pittman*, 9 Bing. 595.

Q. B.]

REG. v. THE MAYOR, &amp;C. OF MANCHESTER.

[Q. B.]

CROMPTON, J.—That case was confirmed by *Overseers, &c. of Birmingham v. Shaw*, 10 Q.B. 868; both those cases are dead against you.] The question before the justices was rateable occupation or no rateable occupation; they have considered and decided, and the question of rateability can only be raised by action; the amount is the question for the quarter sessions: (*R. v. Painter*, 3 E. & B. 328; *R. v. Denman*, 3 E. & B. 672, were also cited.)

*Ridton*, contra, was not called on.

COCKBURN, C. J.—I am of opinion that this rule should be made absolute, although there may be some conflict of authorities. The last decision is *The Overseers of Birmingham v. Shaw*, which adopts *Marshall v. Pittman*, and that case established that whenever there is a beneficial occupation the property is to be rated, and whenever one who is the visible occupier objects that his occupation is not beneficial, the objection is a matter which must be inquired into before a court of appeal. It is at the quarter sessions that the owner must seek his remedy, and if he does not do that we cannot help him. If a man lock up his house and go away, he might say he was not in actual occupation; but if there be occupation, and the question is whether it is beneficial or not, that is matter of appeal. The distinction is obvious: a man cannot be rated unless he is an occupier, and when the occupation is doubtful, and there is some occupation, but whether a rateable one or not is disputed, that is a question for the quarter sessions on appeal. Now here there was an occupation; the party occupied by his servant, and there was property liable to be rated. If his answer was, there was an occupation, but not such a one as is liable to be rated, that is a question for the quarter sessions. That is the effect of the late decisions, and I think a very proper one. The courts are anxious to avoid a conflict of jurisdiction, and I think the distinction is very properly taken. It would be inconvenient to give jurisdiction to justices in petty sessions as distinguished from quarter sessions. *R. v. Morgan*, cited by my brother Hayes, is in his favour; but *The Overseers of Birmingham v. Shaw* is of later date, and, in my opinion, is a sounder view of the question.

CROMPTON, J.—I am of the same opinion. We have often decided lately that, when justices have acted, we will not allow matter to be set up which is matter of appeal; to that there has been an exception, viz., when there has been no occupation, which question may be raised in an action. *R. v. Justices of Birmingham* has decided that occupation or no occupation is for the justices, and that is the most correct view, and I should be sorry to disturb it; and the question of rateability or not of the occupation is for the sessions. That is distinctly laid down in that case, which adopts *Marshall v. Pittman*. I entirely agree with the rule of law as laid down by Lord Denman; he says (10 Q. B. 881): "As soon as the land is shown to be in the parish, and A. B. to be the occupier, the case is *prima facie* brought within the statute of Elizabeth, the rate on its face is good, and jurisdiction attaches; whether that *prima facie* case can be answered by any circumstances affecting the character of the occupation is matter to be determined by the court of appeal on appeal made."

HILL and BLACKBURN, JJ. concurred.

Monday, May 7.

REG. v. THE MAYOR, &C., OF MANCHESTER.

*Turnpike-road—Non-repair—Indictment—Apportionment of fine—3 Geo. 4, c. 126, s. 112.*

*Part of a footway adjoining a turnpike-road was gravel and part paved for convenience of walking, and it was taken as a fact, paved to the necessary extent for practical purposes, although on each side*  
MAG. CAS.]

*of such pavement a part of the footway remained gravelled:*

*Held, that it was a question of fact whether this was a pavement or paved footway within the 3 Geo. 4, c. 126, s. 112; and it being left to the court, the court held that it was practically such, and that, therefore, the trustees were exempted from liability to repair it by reason of sect. 112.*

Rule nisi calling on the trustees of a turnpike road passing through the township of Chorlton-in-Medlock, to show cause why a fine of 49l. 8s. should not be apportioned between the inhabitants of the township and the trustees of such road.

It appeared that an indictment for non-repair of a footway adjoining a turnpike-road leading from Manchester to Buxton had been preferred against the Mayor, &c., of Manchester (the township of Chorlton-in-Medlock being within the borough of Manchester), upon which they had been convicted and sentenced to pay a fine of 49l. 8s., the amount necessary to satisfy the repairs. The footway adjoining varied in breadth, from 2½ yards to 3½ yards, and along the centre a flagged stone pavement, of one yard in width, was laid down for the public convenience. The remainder of the footway on each side of the pavement was gravel.

*Welsby* showed cause.—The only question is, whether that portion of the footway on which there is a flagged stone pavement was a pavement within the meaning of the Turnpike Act, 3 Geo. 4, c. 126, s. 112, so as to exempt the trustees from liability, and cast it upon the township. The 3 Geo. 4, c. 126, s. 110, empowers the court to apportion the fine between the inhabitants of the parish, township, or place, and the trustees of the turnpike-road. Sect. 111 empowers the trustees to make and repair causeways for the use of foot passengers upon the side of the turnpike-road. And sect. 112 provides that nothing in the Act contained as to the making or maintaining any causeway or footway shall empower the trustees to lay down, continue, repair, or maintain any pavement, or any paved or pitched causeway or footpath, but every such pavement, paved or pitched causeway or footway shall be made, repaired and maintained at the costs of the inhabitants of the town, &c., or by such other persons as shall be liable to make, maintain and repair the same. It is submitted that this was a paved footway within that section. The parties are desirous of having the opinion of the court.

*Monk and Mellish* in support of the rule.—This is a footway partly paved and partly gravel, and therefore does not fall within sect. 112. [HILL, J.—Sect. 110 seems only to refer to indictments for non-repair of highways being turnpike-roads, and not to footways or causeways adjoining the roads.] In *Loveridge v. Hodsoll*, 2 B. & Ald. 602, it was considered that, by the 111th section of 3 Geo. 4, c. 126, the footway did form part of the turnpike-road.

COCKBURN, C.J.—This is a question of fact. Is this a pavement or a paved footway or not? A certain portion of the footway is paved, and a certain portion not. It would be extremely inconvenient to divide it into two portions, one of which is to be repairable by the parish or township and the other not; and the better course is to consider the whole as a paved footway, and then it follows that the trustees are not liable to repair it by the 112th section of the 3 Geo. 4, c. 126.

CROMPTON, J.—This is a question of degree, and I think that we must take it that it was a paved footway to the extent that was practically necessary for the public to walk upon it. The consequence is, that the burden of repairing it will be thrown on the township, and not on the turnpike trustees.

HILL and BLACKBURN, JJ. concurred.

*Rule absolute as to the sum of 34l., and discharged as to the residue.*

Q. B.]

REG. v. FOX—*Ex parte* H. E. ELLIS—ELLIS v. WOODBRIDGE.

[C. B.]

REG. v. FOX.

*Indictment—Certiorari—Costs—Prosecution instituted by town council.*

*A prosecution was directed to be instituted by the town council of a municipal borough, and two members of the council instructed the attorney who conducted it and rendered themselves liable for the costs to him. The defendant removed the indictment by certiorari, entering into the usual recognisance:*

*Held, that the two councillors were entitled, by the 5 Will. & M. c. 11, to costs from the defendant on conviction.*

Rule nisi calling on the defendant to pay to the prosecutors the costs of the prosecution and proceedings in error.

The defendant, being clerk to the justices of the borough of Newport, was convicted on an indictment under the 5 & 6 Will. 4, c. 76, s. 102, charging him with being interested in certain fees received by his partner, Charles Prothero, the clerk of the peace for the county, on the prosecution of offenders committed from the borough for trial at the quarter sessions for the county. The indictment was removed by *certiorari* into this court on the usual recognisance required by the 16 Vict. c. 30, s. 5, and the defendant afterwards brought error upon the judgment, and the Court of Ex. Ch. affirmed the judgment. Previous to the indictment a *quo warranto* was applied for against the defendant, with the view of removing him from his office of clerk to the borough justices, on account of his said partner being interested in the prosecutions, but this court held that a *quo warranto* would not lie. On that occasion Messrs. Shepherd and Townsend, members of the town council, became the relators, but the costs of the defendant on the *quo warranto* were paid by the town council. It further appeared that the prosecution of the defendant was directed by the town council, and sanctioned by a public meeting of the burgesses. Messrs. Townsend and Shepherd instructed the attorney for the prosecution, and, no doubt, had rendered themselves liable to him for the costs.

*Phipson* showed cause. — Messrs. Townsend and Shepherd are merely nominal prosecutors, the town council being the real prosecutors, and the question is, whether mere nominal prosecutors are within the 16 Vict. c. 30, s. 5, which requires the recognisance on removal of an indictment by *certiorari* to contain a provision that the defendant in case of conviction shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment. Under the 5 Will. & M. c. 11, s. 3, the prosecutor must be some "person aggrieved" to entitle him to the costs; and in *R. v. Cook*, 1 Man. & Ry. 526, it was held that when the costs are defrayed by subscription, and the nominal prosecutors incur no expense, they are not entitled to costs as prosecutors within 5 Will. & M., c. 11, s. 3: (see also *Gray* on Costs, 457.) If the town council can legally contract, they have done so in this case with the attorney for the prosecution. In *R. v. Wilson*, 1 E. & B. 597, the costs of an indictment by order of the Lord Mayor and prosecuted by the city solicitor, and removed by *certiorari*, were held not recoverable under the 5 Will. & M. c. 11, s. 3.

*Welsby*, in support of the rule, was not called upon.

COCKBURN, C.J.—This case falls within the principle that has been acted upon, and Messrs. Townsend and Shepherd were persons aggrieved within the meaning of the 5 Will. & M. They authorise their names to be used and made themselves responsible for the costs. There is not the slightest reason for saying that they were put forward for the purpose of protecting persons in the background.

CROMPTON, J.—The case of *Arnold v. Mayor of Poole*, 4 M. & G. 860, shows that the parties who give the instructions to the attorney, make themselves

liable to him. This case is similar to *R. v. Williams*, 6 Q. B. 273. *Rule absolute.*

Tuesday, May 8.

*Ex parte* H. E. ELLIS.

*Attorney's bill of costs—Taxation—Settlement in account—Application within a month—Taxable items.*

*Cooke Evans* moved to refer the bill of costs of Fredk. Patey Chappel, an attorney, to the master for taxation. An application had been made to Martin, B. at chambers, who made an order giving leave to the attorney to add items; that order was abandoned, and had not been drawn up. It appeared that Chappel had acted as attorney for Hy. Emly Ellis, the applicant, in obtaining a loan, and he sent in a bill of costs to the amount of 30*l.* 13*s.* The attorney on the balance of accounts owed a large sum to Ellis, and he gave him a promissory note for 520*l.*, there being a memorandum at the bottom of the account, signed by Chappel, that the settlement of account was without reference to any dispute arising on the question of the amount of the bill of costs. The bill was delivered on the 15th March, the settlement of the account was on the 16th, and the order of Martin, B. was within a month of the delivery. It was now contended that the learned baron had treated this settlement of account as a payment of the bill—that there was no discretion in the judge, but that it was imperative on him to make the order if the application was made within the month of delivery: (6 & 7 Vict. c. 37, ss. 37, 41.)

*Rule granted subject to there being taxable items in the bill.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAUGHAN WILLIAMS, Esqrs., Barristers-at-Law.

Monday, April 23.

ELLIS v. WOODBRIDGE.

*Duty of surveyor of parish—5 & 6 Will. 4, c. 50—Leaving public bridle and footways.*

*In an information under the 5 & 6 Will. 4, c. 50, against the surveyor of a parish for not putting up posts across a public bridleway and footway at its extremities:*

*Held, that he was not bound by the Act to do so.*

This was an information against the surveyor of the parish of Pinner for not putting up posts at the entrance of a bridleway in his parish. The following case was stated under 20 & 21 Vict. c. 43, for the opinion of this court.

At a petty session of the peace, holden in and for the division of Gore, in the county of Middlesex, on Wednesday the 17th Aug. 1859, before us the undersigned, being justices acting in and for the said county and division aforesaid, one Jason Woodbridge was charged in and by a certain information, "for that, on the 29th July last, at Pinner, in the said county, he being then and there the surveyor of the highways of Pinner aforesaid, did then and there wilfully neglect his duty as such surveyor by not putting up posts on a certain bridleway and footway leading from Pinner to Eastcott, to secure the same from being passed over and spoiled by waggons, wains, carts, or carriages, the same being a public bridleway and footway only, contrary to the form of the statute 5 & 6 Will. 4, c. 50, whereby he had rendered himself liable to a penalty of not exceeding 5*l.*" And the said parties respectively being then present, the said information was duly heard by us, and upon such hearing we adjudged that the said information should be dismissed with costs.

And whereas the said John Ellis hath, pursuant to the provisions of the statute first hereinbefore mentioned, given us notice and required us to state and

C. B.]

ELLIS v. WOODBRIDGE.

[C. B.]

sign a case setting forth the facts and grounds of our determination upon the hearing of the said information, in order that he might take the opinion of the Court of C. P. thereon.

Now we the said justices, pursuant to such notice and the provisions of the statute aforesaid, do hereby state and sign such case as follows:—

At the hearing of the said information the informant cited the 5th section (the interpretation clause) of 5 & 6 Will. 4, c. 50, which enacts, "That the word 'highway' shall be understood to mean all roads, bridges (not being county bridges), carriage-ways, cartways, horseways, bridleways, footways, causeways, churchways and pavements."

And also the 24th section of the said Act whereby it is enacted, "That the surveyor of every parish shall, with the consent of the inhabitants in vestry assembled, secure horse causeways and foot causeways by posts, blocks, or stones fixed in the ground, or by banks of earth cast up or otherwise, from being passed over and spoiled by waggons, wains, carts or carriages, at the cost of the parish."

And also the 81st section of the same Act, whereby it is further enacted, "That if any gate across any public cartway shall be less than ten feet wide, or any gate across any public horseway shall be less than five feet wide clear between the posts thereof, then and in every such case, upon notice in writing from the surveyor to the person to whom the gate shall belong, left at the dwelling-house of such person or his steward or agent, requiring him to enlarge the same, if such person shall neglect for the space of twenty-one days after such notice shall have been left as aforesaid to remove or enlarge such gate, he shall forfeit a sum not exceeding ten shillings for every day he shall so neglect to remove or enlarge such gate as aforesaid."

He, the said informant, also put in an extract from an award made by certain commissioners appointed in pursuance of the Act 43 Geo. 3, intitled "An Act for dividing, allotting and inclosing the open and common fields, commons and waste grounds within the parish of Harrow, in the county of Middlesex," who thereby set out a roadway in the words following:

"No. 65. Road to Eastcott.—One other private carriage-road and public bridle and footway of the breadth of twenty-five feet, branching out of the last described road (No. 64) and extending in a westward direction over the north side of Pinner-marsh to the extent thereof, and thence southward, and again westward, over Down-field, to a bridleway set out in the parish of Ruislip."

The situation of this private carriage-way and public bridleway and footway is in the hamlet of Pinner, in the parish of Harrow, and is of the width of twenty-five feet between the boundary-hedges of the land, that on the north side being of old inclosures, and that on the south side of land inclosed by the commissioners, and leads from a bye-road in the hamlet of Pinner to a bye-road in the parish of Eastcott.

Some years ago a small quantity of gravel was laid along the centre of it, of the width of six or seven feet, the remainder on each side being green sward. It is used as a cartway by the farmers going to and returning from their land abutting on each side. It meets and is joined at the boundary of the hamlet of Pinner by a public bridleway, duly set out by commissioners appointed by Act of Parliament, 44 Geo. 3, intitled "An Act for inclosing lands in the parish of Ruislip, otherwise Ruislip, in the county of Middlesex."

It was also given in evidence by the informant that for the last forty years posts had been placed across the said public bridleway and footway at the end of the said private carriage-way and at the boundary of Pinner and Ruislip at the point where it meets the public bridleway belonging to the parish of Ruislip, and that they had been put up from time to time at the cost of the hamlet of

Pinner by the surveyor for the time being, and so maintained until about two years ago, since which time, for want of their restoration, the private carriage-way and public bridleway and footway had been used as a public highway by persons travelling over them in carriages, to the detriment of the public bridleway and footway. On the part of the defendant it was admitted that posts had been from time to time put up at the boundary of the parish, but that about two years ago the then existing posts were forcibly removed; that they had been reinstated six several times at a considerable expense (on two occasions with iron posts), and as often destroyed; that a reward had been offered for the apprehension of the offenders, and every other step taken by him as the surveyor of the highways of Pinner to sustain the said road as a private carriage road and public bridleway and footway.

And, further, that men had been apprehended in the fact of cutting the iron posts asunder at midnight, and on being taken before the magistrates asserted that they had a right to the free use of the road in question for the whole width of twenty-five feet as a public footway; that they were exercising that right, and that the magistrates had therefore no jurisdiction.

The 80th section of the said Act, 5 & 6 Will. 4, c. 50, enacts "That the said surveyor shall, and he is hereby required to make, support and maintain, or cause to be made, supported and maintained, every public cartway leading to any market-town twenty feet wide at the least, and every public horseway eight feet wide at the least, and to support and maintain every public footway by the side of any carriage-way or cartway three feet wide at the least, if the ground between the fences including the same will admit thereof."

And whereas upon the hearing of the said information, we were of opinion that the 21st section of the 5 & 6 Will. 4 contemplates the erection of posts, &c. against footways, causeways and bridleways by the side of carriage-ways for the purpose of protecting them against injury or damage by waggons, wains, carts or carriages, and does not contemplate the erection of posts, &c. at the extremities of such ways for the purpose of protecting the carriage-ways, bridleways and footways from trespassers.

Secondly, that the said section does not intend the protection by posts of private carriage or other ways against trespassers from adjoining public ways.

Thirdly, that the commissioners acting under the Harrow Inclosure Act having set out a certain space of ground of the width of twenty-five feet as a public bridleway and footway, as well as a private carriage-road, without describing the boundaries of each, it is not competent to the surveyor of highways to determine such respective boundaries by erecting posts at the extremities of such ways.

Fourthly, that the public claiming *bona fide* a right of user of the entire way, it was a question of title, and consequently we had not jurisdiction.

For these reasons we dismissed the complaint.

Whereupon the judgment of the said Court of Common Pleas is required as to whether or not we the said justices were correct in point of law in our determination as aforesaid, or as to what should be done in the premises.

E. W. COX.

H. H. B. HERN.

*Karslake* for the appellant.—By sect. 24 of 5 & 6 Will. 4, c. 50, the surveyor is bound to secure the public bridleways and footways by posts and stones, which he has not done here.

*J. A. Russell*, for the respondent, was not called on.

ERLE, C.J.—In this case I am of opinion that the decision of the justices was correct. Where public bridleways and footways have been raised, which is common in various parts of England, the surveyor of the parish is bound to mark them out with posts or

[Ex.]

PRICE v. TAYLOR.

[Ex.]

stones, so that carts cannot go out of their own road on to them. The Legislature has devoted a part of a road for walking and riding upon, but it never intended that the entrance was to be stopped in the way that the surveyor is here called upon to do; and if any one did enter upon it with a waggon or carriage, an action of trespass would prevent him from doing so again. If the posts were only put up at the end of the road, there would be nothing to prevent any one entering on it at the side; but I do not think that the surveyor is bound to put up anything at the entrance, for if so he might put up a bank at the end, which might to some people be very inconvenient.

WILLES, J.—I am of the same opinion. The construction to be put upon the statute must be in reference to what may usually happen, and not in reference to waggons, the owners or drivers of which may choose to commit an act of trespass.

BYLES, J. concurred.

*Judgment for the respondent. (a)*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and JOHN DUNBAR, Esqrs., Barristers-at-Law.

Monday, April 23.

PRICE v. TAYLOR.

*Building society—Trustees of—Signing promissory note as such—Personal responsibility.*

*The defendant gave to the plaintiff a promissory note, heading the note with the name of a building society, and adding after his name thereto subscribed "trustee." In an action against the defendant upon the note, he pleaded that it was made by a certain building society, whereof he was a member with others; that it was not made by him otherwise than as such member; and that divers persons were trustees and liable by virtue of the Acts of Parliament in that behalf to be sued as such upon the contracts of the society. To this plea there was a demurrer: Held, that the plea was bad, and the defendant personally liable on the promissory note he had so signed.*

Action by the payee against the maker of a promissory note, of which the following is a copy:—

"Midland Counties Building Society, No. 3.

"Birmingham, March 12, 1858.

"Two months after demand in writing we promise to pay Mr. Thomas Price the sum of one hundred pounds with interest after the rate of six pounds per cent. per annum, for value received.

"100*l*."

"W. R. HEATH, } Trustees.  
"JOHN TAYLOR, }

"W. D. FISHER, Secretary."

The declaration also contained counts for money lent, interest, and on account stated.

Plea to the whole declaration, that the several contracts in the declaration, and each and every of them, were made and entered into by a certain building society, whereof the defendant and divers other persons at the time of the making of the contract were and are a Building Society, duly established under and by

(a) The point decided by this case is of considerable importance, and may be briefly stated thus. The 24th section of 5 & 6 Will. 4, c. 50, directs the surveyor to secure horse causeways and foot causeways by posts, blocks, or stones fixed in the ground, or by banks of earth cast up or otherwise from being spoiled by waggons, wains, &c. The question was, whether this required the surveyor to erect, or to keep erected, posts across a road, asserted to be only a horse causeway, so as to prevent carts and carriages from going over it. The magistrates by whom the case was tried, determined that no such duty was incumbent upon the surveyor, and that the posts, &c., designed by the Act were to be erected by the side of causeways, so as to keep vehicles or horses, &c., from going from their own proper causeway to the other. And the court held this interpretation of the Act to be the right one.

virtue of the provisions of the 6 & 7 Will. 4, c. 32, for the regulation of building societies and all the other statutes in that behalf, members; that is to say, the No. 3 Midland Counties, the rules of which society were duly certified, &c., and all other matters and things required by the statutes duly performed in pursuance of the statutes to constitute the society a building society within, and subject in all respects to, the provisions of the Acts; and the contracts were not, nor was any or either of them, made by the defendant otherwise than as a member of the society, together with the other members, and that at the time of the commencement of this suit divers persons were trustees of the society duly appointed in all respects as required by the Acts and by the rules of the society, and liable by virtue of the Acts to be sued as such upon all the contracts of the society.

Demurrer to the plea.

*Quain* for the plaintiff.—The plea is clearly no answer to the action. By the 1st section of the 6 & 7 Will. 4, c. 32 (the Building Societies Act), the building society is authorised to make rules and regulations for its government, and by sect. 3 may be made to provide forms of conveyance, &c., or other instruments which may be necessary for carrying the purposes of the society into execution. Sect. 4 incorporates the 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40 (the Friendly Societies Acts). The 10 Geo. 4, c. 56, s. 11, enacts that the trustees or treasurer may give bonds, and in the 21st section that the effects of the associations are to be vested in the trustees or trustee for the time being, and they are thereby empowered to bring actions, &c. Yet there is no provision containing any express or implied power to the trustee of a building society to borrow money upon promissory notes, or to bind such societies by issuing them; the very objects to be attained by a building society, if such were the case, would be frustrated, and it is wholly against the intention and spirit of the Acts. On the face of the note, it purports to be made by the defendant personally; it is for value received—money lent, in fact—and there is nothing whatever to exempt him from being personally liable: (*Mare v. Charles*, 5 E. & B. 978; *Healey v. Story*, 3 Exch. 3; *Pembvill v. Connell*, 5 Exch. 381.) There is a count in the declaration upon the account stated, and the plea can be no answer to that.

*Gray*, contra, for the defendant, in support of the plea.—The question is, whether this plea is not an answer to the action. The plea states in substance that the contracts on which the defendant is sued were made and entered into with the building society, of which the defendant was a mere trustee only. That upon the pleadings must be now taken to be true. Does the law allow such contracts? By the Acts of Parliament referred to the building society is empowered to make rules for its own government, and it may have made a rule enabling the trustees to raise money by promissory notes. Trustees have in conducting the affairs of the society many duties to perform, such as bringing actions, defending suits, and the like—issuing shares, if considered expedient, before subscriptions are paid up; and for any of these purposes it may be requisite to borrow money to carry on the business of the society. *Steward v. Greaves*, 10 M. & W. 711, and *Forbes v. Marshall*, 11 Exch. 166, were referred to.

*Quain*, in reply, was stopped by the Court.

POLLOCK, C.B.—The judgment of the court must be for the plaintiff. The plea means nothing more than this: that what professes to be the contract between the parties was not so in reality, but something else. The defendant does not deny the form of the contract, as stated in the declaration, but contends that it does not render him personally liable. I think it does, and that it is not competent for him by a plea to say that a

[Ex.]

PRICE v. TAYLOR—SHORT v. HUDSON.

[Ex.]

written document means something different from what it purports. If there had been any circumstances in the case to show that the defendant had entered into an engagement which he did not intend, or by mistake, it might in former times have given rise to the application for the equitable interference of the court, or form now grounds for an equitable plea; but it is not open to him by plea to say that his contract meant something different to what it professes to mean. He has given his own promissory note for the money borrowed, and it appears to me he is personally liable upon it.

MARTIN, B.—I am of the same opinion. The way to ascertain the meaning of a written document is to read it; and with respect to promissory notes in particular, the following rule, stated by Bayley, B. in his *Treatise on Bills of Exchange*, 6th edit., p. 79, is the correct rule, and has been so considered ever since I have been connected with the profession:—It is this, "Where a bill or note is drawn by an agent, executor, or trustee, he should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to show that intention." The question therefore here is, does the defendant show that he is not personally liable? So far from it, I think he shows that he is personally liable. [The learned Baron read the promissory note.] Every word of the plea may be true, and yet this action maintainable. The plea states that the contracts sued on were made by a building society, whereof the defendant and divers other persons were members—that is to say, the No. 3 Midland Counties Building Society. If that is meant as contradiction to the written document, it is no contradiction to it at all. But the plea goes on:—"The contracts were not, nor was any or either of them, made by the defendants otherwise than as members of the society, together with the other members." I do not see how that makes any difference, and it seems to be a very clear case.

BRAMWELL, B.—I think our judgment should be for the plaintiff on this demurrer, but I do not quite agree that the case is so very clear. The first thing is to ascertain the proper meaning of the document sued on. It says, "Two months after demand in writing we promise to pay Mr. Thomas Price the sum of 100*l.* with interest after the rate of six per cent. per annum, for value received," and is signed by two persons who put against their names that they are trustees, and a third who puts his name that he is secretary. The natural view of the matter is that these persons bind themselves and no one else. It is true they describe their own offices in the company, but do not undertake for any one but themselves. The difficulty I feel is this. I think, on the authority of *Aggs v. Nicholson*, 1 H. & Nor. 165, that if this promissory note were made by the defendant and taken by the plaintiff on the understanding that it was not to be binding on the defendant, but on some one else, it would bind none but those whom it was meant to bind. The defendant has not shown in his plea that this was a promissory note binding on the society and not on himself. I doubt if he could have said that, or proved it if he had said so, and I agree that the plaintiff is entitled to judgment.

WILKE, B.—I am of the same opinion. The promissory note on the face of it purports to bind those who signed it; the defence in substance set up is, they did sign it, but only as agents for some one else, that is to say, this building society. I do not think that is a sufficient answer. If any circumstances took place at the time to show that the defendant was not to be personally responsible—that might perhaps be a ground of equitable plea. *Judgment for plaintiff.*

Wednesday, April 25.

SHORT (appellant) v. HUDSON (respondent.)  
*Turnpike tolls—Gatekeeper demanding payment twice*

on same day—Van carrying goods for pay, hire, or reward.

By the 10 Geo. 4, c. 59, "An Act to amend an Act of the 7 Geo. 4, for consolidating the trusts of the several turnpike roads in the neighbourhood of the metropolis north of the river Thames," it is by sect. 28 provided "that the tolls thereby made payable shall be paid on each of the said districts for every horse or beast drawing any stage coach, van, caravan, waggon or other carriage conveying passengers or goods for pay, hire, or reward, for each time of passing along any of the roads in that district.

A general carman was applied to for a van and two horses to remove some goods from Hammersmith to London. He sent the empty van and horses on their way to Hammersmith, through a side-bar turnpike toll-gate on that trust, to which the above Act of Parliament applied, and the servant man then and there paid the proper legal toll of 9*d.* On the return of the van laden with the goods the same day from Hammersmith to London, the collector of tolls at the Norland-hill turnpike-gate, on the same trust, demanded payment again (notwithstanding the ticket of passing and payment of the toll on the same day was then shown to him), saying a van carrying goods for pay or reward must pay each time of passing. The toll was then again paid, but under protest, and the collector summoned before the police magistrate of the district, who adjudged him to pay a penalty and costs. Upon appeal to this court:

Held, that the conviction of the toll collector was right, as the van employed as stated was not, under the circumstances, a van carrying goods for pay, hire, or reward within the meaning of the 28th section.

This was an appeal from the decision of a police magistrate, who had convicted a turnpike-gate keeper for demanding and being paid a toll which it was said he had no right to receive. Short, the appellant, was a collector of tolls at the Norland turnpike-gate, situate in the third district of the metropolis turnpike-roads, north of the river Thames, in the parish of Hammersmith, Middlesex, and on the 24th Nov. 1859 he demanded of a servant of Hudson the sum of 9*d.* as toll for a van drawn by two horses, the property of Hudson, then passing through the gate, the servant having previously, on the same day, paid the toll due for the same, and when the second sum of 9*d.* was demanded by Short, the servant produced to him a ticket denoting the payment of the toll for the said van and horses, and claimed to be exempt from the payment of any further toll by reason of the previous payment. The police magistrate at Hammersmith convicted Short, and adjudged him to pay a penalty of 2*s.* 6*d.* and costs, 40*s.* The toll collector being dissatisfied with such decision, gave due notice of appeal, and the following case was stated for the opinion of the court:—

The respondent is a bonded and general carman, and proprietor of vans and carts on contract or job.

The appellant is the collector of the tolls at the Norland toll-gate.

On the day named in the summons the respondent's van and two horses were hired to remove some household furniture from Hammersmith to London.

John Kinton, a carman in the employ of the respondent, was sent from London with the van to remove the said furniture from Hammersmith, and upon his arrival at the Black Lion toll-gate (which is in the same district as the Norland gate) with the said van empty, the collector there demanded and received the sum of ninepence, being the toll payable for a van drawn by two horses. A ticket was given to Kinton, denoting the payment of the said toll, who then proceeded on his journey, and subsequently on the same day returned with the same van and horses through the Norland gate, the van being then laden with the said furniture, and at the same time produced to the ap-

[Ex.]

SHORT v. HUDSON.

[Ex.]

pellant the ticket which he had previously received, and claimed to be exempt by reason of such previous payment; but the appellant insisted upon the toll being again paid. The appellant having appeared upon summons before me to answer to the respondent, admitted that he demanded and took the toll upon the return of the van, but that he was justified in doing so under the provisions of the Acts regulating the metropolis turnpike-roads north of the river Thames.

The said roads are regulated and governed by two Acts of Parliament; the one passed in the seventh year of the reign of Geo. 4, intituled "An Act for consolidating the trusts of the several turnpike-roads in the neighbourhood of the metropolis north of the river Thames;" and the other passed in the 10th year of the same reign, intituled "An Act to amend an Act of the seventh year of his present Majesty for consolidating the trusts of the several turnpike-roads north of the river Thames, and to make and maintain two new or branch roads to communicate with the said metropolis roads."

The tolls payable on the said roads upon their first formation, under the 7 Geo. 4, c. 142, were those contained in the second schedule to that Act; but by the 17th section of 10 Geo. 4, c. 59, such tolls were to cease to be payable from and after the 1st Jan. 1830, a fresh scale being provided by the 19th and subsequent sections of the last-mentioned statute; the 18th section of which divides the roads into districts for the purpose of collecting tolls. It is admitted that 9d. is the legal toll payable for a van and two horses in the district in question.

By the 25th section 10 Geo. 4, c. 59, it is enacted as follows:—"Provided always, and be it further enacted, that when the toll by this Act authorised to be taken shall have been once paid in either of the aforesaid districts for or in respect of any horse or other beast, cattle, or other stock, no further toll shall be demanded or taken during the same day (except in the cases hereinafter mentioned) for or in respect of the same horse or other beast, cattle, or other stock, at any other gate or bar within the same district, or on returning or repassing through the same gate or bar."

By the 28th section it is enacted, "Provided also and be it further enacted, that the tolls hereby made payable shall be paid on each of the said districts for every horse or beast drawing any stage-coach, van, caravan, waggon, or other carriage conveying passengers or goods for pay, hire, or reward, for each time of passing along any of the roads in that district."

The 6th section of the 7 Geo. 4 extends the powers and provisions of the General Turnpike Acts (except as the same are by that statute expressly varied, altered, or repealed) to all the roads mentioned and described in the first schedule annexed to the said statute of 7 Geo. 4.

The respondent contended that toll having been paid for the van at the Black Lion gate on its journey to remove the furniture, he was exempt under said 25th section from the payment of any further toll on that day at any toll-gate situate within the district in question.

The appellant contended that he was justified in demanding and taking a second toll upon the return of the van, on which occasion the horses came within the 28th section as drawing any "van conveying goods for pay, hire, or reward," to which mode of employment there is attached a liability to pay every time of passing along the road.

Whereupon I determined that the appellant was guilty of the said offence, and convicted him as aforesaid, upon the ground that he was not justified in demanding a second toll on the same day for the said van and horses, the said van employed as aforesaid not being a stage-coach, van, caravan, waggon, or other

carriage carrying goods for pay, hire, or reward, within the meaning of the said 28th section.

If the court be of opinion that the appellant was not legally entitled to demand or take the second toll, then the conviction to be confirmed. But if the court be of a contrary opinion, then the conviction to be quashed.

Given under my hand this 26th day of March, at the police-court aforesaid.

(Signed) C. O. DAYMAN.

*Huddleston*, Q. C. appeared in support of the order of the magistrate.—This is an appeal under the 20 & 21 Vict. c. 43, and the question is, whether a collector of turnpike tolls is justified in demanding a second toll of a man who had gone through the toll-gate, or a side-bar toll-gate within that turnpike trust, before on the same day when he paid the toll, with two horses and an empty van, should he pay a second time, when he afterwards, and on that day, returned with the van laden. It depends upon the construction to be put on the 10 Geo. 4, c. 59. Sect. 25 says that when the toll, by this Act authorised to be taken, shall have been once paid in either of the aforesaid districts for, &c., no further toll shall be demanded or taken during the same day (except in the cases hereinafter mentioned), for or in respect of the same horse, &c., at any other gate or bar within the same district, or on returning or repassing through the same gate or bar, &c.; and by sect. 28, "that the tolls hereby made payable shall be paid on each of the said districts for every horse or beast drawing any stage-coach, van, caravan, waggon or other carriage, conveying passengers or goods for pay, hire, or reward, for each time of passing along any of the roads in that district." The principle throughout the Acts appears to be, that if a party has paid once in the day he is not to be called upon to pay again except in the case of stage-coaches, or other like carriages plying for hire, and conveying passengers each way. The learned police magistrate, Mr. Dayman, determined that the appellant was guilty, and convicted him upon the ground that he was not justified in demanding a second toll on the same day for the van and two horses, the van so employed not being a stage-coach, van, caravan, waggon, or other carriage carrying goods for pay, hire or reward, within the meaning of the said 28th section; and the toll having been paid at the Black Lion gate for the van (when going empty) and horses on the journey to remove the furniture, the respondent was exempt, under the 25th section, from the payment of any further toll, on that day at any toll-gate situate within the same trust or district, because he does not come within the terms of the exception afterwards referred to in the 28th section of that Act. (He was then stopped.)

*Joyce* (*Levy* with him), contra, for the appellant, was called upon.—The toll collector was justified in demanding and taking a second toll upon the return of the van, on which occasion the horses came within the 28th section, as drawing a van conveying goods for pay, hire, or reward, to which mode of employment there is attached a liability to pay every time of passing along the road: in fact it comes within the very words of the section. It was a van conveying goods for pay and reward, and the 28th section says the tolls thereby made payable shall be paid for every van conveying goods for pay or reward for each time of passing along such roads. The van and horses were hired for the express purpose of conveying the owner's goods from Hammersmith to London. [POLLOCK, C.B.—The hire was for the use of the waggon, not for the carriage of goods.] Any carriage hired to convey goods, and going empty to fetch such goods, is liable to the payment of the toll when so going upon these roads, and upon the return of such carriage laden a second toll is payable. The van of the respondent was a carriage employed in conveying goods for hire, within the meaning of the 28th section, and therefore

[EX.]

BENNETT v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

[EX.]

liable to the payment of toll both upon going and upon returning. The 27th and 29th sections were also referred to, showing that hackney coaches and post-chaises are to pay each time of passing with a fresh hiring.

**POLLOCK, C.B.**—I am of opinion that the decision of the police magistrate in this case was quite right, and that the conviction should be confirmed. This conveyance does not come within the terms of the 28th section of the Act: of Parliament 10 Geo. 4, c. 59. The word "stage" used there shows, to my mind, very clearly what the clause means. Stage-coaches, &c. conveying passengers for hire shall pay for each time of passing along any of the roads; but I do not think it was the intention of the Legislature, or the object of the Act, that an empty cart paying once for going though the gate should be compelled to pay again returning laden on the same day: it was not a stage van or waggon within the terms of the Act. The pay was for the use of the waggon, in respect of that particular owner, not for the carriage of the goods. The owner of the vehicle was not a carrier of goods, he was the letter out of a van. The Act applies to carriages conveying goods for hire, and not as here, where this vehicle was expressly engaged for the carriage of the goods.

**MARTIN, B.**—I also think it is clear that the respondent was not subject to pay this double toll, for when the 10 Geo. 4 is looked at, it shows very plainly what was intended. The 26th section says that horses drawing different carriages on the same day through the gate shall pay each time of passing. Sect. 27, that any postchaise or other carriage is to pay each time of passing with a fresh hiring. Sect. 29, the same as to hackney coaches, chariot, or cabriolet, that they shall pay each time of passing with a fresh hiring. And the 28th section, upon which reliance is placed for imposing the tolls, was, that the toll shall be paid for every horse, &c. drawing any stage-coach, van, caravan, waggon, or other carriage conveying passengers or goods for pay, hire, or reward, for each time of passing; but this does not come within the terms of that clause, for it was nothing more than sending a van and two horses out to Hammersmith to bring a load of goods from there into London. The goods being at Hammersmith, a van was sent out there to bring them in. The contract was for the removal of the goods with the van, and this was not a van conveying goods for hire as intended by the 28th section.

**BRAMWELL, B.**—I am also of opinion that the police magistrate, Mr. Dayman, was right, and right for the reasons he has himself given in the case stated for us to determine.

**WILDE, B.**—I am of the same opinion. On the words of the Act, I think the van and horses employed for the removal of this furniture were not liable to the double toll; and I agree with the Lord Chief Baron to render them so it should be a stage-coach, van, or carriage conveying passengers or goods for hire, which this was not; it was a contract or an engagement on the part of the owner for the removal of a certain quantity of furniture.

*Judgment for the respondent, with costs.*

April 27 and 30.

BENNETT v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

*Plaintiff convicted of felony after action—Defendant paying money into court—Plaintiff discontinuing and accepting sum paid into court—Right to costs after conviction for felony.*

*The plaintiff brought an action to recover the value of goods alleged to have been sent by him to the defendants to be safely carried and delivered, but which were lost by the defendants, or never delivered by them. The defendants paid 10s. into court in satisfaction for the hampers in which the goods were said to*

*have been sent, and pleaded the general issue to the residue of the plaintiff's claim. The plaintiff was afterwards convicted of felony. The defendants then pleaded this by a plea puis darrien continuance. The plaintiff confessed it, accepted the 10s. paid into court, and took it out in satisfaction of his claim, and signed judgment for the costs of the action.*

*Upon motion to set aside the judgment so signed, or to stay all further proceedings in the suit:*

*Held, that the plaintiff was by the 23rd rule of Hilary Term Rules 1853, and the 22nd and 23rd rules of pleading under the C. L. P. A., entitled to sign judgment for the costs.*

This was an action brought to recover from the railway company the value of certain hampers of boots and shoes represented to have been sent by the plaintiff on the defendants' line of railway, and by them lost. The defendants believing that no such goods had been sent at all by the plaintiff, applied for and obtained an order of a learned judge for particulars of such goods, with the invoices for same, &c. After a good deal of delay and much trouble, some kind of particulars were supplied. The defendants subsequently pleaded, first, the general issue; and, secondly, payment of a sum of 10s. into court for the hampers. Afterwards the plaintiff was indicted for receiving stolen goods, tried and convicted, and sentenced to two years' imprisonment with hard labour. Defendants then pleaded *puis darrien continuance*, a plea stating the conviction, &c. The defendant or his attorney confessed that, then accepted the 10s. out of court in satisfaction of the cause of action, and entered a *nolle prosequi* to the rest of the claim, and signed judgment for the costs of the action. A rule *nisi* was then obtained by the defendants to set aside the judgment, or to stay all further proceedings in the cause.

**Geo. Brown** showed cause. — The plaintiff was entitled to take the 10s. out of court, and sign judgment for the costs of the action. The 23rd rule of Hilary Term 1853 says in reference to "discontinuance," "to entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation defendant shall be at liberty to sign judgment of *non pros.*;" and by the 22nd rule of pleading under the C.L.P.A., "a plea containing a defence arising after the commencement of the action may be pleaded, together with pleas of defence arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first-mentioned plea." 23rd. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea. [**POLLOCK, C.B.**—The plaintiff has been convicted of felony since the money was paid into court. Has it not now become the money of the Queen? His rights are forfeited to the Crown.] It is submitted not; besides the attorney might have a lien for his costs.

**Phipson** in support of the rule. — It is not shown here that the plaintiff's attorney has or claims any lien, and it must be taken, therefore, that none exists. The rule of court must have a reasonable construction. In Hawkins' Pleas of the Crown it is said that after a conviction of felony all choses in action go to the Crown, with the exception of the rights, perhaps, in respect of personal injury. Here the plaintiff was convicted after the defendants had pleaded in the action.

*Curr. adv. vult.*

April 30.—**POLLOCK, C.B.** delivered judgment.—



This was an action originally brought by the plaintiff against the railway company to recover the value of certain goods alleged to be in certain packages delivered to the railway company; the company pleaded to the action. They pleaded, first, that they were not guilty, and they paid 10s. into court, with reference probably to the baskets or hampers that were supposed to contain goods. The real defence was, that the whole affair was an imposition, the object of the plaintiff being to recover the value of goods which in fact were never sent. After the 10s. was paid into court, it appears that the plaintiff was indicted and found guilty of receiving goods knowing them to be stolen, and having been convicted and sentence passed upon him, the attorney who conducted the cause, with or without the assent of the plaintiff (and it does not matter which), stayed the action; that is, he took the money out of court, and then an application was made by Mr. Phipson to plead *puis darrien continuance* the conviction of the plaintiff, whereupon, the plea being perfectly true, the defence arising after the commencement of the action being so pleaded, and being perfectly true, the plaintiff confessed the plea, and then applied for the costs of the cause up to the time of pleading the plea *puis darrien continuance* under the 22nd rule of the pleading rules, under the authority of the C. L. P. A. Mr. Phipson then moved for a rule to show cause why the action should not be stayed, and judgment had been signed, and he moved to set it aside and stay the proceedings. We are of opinion that the 22nd rule clearly contains this case in its expressions, and it is impossible for us to deal with it otherwise. I believe the judgment of all my learned brothers is to discharge Mr. Phipson's rule, the 22nd rule, is this: "A plea containing a defence arising after the commencement of the action may be pleaded together with the pleas and defences arising before the commencement of the action: provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of pleading such first-mentioned plea." The course which the defendants have taken in this case seems to all of us to make this rule applicable. It may be possible, it is even probable, that there may be some foundation for the defence which was suggested on the part of the railway company. Perhaps there is not much injury done to a man who is now suffering punishment after a conviction for receiving goods knowing them to be stolen; there is not much injustice done to him in supposing that it is possible that the demand on the part of the plaintiff may have been a fraud upon the company; but if that were so, the course that the company should have taken would have been to persist in their defence, and to show that the fact was so; instead of which they retire behind the plea, merely saying that the man was convicted, and therefore the right of action, though the action itself does not go to the ground, the right of action does. If he has a title to claim from the company damages in respect of these goods supposed to have belonged to him, there is no doubt it belongs to the Crown. The company, instead of meeting the matter upon the merits, get rid of the action by saying, "Well, now, you are a felon convict, and your interest in those goods has passed to the Crown, and you can no longer support the action." If the company will resort to that plea, *puis darrien continuance*, which is no doubt perfectly true, the plaintiff has a right to say "It is true, I cannot longer maintain it," but if you plead a plea which does not actually go to the merits, but merely says I cannot longer sustain it, there is no injustice in saying, if that be so you must pay the costs up to the time of pleading that plea. We therefore think Mr. Phipson's rule must be discharged.

MARTIN, B.—I think it would be wrong if we depart from the plain words of the rule because we may

suspect there has been fraud in the matter; and it is much better to act upon the rule.

*Rule discharged with costs.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 28.

(Before POLLOCK, C.B., CHANNELL, B., BYLES, BLACKBURN and KEATING, JJ.)

REG. v. JOHN DAUBENEY HIND.

*Evidence—Dying declaration—Admissibility.*

*Upon an indictment for feloniously using certain instruments upon the person of a woman, with intent to procure a miscarriage, the dying declaration of the woman is inadmissible.*

*The rule laid down in Mead's case, 2 Barn. & Cres. 608, "that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration," recognised and adopted.*

Case reserved by Keating, J. for the opinion of this court.

John Daubeny Hind was tried before me at the last assizes for the county of Gloucester, and convicted upon an indictment charging him with feloniously and unlawfully using certain instruments upon the person of one Mary Woolford, deceased, with intent to procure the miscarriage of the said Mary Woolford.

On the trial, a dying declaration of the said Mary Woolford was tendered in evidence on the part of the prosecution, and objected to on the part of the prisoner, upon the ground that the death of Mary Woolford was not the subject of the inquiry.

I received the evidence, but reserved the question as to its admissibility, and respite the execution of the sentence until the Court of Criminal Appeal should pronounce its decision upon the point: (see *R. v. Baker*, 2 M. & Rob.)

If the court should be of opinion that the evidence was not admissible, then the judgment is to be reversed, inasmuch as without the evidence of the dying declaration of Mary Woolford the prisoner could not have been convicted.

If the court should think the evidence admissible, then the judgment is to stand.

No counsel appeared for the prisoner.

*Carrington* for the prosecution.—The only question is, as to the admissibility of a dying declaration upon a charge of using instruments upon the person of a woman, to procure a miscarriage. On the part of the prosecution it is submitted that such declarations are admissible in all cases where personal injury has been sustained. In *Re v. Hutchinson*, 2 Barn. & Cres. 608, n., where the prisoner was indicted for administering savin to a pregnant woman with intent to procure abortion, evidence of her dying declaration was rejected (Bayley, J.), because the woman's death was not the subject of inquiry. In *Re v. Baker*, 2 Moo. & Rob. 53, where the prisoner was indicted for the murder of A., by eating poisoned cake, Coltman, J., after consulting Parke, B., admitted the dying declarations of another party who also died in consequence of eating some of the cake, but whose death was not the subject of the indictment. *McGregor's* case in the Court of Session, Scotland, 16 State Trials, 29, was also cited.

POLLOCK, C.B.—In this case we are all of opinion that the dying declaration of the woman was improperly received in evidence. The rule we are disposed to adhere to, is to be found laid down in *Re v. Mead*, 2 Barn. & Cres. 608. There Abbott, C.J. said, "The general rule is, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." Speaking for

C. CAS. R.] REG. v. C. HALLIDAY—ATTORNEY-GENERAL v. CORPORATION OF THETFORD. [V.C.W.]

myself, I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of England, which I think ought not to be extended.

*Conviction quashed.*

#### REG. v. CHARLES HALLIDAY.

*Evidence—Husband and wife—Wife implicated but not charged—Admissibility of husband.*

*The prisoner was indicted for obtaining money from the trustees of a savings bank, by falsely pretending that a document produced by the wife of D. had been filled up by D.'s authority; and in another count for conspiring with the wife of D. to cheat the bank. D.'s wife presented the document, which had been fraudulently filled up at the instance of the prisoner, and obtained the money, and afterwards eloped with the prisoner. D.'s evidence was necessary to show that he had given no authority, but it was objected to, on the ground that it implicated his wife:*

*Held, that D.'s evidence was admissible, as the wife was not charged upon the indictment.*

Case reserved for the opinion of this court by Byles, J.

The prisoner was indicted for obtaining from the trustees of the Swansea Savings Bank a sum of 60L, by falsely pretending that a certain document produced to the bank by Eliza Thomas, the wife of Daniel Thomas, had been filled up by the authority of D. Thomas, the depositor, and was a genuine document.

There was a second count founded on another false pretence, by which the prisoner was alleged to have obtained by another document, produced by the said E. Thomas, a further sum of money.

There was a third count for a conspiracy between the prisoner and E. Thomas to cheat the savings bank.

It appeared that an authority to receive the money had been filled up by another witness at the instance of the prisoner; that E. Thomas, the wife of the depositor, had presented it and obtained the money; and that the prisoner had afterwards eloped with E. Thomas. On the apprehension of the prisoner a large sum of money was found in his possession.

The evidence of D. Thomas, the depositor, was essential to the prosecution, in order to show that he had given no authority to fill up the document, or to withdraw the deposit.

It was objected, on behalf of the prisoner, that, although the wife of D. Thomas was not included in the charge, yet he was not an admissible witness to prove her guilty of a conspiracy, nor even to prove the counts for false pretences: (see *Reg. v. Gleed*, 2 Russell on Crimes, 983.)

I thought his evidence admissible on all the counts.

In deference, however, of the high authority of Littleale and Taunton, JJ., I reserved the point and suggested that the counsel for the prosecution should consent to a verdict of acquittal on the last count.

The counsel for the prisoner then objected that an acquittal on the last count was inconsistent with a verdict of guilty on the first count.

The jury, however, found the prisoner guilty on the first count, and not guilty on the second and third counts.

I reserved these questions:—First, whether the husband's evidence was properly received in proof of the first count; secondly, whether there is any necessary inconsistency in the finding on the first and third counts.

The prisoner's sentence was deferred, but the prisoner remains in custody.

No counsel appeared either on the part of the prosecution, or the prisoner.

The judges retired to consider the case, and on their return into court,

POLLOCK, C.B. said:—The question is, whether the

[MAG. CAS.]

evidence of the husband was admissible, his evidence tending to show that his wife was acting unlawfully and criminally. On this indictment the wife was not charged at all, but she was involved in the conspiracy charged in the third count. Though that is so, it does not prevent the husband's evidence from being admissible. We are also of opinion that the acquittal of the prisoner on the third count, does not necessarily involve any inconsistency with the conviction on the first count.

*Conviction affirmed.*

#### V. C. WOOD'S COURT.

Reported by W. H. BENNET, Esq., Barrister-at-Law.

Wednesday, May 23.

ATTORNEY-GENERAL v. THE CORPORATION OF THETFORD.

*Costs—Borough fund—Charging order.*

*By a decree, made on the hearing of an information against a corporation, the defendants were ordered to pay the relator his costs of such information. An advowson belonging to the corporation had been sold, under the powers of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, and the amount of the proceeds stood to the credit of the corporation at the Bank of England:*

*Held, that the relator was entitled to have a charging order for the amount of these costs upon this fund.*

In the year 1859 an information had been filed by a relator against the corporation of Thetford, for the purpose of having the proper application of certain sums arising from the navigation funds and tolls of the borough, levied by the corporation in aid of the borough fund, and to pay off a mortgage-debt which had been secured upon certain properties belonging to the corporation. In November of that year a decree had been made, making certain declarations, and amongst other things ordering that the relator should be paid his costs of the information. A fund was now in the bank to the credit of the corporation, and in the names of four of the town council, arising from the sale of an advowson belonging to the corporation under the provisions of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76.

In April last the relator had obtained from this court an order *nisi*, charging the fund in court to the extent of a sum of 66l. 10s. 6d., the amount of the relator's taxed costs.

This was an application to have such order *nisi* made absolute.

C. J. Shebbeare, for the relator, contended that, under the 2nd section of the 5 & 6 Will. 4, c. 76, he was entitled to have the fund so standing to the credit of the corporation charged with the amount of his costs, which had been so taxed in pursuance of the decree.

Bevir, for the corporation, contra, urged that the remedy of the relator for his costs was by bill in equity against the corporation, and as the fund was standing in the names of the four town council as trustees for the navigation belonging to the corporation, and not specifically to the credit of the corporation in their corporate capacity, the 92nd section of the Municipal Corporation Act applied. The claim of the relator was not therefore "upon the real and personal estate of the body corporate by virtue of a proceeding in equity" as mentioned in that clause. He cited *Reg. v. Bridgewater*, 10 Ad. & Ell. 282; *Reg. v. Mayor of Leeds*, 4 Q. B. Rep. 790; *Reg. v. Passmore*, 10 Ad. & Ell. 281; *Ex parte Corporation of Hythe*, 4 Yo. & Coll. 55.

The VICE-CHANCELLOR said he could make the order absolute. The proceeds of the advowson sold by the corporation was clearly the property of that corporation. In his opinion the saving clause in the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 92,

R

[Q. B.]

KNOX AND ANOTHER v. SHEPHERD—CHILCOTE v. YOULDON.

[Q. B.]

was intended to reserve any rights which could have attached against the real or personal estate of the corporation by virtue of any proceedings at law or in equity. The trust created by the Act would, as to the borough fund, prevent any such application but for such saving clause. It had been contended that the proper construction of this clause required the relator to file his bill in equity against the corporation in their corporate capacity, but he could not assent to this narrow construction of the clause. For the purposes to which, according to that construction, the clause was alone intended to be applied, no saving clause would have been necessary. The Legislature could not have intended that no claims which would have been lawful before the passing of the Act, and would have prevented the property being handed over and added to the borough fund, should be saved by this clause unless enforced by a suit in equity for that purpose. The decree having declared that the relator was entitled to the costs of the information, the property of the corporation was immediately attachable upon the amount of such costs being ascertained, and it was liable to satisfy such a demand. Here there had been a suit against the corporation in which they had appeared to defend their corporate rights. This case, therefore, was exactly within the saving clause, and the relator was entitled to have his claim for costs satisfied out of this fund, before it was added to the borough fund for the general purposes of such fund.

*Charging order made absolute.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

*Saturday, May 5.*

KNOX AND ANOTHER v. SHEPHERD.

*Building society—Administrator of deceased member—Liability for fines—Prohibition.*

*A building society's rules provided for the settlement of disputes by arbitration. After the death of a member of the society, certain fines and subscriptions became due, for which the trustees sued his administrator in the County Court.*

*Held, that the administrator was a member of the society, and had been so treated by them, and this court made absolute a rule for a prohibition to the County Court to restrain proceedings, that the dispute might be settled by arbitration under the rules.*

*Hayes, Serjt.* showed cause against a rule for a prohibition directed to the County Court judge of Clerkenwell to restrain him from proceeding further in this case. It appeared that the plaintiffs were trustees of the North London Benefit Building Society, and in that capacity had issued a plaint against the defendant as administrator of his father, a deceased member of the society. The 14th rule of the society provided that, "in case of the death of any member, his executors or administrators shall be entitled to his share or shares, and may vote and act in all cases whatever as fully as the deceased member, whom they represent, might have done if living." The deceased T. Shepherd was an original member of the society, and holder of two shares; he died in Jan. 1855, and some time after the defendant called at the office of the society and produced letters of administration granted to himself, and the deceased's club-book, showing his payments to the society, in support of his title as administrator under the above rule, and from thenceforth be acted and was treated by the society as the legal representative of the deceased. At the death of the father there was nothing due from him to the society in respect of his subscription or fines; his payments covered his liability and left a few shillings over. Defendant had received no money from the society, but he might have done so had he pleased. On the 8th

Aug. 1859 defendant gave notice to withdraw the shares held in the society by his late father. The sum sought to be recovered was for subscriptions and fines due between the death of the deceased member and the notice of withdrawal. By the 22nd rule of the society it was provided, that "in case of any dispute between any members of the society, or the trustees or the board thereof, such dispute shall be referred to arbitration, pursuant to 10 Geo. 4, c. 56, s. 27." The County Court judge had given judgment for the plaintiffs. It was now contended that this was not a dispute between the members of the society; the defendant is not sued as a member. The 6 & 7 Will. 4, c. 32, s. 4, incorporates the 10 Geo. 4, c. 56, and applies the provisions of Friendly Society Acts to building societies; and 10 Geo. 4, c. 56, s. 27, provides that rules shall be made directing how disputes shall be settled. This society had made a rule, No. 22, that "in case of any dispute between any members of the society, or the trustees or the board thereof, such dispute shall be referred to arbitration, pursuant to 10 Geo. 4, c. 56, s. 27." A particular tribunal is thereby established, no doubt; but this is not such a dispute as the rule refers to. Here the defendant is sued as administrator for certain liabilities of a deceased member, and he denies that he is a member; the father of the defendant was an original member of the society, and was liable to pay contributions. There is a rule that the administrator may take the shares of a deceased party; and the claim is for subscriptions and fines due, and credit has been given for sums received. [COCKBURN, C.J.—Must not the rule be held to embrace members and persons claiming under them?] The 18 & 19 Vict. c. 63, does not treat of these societies; it does not repeal the 6 & 7 Will. 4, c. 32. The mere repeal of the 10 Geo. 4, c. 56, by 18 & 19 Vict. does not take that statute out of the 6 & 7 Will. 4, into which it was incorporated: (*Cutbill v. Kingdom*, 494.) If there is no rule made under the Act which is applicable to the case, the common law jurisdiction is not taken away. [BLACKBURN, J.—This is not quite the case of a man claiming under a member.] *Kelall v. Tyler and others*, 25 L. J. 153, Ex.; *Reg. v. Trafford*, 26 L. J. 95, Q. B. were cited.]

*Collier, Q. C.* (*Hance* with him).—The trustees of the society have treated the defendant as a member, and he has so acted. The defendant claimed to withdraw; these payments had accrued due since the deceased's death.

COCKBURN, C.J.—The society have adopted the defendant as a member, and they so treated him, for they fined him. The father paid everything up to his death, and this action is for sums accrued due since. The rule makes the administrator liable, but fines and subscriptions can be claimed from him only as a member. As an administrator he is not subject to the rules, but he has availed himself of them to come in and become a member, and if he is a member the dispute must be settled by arbitration.

*Rule absolute.*

*J. Hughes*, plaintiff's attorney.

*J. W. Jewitt*, defendant's attorney.

*May 26 and 30.*

CHILCOTE (appellant) v. YOULDON (respondent).

*Commons Inclosure Acts*—8 & 9 Vict. c. 118—15 & 16 Vict. c. 79, s. 13—1 & 2 Vict. c. 71—*Ancient inclosures—Rights of parties interested in—When such rights not barred.*

*Land which has been inclosed by a party more than twenty years before the day of the first meeting for the examination of claims under an inclosure award is not liable to be dealt with by such award without the consent of the party interested; and the rights of such party are not affected by the fact of such in-*

Q. B.]

CHILCOTE v. YOULDON.

[Q. B.]

*closed land being included in the map and the award of the commissioners, and by his not having taken any steps upon the subject.*

*Where, therefore, such land was so included in the map and award, and the party interested took no steps upon the subject, but refused to give up possession, and the valuer applied to justices for a warrant of possession, and the justices refused to grant such warrant upon the ground that the land in question was "ancient inclosure," and was not subject to be inclosed without consent:*

*Held, that the justices were right, and that the party interested might effectually object at that stage of the proceedings.*

This was a case stated under the 20 & 21 Vict. c. 43, as follows:—

"At an adjourned petty sessions of her Majesty's justices of the peace, held in and for the division of Paignton, in the county of Devon, on the 19th Jan. 1860, a complaint in writing was made under the provisions of the 8 & 9 Vict. c. 118, and the 15 & 16 Vict. c. 79, s. 13, by the appellant, the valuer appointed and acting in the matter of the inclosure of the commons and waste lands in the manor of Brixham, situate in the parish of Brixham, in the county of Devon, against the respondent, an occupier holding over and detaining a portion of land used as garden ground, and alleged to be within the limits of the said common. On the part of the appellant, evidence was given of his appointment as valuer, and that the piece of ground occupied and held over by the respondent was originally an encroachment on the said commons, and included in the map of the commons annexed to the provisional order for the said inclosure, under the seal of the Inclosure Commissioners; that no claim in respect thereof, or in reference thereto, was made by the respondent before or delivered to the appellant as such valuer or otherwise, at the several times or places by him appointed and notified for such purpose; that the valuer had duly allowed the majority of the claims that were so made by other parties, and that the land occupied by the respondent was included and allowed in such claims; and it was thereupon argued, on behalf of the said appellant, that the land so occupied and held over was an encroachment which, by being included in the provisional order, must thereby be "deemed to be parcel of the land subject to be inclosed," and therefore such as he was empowered to recover under the provisions of the 15 & 16 Vict. c. 79, s. 13. On the part of the respondent, the above facts were not disputed, but it was proved in addition thereto, that the said piece of ground had been inclosed for more than twenty years next preceding the day of the first meeting for the examination of claims, but that the fences thereof were during portions of such time in an imperfect condition, and that it had been so occupied by different persons not claiming directly from each other, or setting up any special title thereto; and it was therefore urged that the said inclosure was an ancient inclosure under the provisions of the 8 & 9 Vict. c. 118, s. 52, and therefore such as by sect. 86 of the last-named Act, the valuer was not empowered to order to be inclosed without the consent in writing of the person interested therein, which said consent had not been given. We the said justices thereupon considered that the fact so proved before us, that the inclosure was an ancient one, was a sufficient answer to the complaint, and that it was not necessary that any claim thereto should have been set up before the valuer, but might be pleaded notwithstanding as a justification for so holding over, and that the respondent could not be dispossessed of the said piece of ground without his consent in writing first had and obtained. And we dismissed the said complaint. The appellant therefore applied to us the said justices to state a case for the

opinion of the Court of Q. B. thereon on the grounds following:—

First, that the acts of the valuer were conclusive, and could not be questioned before the justices.

Secondly, that the said encroachment being included in the map annexed to the provisional order for inclosure by the commissioners, was thereby conclusively "deemed to be parcel of the land subject to be inclosed" within the meaning of the 13th section of the 15 & 16 Vict. c. 79.

Thirdly, that such provisional order being conclusive as to what land should be deemed to be subject to be inclosed, it was beyond the jurisdiction of the justices to hear any evidence as to the fact of its being an ancient inclosure, or any evidence in relation to such encroachment other than was required to prove the allegations contained in the said complaint.

Fourthly, that as the encroachment in question was included in the map annexed to the provisional order, the respondent was bound to have delivered a claim in writing to the valuer for any "right or interest he may have had or claimed in any land proposed to be inclosed" under sect. 47 of the 8 & 9 Vict. c. 118, or to have appealed against the decision of the valuer (appellant) in respect of such claims as were delivered to, determined on and allowed by the valuer under the 84th section of the last-named Act.

Fifthly, that the fences of the said piece of land having been kept in an imperfect condition during the twenty years next preceding the first examination of claims, and the said piece of ground having been occupied during the last-mentioned term by different persons not claiming directly from each other or setting up any special title thereto, the said piece of ground was not, therefore, an ancient inclosure within the meaning of sects. 52 and 86 of the 8 & 9 Vict. c. 118, but an "encroachment" within the meaning of sect. 50 of the said Act."

By sect. 25 of the 8 & 9 Vict. c. 118 (the Commons Inclosure Act), upon application to the commissioners, they may direct an assistant commissioner to inquire into the expediency of the proposed inclosure, who by sect. 26 is to report upon the expediency, &c. of the proposed inclosure, whereupon by sect. 27 the commissioners may make a provisional order for the inclosure of the land. By sect. 33 a valuer is to be appointed to divide, set out and allot such land. Sect. 34 provides for the duties, &c. of the valuer. By sect. 47 any person claiming any common or other right or interest in any land proposed to be inclosed is to deliver such claim in writing to the valuer stating the particulars, and by sect. 48 such claim is to be heard by the valuer, who may allow or disallow the same, &c., and he is to make an order thereupon, which is to be final, unless the party dissatisfied shall give notice of his desire to have his claim determined by the commissioner or an assistant commissioner. By sect. 50 it is enacted that all encroachments and inclosures other than inclosures duly authorised by the custom of the manor which shall have been made by any person from or upon any part of the land proposed to be inclosed within twenty years next before the first meeting for the examination of claims shall be deemed parcel of the land subject to be inclosed, and shall be divided, allotted and inclosed accordingly. By sect. 52 it is enacted "that all lands which shall have been inclosed from any land subject to be inclosed under this Act for more than twenty years next preceding the day of the first meeting for the examination of claims in the matter of such inclosure, shall, for the purposes of this Act, be deemed and taken to be ancient inclosures, but not so as to carry any right of common," &c. By sect. 55 the valuer is to make a schedule of all claims and objections for public inspection, and there is provision for the rehearing of the claimants, and after that the rights of the

Q. B.]

THE JUSTICES OF KENT v. THE MAIDSTONE COMMISSIONERS.

[Q. B.]

parties may be tried by a feigned issue. By sect. 57 the determination of the commissioners is to be final if not disputed. The 11th section points out what kind of land is subject to be inclosed. By sect. 86 old inclosures may be allotted with the consent of the persons interested.

By the 15 & 16 Vict. c. 79 (Commons Inclosure Acts Extension Act) it is enacted that "when any person by whom any encroachment or inclosure of whatever value, which under the firstly recited Act shall be deemed to be parcel of the land subject to be inclosed, shall be actually occupied, shall neglect or refuse to quit and deliver up possession of the same, or any part thereof to the valuer," the possession of the same may be recovered by the valuer under the provisions of the 1 & 2 Vict. c. 74 ("An Act to facilitate the recovery of possession of tenements after due determination of the tenancy").

*Coleridge* appeared for the appellant (the valuer), and contended that the justices were wrong in their decision, upon the grounds severally set out in the case as stated: (*Turner v. Blamire*, 1 Dru. 402.)

*Karslake* for the respondent.—The question turns on, whether this encroachment was part of the land subject to be inclosed within the meaning of sect. 11 8 & 9 Vict. c. 118. Now, sect. 13 enacts that no part of the New Forest or of the Forest of Dean shall be land subject to be inclosed under that Act; and it is therefore, as it must be, admitted by the appellant, that if the map had included land which was part of those forests it would have been conclusive, and would have been binding; and the argument must go so far as to say that if private property had been included in the map, it would have been binding. It is urged that although this was an ancient encroachment, yet being included in the map, and the respondent not having appealed against its insertion, it must now be taken to be land subject to be inclosed. Sect. 52, however, takes ancient encroachments out of the jurisdiction of the commissioners, and it is only in respect of lands that the commissioners are authorised to deal with that an appeal is given. It lies on the commissioners to make out that this encroachment is part of the lands to be inclosed, and they cannot give themselves jurisdiction. The 8 & 9 Vict. c. 118, ss. 11, 12, 13, 16, 25, 27, 29, 39, 47, 48, 50, 52, 56, were referred to, and the case of *Turner v. Bemaire*, 1 Drew, 402, cited.

*Coleridge*, in reply, referred to *Rees v. Davies*, 4 C. B., N. S., 56.

*Cockburn*, C.J.—I am of opinion that our judgment ought to be for the respondent. The question is, whether a party who has obtained by encroachment on land subject to be inclosed a right to the possession and property in the land at the time when the inclosure takes place, by not appealing against the award is bound by the award of the commissioners in consequence of his omission to appeal. It is admitted that there is no distinction between the case of land gained by encroachment and of an ordinary freehold obtained in a legal manner. When the 8 & 9 Vict. c. 118, is looked at, it is apparent that all the provisions of the Act relate to land not merely proposed to be inclosed, but subject to be inclosed, and it never could have been the intention of the Legislature to interfere with private property held by individuals, and not subject to rights of common. The Act first by sect. 11 sets forth the descriptions of land subject to be inclosed, and then the scheme by which they are to be inclosed. The parties interested in the lands subject to be inclosed and desirous of having them inclosed are to put the commissioners in motion, who are then to draw up the conditions of the proposed inclosure in an order, and to hear what may be alleged in favour of the inclosure, and any objections that may be urged against it. Having

determined on the expediency of the inclosure a valuer is to be appointed and the claims are to be sent in, and the allotments are to be determined in respect of those claims. And then comes the provision as to appeals (sect. 48) by any person dissatisfied with the decision on his claim or on his objection to the claims of others. Sect. 52 enacts that all lands which shall have been inclosed from any land subject to be inclosed under the Act for more than twenty years, shall be deemed and taken to be ancient inclosures, and not part of the land to be inclosed under that Act. Sect. 56, is, I think, merely a sequel to the former section, which gave an appeal from the valuer to the commissioners, giving a further appeal from their decision. But this does not apply to the case of a person not in a position to prefer a claim, and who has not made any claim. There is no express provision, or anything by implication which touches this case, which does not properly fall within the Act. A man's private freehold, or land gained by twenty years' possession, is not within the list. Nothing short of a clear enactment will justify any interference with private rights, and if the encroachment has not been made within twenty years, the commissioners, by their acts, cannot give themselves jurisdiction. Our judgment must therefore be for the respondent.

*Wightman*, J.—I am of the same opinion. The question arises on a proceeding under sect. 13 of 15 & 16 Vict. c. 79, by the valuer to gain possession of an encroachment in the same manner as a landlord against a tenant holding over. The magistrates have jurisdiction under that Act in case only the encroachment is part of the land subject to be inclosed. There is a preliminary inquiry whether the encroachment is to be deemed part of the land to be inclosed, and unless it is, the valuer has no right to proceed under that section. Now, it has been argued that this has been conclusively determined by the map of the inclosure, and by no objection being raised by the respondent to the valuer's including the encroachment in the map. But it appeared to the magistrates that this was an encroachment more than twenty years before, and therefore, by sect. 52 of 8 & 9 Vict. c. 118, it is to be deemed an ancient inclosure, and not part of the lands to be allotted under that Act. The question then is, whether mere neglect to make the objection before the valuer will disentitle the respondent to object afterwards that this was not land subject to be allotted. It is only in case of encroachments within twenty years that the valuer would seem to have any jurisdiction. Here the whole encroachment was more than twenty years previously. It seems, therefore, to me that our judgment should be for the respondent.

*Blackburn*, J.—The commissioners must make the inquiry whether the encroachment was or was not within twenty years, but their decision will not give them jurisdiction in case the encroachment was really more than twenty years before.

*Judgment for the respondent.*

*Saturday, May 26.*

THE JUSTICES OF KENT (appellants) v. THE MAIDSTONE COMMISSIONERS (respondents).

*Gaols—Rate—"Parliamentary or parochial"—Construction of words—When these words are words of limitation and when of amplification.*

By a local Act for the town of Maidstone, commissioners were empowered to assess the property in the borough to a certain rate for the purposes of the Act, and all gaols and some other public establishments were also to be rated according to a yard running measure. By a section in a subsequent Act (54 Geo. 3, c. 104, s. 18), after reciting that it is expedient that the said county of Kent should be relieved and exonerated from any taxes in respect of any of the gaols, &c. of the said county, it is enacted that "no rate, tax, or assessment whatsoever, parlia-

Q. B.]

REG. v. JUSTICES OF DURHAM, *ex parte* JUSTICES OF SUNDERLAND.

[Q. B.]

mentary or otherwise, shall be raised, assessed, or levied on or be payable by the said county of Kent for or on account of the said gaols, houses of correction and court houses, or any or either of them or any part thereof." The county gaol of Kent is within the borough of Maidstone, and the commissioners under the local Act assessed it as provided for by their Act. Upon a case stated for the opinion of this court, as to whether or not the gaol was liable to be assessed:

*Held*, that it was exempt, and that taking the whole of sect. 18 of the 54 Geo. 3, c. 104, together, the words "parliamentary and parochial" are not to be taken as words of limitation, but as words making the exemption as complete as possible.

This was a case stated by consent for the opinion of this court, as to the liability of the county gaol at Maidstone to be assessed to the local rate for the borough of Maidstone under the 31 Geo. 3, c. lxii. (local). By this statute ("An Act for regulating, &c. the town of Maidstone"), it is enacted by sect. 8 that, for raising money for the purposes of the Act, the commissioners therein named are authorised to levy certain rates; and by sect. 13 the gaol at Maidstone and other public buildings are to be assessed at the rate of one shilling by the running yard.

By the 54 Geo. 3, c. 104, s. 18, it is enacted, "And whereas it is expedient that the said county" (of Kent) "should be relieved and exonerated from any taxes in respect of any of the gaols, houses of correction, and court houses of the said county. Be it therefore enacted that from and after the passing of this Act no rate, tax, or assessment whatsoever, parliamentary or parochial, shall be raised, assessed, or levied on or be payable by the said county of Kent, for or on account of the said gaols, houses of correction and court houses, or any or either of them, or any part thereof."

Under the first of the foregoing Acts the Kent county gaol at Maidstone was assessed to the local rate in the sum of 52l. 16s., at the rate of 1s. per yard running measure, against which assessment notice of appeal was given on the ground of the contended exemption from rating contained in sect. 18 of the 54 Geo. 3, c. 104.

*Deeds* (*Bovill*, Q.C. with him) appeared for the respondents, and contended that the rate in question is neither a parliamentary or parochial assessment, and that, as the exemption in stat. 54 Geo. 3, c. 104, s. 18, is confined to assessments of those particular descriptions, the assessment in question upon the gaol is good: (*Palmer v. Eariuk*, 14 M. & W. 428; *The Bedford Commissioners v. The Bedford Union*, 21 L. J. 229, M.C.; *Baker v. Greenhill*, 3 Q. B. 148.) [CROMPTON, J.—The words "no rate, tax, or assessment whatsoever," these are very strong words, and if they had stopped there, no doubt could have arisen. You read the words "parliamentary or parochial" as words of limitation; they may, however, be used as words of amplification?—they may have been thrown in to show that the exemption is intended to apply to any kind of rate or assessment.] If the words had been "free from all taxes and assessments whatsoever," the case would have been free from doubt: (*R. v. Inhabitants of Christchurch*, 8 B. & C. 660; *Company of Proprietors of Waterloo Bridge v. Cull*, 28 L. J. 70, Q.B.; 29 L. J. 10, Q.B.

*Barrow*, for the appellants, argued that the gaol was exempt under the provisions of sect. 18 of the 54 Geo. 3, c. 104, for that the rate in question was sufficiently within the words and the intention of the Legislature, which clearly intended the exemption to be general, the words "parliamentary or parochial" being words of augmentation (*Waller v. Andrews*, 3 M. & W. 312), and that they should be taken in their proper and enlarged sense.

*Deeds* in reply. [CROMPTON, J.—The preamble

to the section clearly shows that it was intended to relieve the gaol of all liabilities.]

COCKBURN, C. J.—I think judgment should be given for the appellants. If we were called upon to decide this case independent of authorities, we should have no doubt whatever as to the meaning of the 18th section, which seems to be entirely to exempt the gaol from any rates or taxes whatever, whether public or local. [His Lordship here read the section.] Mr. Deeds endeavoured to put on the words "parliamentary or parochial" such a construction as to make them words of limitation, and as, according to his view, this is neither a parliamentary nor a parochial tax, the gaol is not exempt. There are certainly some taxes which have not been deemed parliamentary, but these cases have turned upon the particular phraseology used by the Legislature. I think that this is a parliamentary tax; but, independently of this, the language of the section shows that the intention of the Legislature was to relieve such buildings as are erected for public purposes. The words are very large, and I cannot bring myself to doubt what was really the intention of the Legislature. Looking at the preamble of the section, and the words made use of, I think that the exemption is established.

WIGHTMAN, J.—If the words had stopped with the words "no rate, tax, or assessment whatsoever," there could have been no doubt; but the words "parliamentary or parochial" are introduced, and the question is, whether or not these words are words of restraint? It seems to me that they are not intended as words of limitation, but are introduced with the view of making the exemption as complete as possible. The object of the Legislature was an exemption from all rates whatever. The cases cited are not to be taken as authorities unless the facts are precisely the same, and the object of the Legislature obviously the same.

CROMPTON, J.—It is clear that the meaning of the Legislature was to relieve the county from all taxes of this nature. I think that, upon examining the cases cited, it will appear that they were decided upon the peculiar words in each, and without impugning any of them, I think, in this case, that the exemption has been shown to exist. The preamble shows what was the meaning of the Legislature, and we may fairly construe the subsequent words by that preamble.

BLACKBURN, J.—I am of the same opinion. The case turns entirely upon the construction to be put upon the words in the 18th section. Taking the object the Legislature had in view into account, I think the words sufficiently show that object.

*Judgment for the appellants.*

Thursday, May 31.

REG. v. THE JUSTICES OF THE COUNTY OF DURHAM, *ex parte* THE JUSTICES OF SUNDERLAND.

*Quo warranto*—Interference by justices in the exclusive jurisdiction of other justices.

*A quo warranto* information is not the proper proceeding whereby to try the right of one set of justices to interfere with the duties of another.

The justices of the county of Durham granted alehouse licences for alehouse keepers in the borough of Sunderland. The justices of the said borough claimed to have the exclusive right to grant such licences:

*Held*, that a *quo warranto* information was not the proper process whereby to try the right.

*Manisty*, Q.C. moved for a rule calling upon the justices of the county of Durham to show cause by what authority they claimed to grant licences to alehouse keepers in the borough of Sunderland. It appeared that both the justices of the borough of Sunderland and those of the county of Durham claimed to have the right of granting these licences, and licences for the town of Sunderland had been granted by the county justices. Both sets of justices were ready to

have the question settled by this form of proceeding. [CROMPTON, J.—What do they usurp. Could you not try the question in an action? BLACKBURN, J.—Is your object merely to have the opinion of this court, or to take the question to a court of error?] It is to take it to a court of error. [WIGHTMAN, J.—All that it can be said the justices have done is, some act out of their local jurisdiction. Suppose under the Bastardy Act a justice not acting in the division in which the woman was residing were to grant a summons, could you have a *quo warranto* against him for it?] The justices are usurping an office by granting a licence for a place in which they have no jurisdiction. They grant the licence not as borough, but as county justices. [CROMPTON, J.—How upon such a proceeding can there be any judgment of seizure into the Queen's hands?]

COCKBURN, C.J.—We cannot apply a *quo warranto* to such a case. If it came to a plea, we could not give you judgment even if you are right, since there could be no judgment of ouster. You must try the question in some other form. *Rule refused.*

Monday, June 4.

REG. v. THE JUSTICES OF RICHMOND, SURREY.

*Justices—Interested—Waiver of objection—Malicious trespass—Assertion of a right.*

*The surveyor of the roads directed trestles to be put at intervals on either side of a road, on which fresh gravels had been laid, to confine the traffic to a particular part of it. A. drove his carriage against the trestles to knock them down, in alleged assertion of a right, he denying the surveyor to have no power so to put the trestles for this object. One of the trestles was injured, and on a summons against A., under the Malicious Trespass Act, the justices convicted and fined A. 1s.*

*By a local Act the justices were made vestrymen, and so became interested in the property in the trestles, and also in the fine:*

*Held, first, that the justices had jurisdiction to convict: and secondly, that in order to obtain a certiorari to quash the conviction on the ground of the justices being interested, the party should show on the face of his affidavits that neither he, nor his advocate before the justices, knew of the objection at the time of the hearing.*

This was an application for a certiorari to remove a conviction of justices, whereby the applicant was convicted of wilfully injuring certain trestles on a highway near Richmond, Surrey.

The applicant resided at Richmond, and had frequent occasion to drive along the highway towards Petersham. On the occasion in question he was driving along the lower road, Richmond, when he found certain wooden stools or trestles put upon the road at intervals, on alternate sides, by direction of the surveyor of highways, the object of which was to compel those who drove to keep in the middle of the road, on which fresh gravels had been laid down. Lord Huntingtower being under the belief that such obstructions on the highway were illegal, and being anxious to try the question how far they were justifiable, purposely drove against the trestles, and overthrew several of them. He did not intend to do any damage to them, but in one instance damage was caused by the trestle falling over. Lord Huntingtower afterwards went and informed the police of what he had done, and the object with which he had done it. The inspector summoned him before the justices, charging him with wilfully damaging certain trestles, the property of the vestrymen of Richmond. Having acted with the view of raising the legal question, his Lordship attended by his family solicitor before the justices, and stated the reasons of his conduct, and contended they had no jurisdiction, as his Lordship acted under a fair and reasonable supposition of a right.

The Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, s. 24, enacts, that "if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, &c., being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, &c.; provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, but that every such trespass shall be punishable in the same manner as before the passing of this Act."

The justices, however, did not think the case came within this proviso, and convicted Lord Huntingtower of maliciously damaging and injuring the trestle, and ordered him to pay a fine of 1s.

HANSON, in moving for the rule, contended that Lord Huntingtower had acted only with a view to raise an important question, and that the slight damage that had occurred to the trestle was not done wilfully, but accidentally. The case fell within the proviso, and the justices had no jurisdiction. [CROMPTON, J.—The word "reasonable" is put in the proviso. Can you contend that there was a reasonable supposition of a right? This regulation of roads newly repaired is well known and generally understood, and it was not reasonable to disturb it. If there was an obstruction, the parties might have been indicted. Every person is not to be allowed to take the law into his own hands in this way.] There was no intention to damage the trestle. [COCKBURN, C.J.—Lord Huntingtower drove against the trestle, and so did unnecessary damage. The justices may have thought that not a right thing to do.] There is another objection; three of the justices present, and acting, were vestrymen of the parish, and so owners of the property injured. The fine also goes to the vestrymen. Under an old local Act the vestrymen are intrusted with the care and repair of the road. Lord Huntingtower was not aware of this disqualification of the justices at the hearing of the summons.

By the COURT.—On the ground of the three justices being interested, you may take a rule; but as to the other objection to the conviction there was some evidence that the applicant had not a fair and reasonable supposition of a right, and the justices had jurisdiction.

Cohen showed cause against the rule.—As to the objection of the justices being interested, I have an affidavit which states the belief of the justices that Lord Huntingtower knew that the justices resided in the parish of Richmond; and if so, it was not open to him to take the objection, for every one is presumed to know the law, and the local Act makes the resident justices, vestrymen *ex officio*. *Dimes v. The Great Junction Canal Company*, 3 H. of L. 759; *Paley on Conv.* 38; *Reg. v. The Cheltenham Commissioners*, 1 Q. B. 467. The maxim *Consensus tollit errorem* applies. [CROMPTON, J.—The maxim cannot apply to such a case as this, where the party does not really know of the existence of the disqualification, but only by a legal fiction.] Then it appears that the defence at the hearing of the summons was conducted by the family solicitor; and, although the solicitor, who resides in Richmond, makes an affidavit in support of the rule, it does not appear that he did not know of the objection.

LUSH and HANSON in support of the rule.—Although the solicitor resides in Richmond, his practice is in London; and if permission is granted, an additional affidavit will be filed, according to the fact, that he was not aware of the objection at the time of the hearing. [COCKBURN, C.J.—The objection taken is of a very technical nature, as it cannot be supposed that the justices could have been influenced by their infinitesimal

C. B.]

HILDRETH v. ADAMSON.

[C. B.]

interest in this one shilling fine. The justices properly convicted Lord Huntingtower, for it was not necessary for him to drive against the trestle and knock it down in order to raise the question.] Then the question is, did Lord Huntingtower at the hearing consent to the interested justices acting? There is no evidence that either Lord Huntingtower, or his attorney, knew of the objection. The local Act was an old one, and is out of print. [CROMPTON, J.—It is quite consistent with the materials before us, that his attorney knew all about the Act.] Even if the attorney knew of the objection and said nothing, still that does not amount to acquiescence in the interested justices deciding the case. [COCKBURN, C.J.—Acquiescence by the advocate is acquiescence by the principal.]

COCKBURN, C.J.—I am of opinion that the objection cannot be sustained, and that this rule must be discharged. The party now objecting is bound to show that at the time of the hearing of the summons neither he, nor his representative who conducted his defence, knew that the justices were interested. It was not necessary that the attorney should deny knowledge of the fact, if the party's non-affidavit stated it. But in the present case Lord Huntingtower makes an affidavit, and denies knowledge on his part, and the attorney also makes a long affidavit; and it nowhere appears that the attorney was ignorant of the objection at the time of the hearing of the summons, though it might well be that he, an attorney residing in Richmond, knew of the local Act affecting its management, by which the justices were made vestrymen and became interested in the fine. The objection is *strictissimi juris*, and as there is no objection to the conviction on the merits, this rule must be discharged.

The rest of the Court concurred. *Rule discharged.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAUGHAN  
WILLIAMS, Esqrs., Barristers-at-Law.

Friday, May 25.

HILDRETH (appellant) v. ADAMSON (respondent).

*Waterworks Clauses Act, s. 59—Public fountains.*

*A local board of health, being proprietors of water-works, may supply a public fountain gratuitously for a limited purpose, and a person taking the water for another purpose is liable to a penalty under 10 & 11 Vict. c. 17, s. 59.*

*Although a fountain erected on a highway may be a nuisance, the water with which it is gratuitously supplied remains the property of the person supplying it, and cannot be taken for any other purpose than that for which it was supplied.*

The appellant in this case was the secretary to the local board of health of Darlington. He had laid an information against the respondent, that he, the respondent, on the 23rd Nov. 1859, did unlawfully take water from a certain fountain belonging to the local board, he not having agreed to be supplied with water by the said board, contrary to the Darlington Local Board Act 1854. A gentleman had presented two fountains to the town of Darlington, one of which was erected in a public street, and was gratuitously supplied with water by the local board as owners of the water-works, for the use of cattle in the cattle market on market days, and for horses, if yoked, when passing to and fro. The respondent, a horsekeeper, had a stable in the town, but instead of having water laid on and supplied to the stable and paying the water-rate to the local board, he was in the habit of driving his horses to the fountain in question to drink, and for this the present information was laid against him by the direction of the local board. Other persons had taken water from the fountain for other purposes than those for which it was supplied, and a notice was in consequence published for them to desist from doing so. To this notice

the attention of the respondent had been called, but he persisted in taking the water. The justices dismissed the information, on the ground that the erection of the fountain on the public highway was an obstruction of the road and a nuisance, and that they could not limit the supply to the purposes mentioned.

Keane for the appellant.—The private Act by which the Darlington Local Board of Health is constituted, incorporates the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), of which the 59th section enacts that "every person who, not having agreed to be supplied with water by the undertakers, shall take any water from any reservoir, watercourse, or conduit belonging to the undertakers, or from any cistern or other like place containing water belonging to the undertakers, other than such as may have been provided for the gratuitous use of the public, shall forfeit to the undertakers for every such offence a sum not exceeding ten pounds." The respondent is liable to a penalty under this section. The magistrates say that the local board has no right to erect a fountain in the public streets, and that if they do, it must be for the gratuitous use of all mankind, so as to bring the case of the respondent within the words "other than for the gratuitous use of the public." The 78th section of 11 & 12 Vict. c. 63 (the Public Health Act 1848), referred to by the magistrates, has nothing to do with the question. It makes no difference whether the fountain is a nuisance to the highway or not.

ERLE, C. J.—I am of opinion that this appeal ought to succeed, and that the ground of objection taken by the magistrates fails. I think the board gave the water limited in its quantity and in its object. The purpose for which it was given was, that the cattle in the market, and horses on their journey, might drink. They have limited the right to take water for the two purposes mentioned. The person convicted would be liable, if he was supplied with water by the board, to pay so much for each horse kept by him. He determined to avail himself of this fountain, and to bring his horses from the stable to the fountain, and so evade the rate. Section 39 enacts [his Lordship read the words of the section], and the magistrates think the water was for the gratuitous use of the public, because the fountain was in the highway, and an indictable nuisance. I do not mean to give an opinion whether their construction of the section as to that is right or not. But that is a question entirely distinct from the question whether the water is the property of the company. The fountain may be a nuisance, and yet the water may be the property of the company. A charitable man may put buckets of water on the highway for the purpose of gratuitously supplying passers by, and those buckets might be an obstruction to the highway, yet he would not have dedicated the water to the public. Sect. 32 of the Waterworks Clauses Act gives the company, in my opinion, a power to supply water gratuitously to a limited portion of the public; and it enables them to deal with the water supplied, and to make agreements respecting it as private property. I think, therefore, this person ought to have been convicted.

WILLIAMS, J.—I am of the same opinion. It is clear the company did not intend to dedicate the water to the public at large, and the question is whether, in spite of their intention, the dedication is to be enlarged. A highway may be dedicated to the public for a limited purpose, though not to a limited portion of the public: (*Poole v. Huskisson*, 11 M. & W. 827.) So the company might dedicate this water to the public for a limited purpose.

BYLES, J.—The reason given by the magistrates cannot be sustained. The water would be for the public use, although limited to certain hours of the day. I think it may be so limited, and that the magistrates should have convicted.



## COURT OF EXCHEQUER.

Reported by F. BAILEY, and JOHN DUNBAR, Esqrs.,  
Barristers-at-Law.

Monday, April 23.

THE LIVERPOOL LIBRARY v. THE MAYOR, ALDERMEN AND BURGESSES OF LIVERPOOL.

*Library—Exemption from rateability—Society for purposes of literature—6 & 7 Vict. c. 36, s. 1.*

*A society called the Liverpool Library were occupiers of premises which were exclusively used for the objects stated in their rules, and the funds by which the institution was supported were derived from purchase-money of shares, from subscriptions of the members, from payments received as fines from such members as became subject thereto under the regulations of the institution, by sale of such shares as became by forfeiture the property of the institution, from the sale of such periodical publications as were required to be removed by later editions, and from the sale at cost price to the subscribers of the catalogues. No dividend, gift, division, or bonus was ever made, but was prohibited by their rules. Newspapers were not supplied to the institution:*

*Held, that the society was for the purposes of science, literature and the fine arts exclusively, and, as such, exempt from rates, as coming within the exemption in the 6 & 7 Vict. c. 36, s. 1, similar to the Bradford Library case, 28 L. J. 73, M.C.*

This was a case stated for the opinion of the court under the 12 & 13 Vict. c. 45, on appeal against the lighting rate, the fire police rate, the paving, sewer, water and general rates, and the improvement rate for the borough of Liverpool. The case was as follows:—

The Liverpool Library was, on the 4th May 1859, rated at 2½d. in the pound to the lighting rate, at ½d. in the pound to the fire police rate, at 8d. in the pound to the paving rate, at 3d. in the pound to the sewer rate, at 2d. in the pound to the water rate, at 3d. in the pound to the general rate, and at 1½d. in the pound to the improvement rate, which was made on the same day by two assessors duly appointed.

The shareholders of the institution claim exemption under the 6 & 7 Vict. c. 36, s. 1. The lighting rate was made under the 21 Geo. 2, c. xxiv. (local Act), and a resolution of the town council of Liverpool of 7th Sept. 1836, for applying the Act by the corporation of Liverpool to the borough, the fire police rate, under the 5 & 6 Vict. c. cvi. (local Act). The paving, sewer, water and general rates, were made under the 9 & 10 Vict. c. cxxvii. (local Act). The improvement rate was under the Liverpool Improvement Act 1858. All the above Acts of Parliament are to be referred to and taken as part of this case. The institution to which the rated property belongs is called the Liverpool Library, and is governed by rules and regulations duly made at a meeting of the shareholders, a copy of which rules is annexed hereto, and is to be referred to by either party and taken as a part of the present case. The institution exists under the above rules and regulations, and is managed and conducted under their provisions, and is devoted to the purposes therein declared, and was so at the time when the rules in question were made. The rated premises in the occupation of the institution are exclusively used for the objects stated in the said rules and regulations, and the funds by which the institution is supported are derived from the undermentioned sources, which are exclusively so applied: First, from the purchase-money of the shares; secondly, from the sub-scriptions of the members raised and levied as stated in the said rules and regulations; thirdly, from payment received as fines from such members as become subject thereto under the rules and regulations of the institution, and by the sale of such shares as become by forfeiture the property of the institution; and fourthly, from the sale of such

periodical publications as are required to be renewed by later editions, and from the sale, at cost price, to the subscribers, of the catalogues occasionally published.

By rule 35 it is declared, "That it shall not be lawful to make any dividend, gift, division, or bonus, in money or otherwise, unto or between any of the members of the institution."

The selling price of the shares for many years past has been 9l. 10s.; for the last six months, after payment of the annual subscription, 9l.; for the last six months of the current year, subscription paid up in either case.

No newspapers are in fact supplied to or introduced into the establishment. The books and other library property of the library are circulated solely among the shareholders and such strangers as are gratuitously introduced by the proprietors according to the rules and regulations.

The question for the opinion of the court is, whether the said Liverpool Library is entitled to the benefit of stat. 6 & 7 Vict. c. 36, and under the provisions of that Act is exempt from the whole of the before-mentioned rates, or from any of them. If any of the said rates can be maintained, they are to be confirmed; but if the exemption is maintained as to all or any of them, they are to be amended according to the judgment of this court. The costs of the appeal and of this case shall abide the event; that is to say, if either party succeeds as to the whole, the whole of the costs are to be paid by the unsuccessful party. If some or one only of the rates should be maintained, the costs to be arranged and paid according to the decision of the clerk of the peace of the borough of Liverpool.

*Mileward* for the respondents.—The library is not exempt from the rates in question. It is not a society instituted for purposes of science, literature, or the fine arts exclusively, within the 6 & 7 Vict. c. 36, s. 1, which exempts from rates "any building belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, provided that such society shall be supported wholly or in part by voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus, in money, unto or between any of its members," &c. This society is not exclusively for literature—the primary purpose of the society is not the promotion of science and literature exclusively—it is substantially a circulating library. The shares are sold in the market at various prices. [POLLOCK, C.B.—There is no dividend. MARTIN, B.—What could you suggest to be within the Act if this society is not?] A society where the whole of the funds are spent for the benefit of the institution. The rules of the society were then referred to, as also the sections of the local Acts, and it was submitted that the local Acts repealed the exemption clause of the public general Act: (*The Bradford Library case*, 28 L.J. 73, M.C.; *The Marylebone Vestry v. The Zoological Society*, 3 E. & B. 807; *R. v. Manchester*, 16 Q.B. 449; *R. v. Brandt*, 16 Q.B. 462; *R. v. Gosnell*, 16 Q.B. 472; and *The Russell Institution v. St. Giles*, 3 E. & B. 416, were cited.)

*Mellish*, contra, not called upon.

The COURT was clearly of opinion that this society was exempt from rateability, and that it was strictly within the language of the statute, that the local Act did not repeal the exemption clause of the public Act, and that the facts of the present case appeared to bring it entirely within the principle of the decision of *The Bradford Library case*, 28 L.J. 73, M.C.,

*Judgment for the appellant.*

Monday, May 28.

FARMER AND OTHERS v. GILES.

*Benefit building society—Construction of rules—Agreement to refer.*

*A shareholder of a benefit building society established*

[Ex.]

FARMER AND OTHERS v. GILES.

[Ex.]

*under the Act 6 & 7 Will. 4, c. 42, having obtained an advance, mortgaged the property purchased therewith to the trustees as security for the advances, and by the deed covenanted to pay the subscriptions which should become due on his shares. The defendant subsequently redeemed by paying, under the provisions of one of the rules, all subscriptions which would become due up to the end of the thirteenth year, of the society, at the expiration of which period it was calculated all the objects of the society would be accomplished. That turned out not to be so, and the trustees brought an action on the defendant's covenant for subscriptions subsequently becoming due:*

*Held, that (following Farmer v. Smith, 4 H. & N. 196, 32 L. T. Rep. 371), the defendant had not ceased to be a holder of the shares.*

*That the question as to the defendant's liability on his covenant was not "a matter in dispute arising concerning the affairs of the said company and benefit building society, and between the said society and the defendant as holder of the shares, and between the other shareholders of the new company and society and the defendant," within the meaning of the rule of the society, which required all such disputes to be referred to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27.*

The plaintiffs sued as trustees of the British Building and Investment Company.

The declaration stated that by an indenture of the 20th Nov. 1845, made between the defendant of one part and the then trustees of the society on the other part, after reciting, as the facts were, that the said society had been formed for the purpose of raising by subscription a fund to assist the members thereof in obtaining freehold or leasehold property pursuant to the said Act, and that rules had been made for the government of the said society, certified, allowed and enrolled, and that the sums of money to be contributed by subscription in respect of each share in the funds of the said society amount to 120*l.*, and that the defendant was, according to the said rules, entitled to receive out of the said fund thereof, by way of anticipation, the sum of 600*l.* in respect of his shares numbered as in the said indenture mentioned, upon his entering into the security thereinafter mentioned, the defendant covenanted with the said trustees, parties to the said indenture, and their successors, trustees for the time being of the said society, that he the defendant should and would pay the subscriptions and interest payable on his said shares, according to the rules of the said society, on the days and in manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares; and the plaintiffs aver that after the making the said indenture, a large sum of money, to wit, 80*l.*, became due and payable from the defendant to the said society for and in respect of the subscriptions payable on his said shares according to the rules of the said society, and that all things have been done on the part of the said society, and of the plaintiffs as trustees as aforesaid, to entitle them to have the said money paid by the defendant, yet the defendant has not as yet paid the same; and for money payable by the defendant to the said society for subscriptions and moneys due and payable by the defendant to the said society under the rules of the said society in the shares of the defendant in the said society, and in respect of the defendant being and continuing a member thereof.

*Plas:—Third to first count.—That before and at the time when the said sum of 80*l.*, and every part thereof, is alleged to have accrued and become due and payable from the defendant to the said society, and before and at the time when the said subscriptions in the first count, alleged to have been payable on the said shares according to the rules of the said society,*

*and each and every of them, accrued and became payable, he the defendant had wholly and finally ceased to be, and was no longer, a holder of the said shares, or any or either of them, or of any shares in the said society, or a member thereof, or subject to the rules or liable to pay the subscriptions in the first count mentioned.*

*Fourth to first count.—That one of the said rules in the first count mentioned (which before and at the time of the making of the said indenture and of the defendant becoming a holder of the said shares in the said society in the first count mentioned and the commencement of this suit, and hitherto was and is in full force and binding upon the said society and upon the plaintiffs as trustees thereof, and upon the defendant as such shareholder) was and is in the words and figures following, that is to say: "Reference of disputes to arbitration. The board for the time being, or the major part of them, shall determine all disputes which may arise concerning the affairs of the company, or respecting the construction of these rules, or any of the clauses or things herein contained, and also of any bye-laws, additions, alterations, or amendments which shall or may hereafter arise between the trustees, officers, or other shareholders of this company; and the decision of the board, if satisfactory, shall be conclusive; but, if not satisfactory, reference shall be made to arbitration pursuant to the 10 Geo. 4, c. 56, s. 27. And at the first meeting of the company after the enrolment of these rules five arbitrators shall be elected, none of the said arbitrators being beneficially interested directly or indirectly in the funds of the company, and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn by the complaining party, or by some one appointed by him or her, shall be arbitrators to decide the matters in difference, whose decision shall be final and binding on all parties, and each of the three arbitrators so drawn and attending shall receive five shillings remuneration; the costs of the reference shall be paid by such party as the arbitrators shall direct; the party requiring the arbitration shall deposit with the manager fifteen shillings." And the defendant avers that the word "board" in the said rule means the persons appointed to and holding the office of directors in the said benefit building society in the first count mentioned, and that the word "company" in the said rule means the said benefit building society; and the defendant further saith that the claims and causes of action in the declaration mentioned, so far as the same relate to the first count, at the commencement of the suit and always were and still are matters in dispute arisen concerning the affairs of the said company and benefit building society and between the said society and the defendant as the holder of the said shares in the first count mentioned, and between the other shareholders of the said company and society and the defendant as the holder of the said shares in the said first count mentioned; and between the plaintiffs as the trustees of the said company and society and the defendant as the holder of the said shares in the said first count mentioned; that is to say, the defendant, as such holder of the said shares, hath always disputed and denied, and still doth dispute and deny, his liability to pay the said sum of 80*l.* in the first count mentioned to the said society or to the plaintiffs as trustees thereof, and the right of the said society and the plaintiffs as trustees thereof, or either of them, to bring or maintain any action for the alleged breach of covenant in the first count mentioned, and hath always disputed and denied, and still disputes and denies, that any breach of covenant ever was committed by him the defendant, as alleged in the first count: of all which the plaintiffs, as such trustees as aforesaid, and the said society have*

[Ex.]

FARMER AND OTHERS v. GILES.

[Ex.]

always had notice, and the defendant avers that all conditions precedent, matters and things requiring to have been performed and to have happened and existed to enable the defendant to have the said matters in dispute adjudicated upon, decided and settled as pointed out and provided for in and by the said rules, and to further prevent the accruing of any right of action in respect of the plaintiffs' claim, so far as the same relates to the first count, and to oust this court of all jurisdiction over the said claim, were performed and did happen and exist before the commencement of the suit.

Sixth to the second count, the same as the fourth.

Demurrer to the third, fourth and sixth pleas, and joinder.

The plaintiffs also joined issue on the pleas and replied.

Secondly, to the fourth plea, that before the matter in dispute therein mentioned arose, the arbitrators appointed in pursuance of the rule had refused to act; that no others were appointed to act in their place, and that when the matter in dispute arose there was no arbitrator to whom it could be referred.

Thirdly, also to the fourth plea, that the board had decided the defendant's liability to pay, and that the defendant had never requested the plaintiffs to refer the said dispute to arbitration, or taken any steps to appoint arbitrators according to the rules.

There were similar replications to the next plea.

The defendant demurred to these four replications.

The demurrers to the pleas and replications now came on for argument together.

*Knowles*, Q.C. (with him *Beasley*) for the plaintiffs.

—There are two questions raised on the demurrers. The first on the third plea is, whether the covenant in the mortgage-deed is not binding until the society is finally at an end, notwithstanding the defendant has paid up the entire amount of his subscription as originally fixed; that point is decided in favour of the plaintiffs by a case in this court, *Farmer and others v. Smith*, 4 H. & N. 196; 32 L. T. Rep. 371. The second question arises on the fourth plea; the rule of the society relied on in it requires "the board to decide all disputes which may arise concerning the affairs or respecting the construction of the rules or any of the clauses therein contained, and also of any bye-law, additions, alterations, or amendments which shall or may arise between the trustees, officers, and other shareholders of the company, and if the decision of the board is not satisfactory, arbitration shall be had pursuant to 10 Geo. 4, c. 56, s. 27." This is not a dispute concerning the construction of that section. In *Crisp v. Bumbury*, 8 Bing. 394, the wording of the rule was different, and the society was of a different kind. *Cutbill v. Kingdon*, 1 Ex. 494, is more like the present case; that was also a building society, and the words of the rule as to arbitration were almost exactly the same as in this case, yet the Court of Ex. held the trustees might notwithstanding maintain an action on the covenant. *Morrison v. Glover*, 4 Ex. 430, decides that the rule applies only to disputes with a member as a member. This is not a dispute with the defendant as a member: (*Reg. v. Trafford*, 24 L. J. 20, M.C.; *Kelsall v. Tyler*, 25 L. J. 153, Ex.; *Fleming v. Self*, 1 Kaye, 518.)

*Lush*, Q.C. (with him *M'Lachlan*).—The cases cited do not apply. In *Cutbill v. Kingdon* the rule provided only for the reference of "all disputes respecting the construction of the rules;" in the present case the rules applies to "all disputes concerning the affairs of the company." In *Morrison v. Glover* the question arose on a mortgage of a lease and a covenant by the shareholder to pay the ground-rent. In *Reg. v. Trafford* the rule applied only to disputes as to money matters; so also in *Fleming v. Self*.

*Knowles*, Q.C., in reply, referred to *Reeves v. White*, 17 Q. B. 995.

*POLLOCK*, C.B.—I am of opinion that the plaintiffs are entitled to our judgment on the demurrers to the third and fourth pleas. As to the third plea, which alleges that the defendant was not a member of the society, I think the case of *Farmer v. Smith*, lately decided in this court, is conclusive. As to the fourth and sixth pleas, the question raised by them is substantially the same; they amount to this, that by the rules of the society, and the Act to which they refer, such a question as is raised here cannot be brought before the ordinary legal tribunals, but must be made matter of reference. It appears to me clear that, according to the cases decided, a mortgage and a covenant connected with it cannot be considered as within the rule or the Acts of Parliament to which it refers. If we were to hold that a mortgagor was within the rule, how would it be possible to enforce the rights of the parties? Under the statute, if a member refuses to obey the award, recourse must be had to a justice of the peace to compel him; but could a justice of the peace honestly do justice between the parties in such a case as this? The power of the justice is not co-extensive with the rights of the parties. The Act could not be intended to introduce a remedy which would not be competent to do justice between the parties, and this case must be excluded from the class of cases in which the aid of the justice is to be called in. He could not do justice here; and the Act of Parliament cannot have been intended to give him jurisdiction. As to the decided cases, I think they clearly go the length of deciding that in the case of a mortgage the rule of reference does not apply. This is not so much a question between a member and the society as between a mortgagor and his mortgagee. The deed is a distinct security, and creates an obligation quite apart from the member's liability to pay on his shares. As our judgment is for the plaintiff on the demurrers to the plea, it is unnecessary to say anything about the replications and the demurrers to them: they fall to the ground.

*BRAMWELL*, B.—I am of the same opinion. As to the third plea, it seems to amount to this, that the defendant, having paid up his subscription, has ceased to be member. There is nothing in the rules as to ceasing to be a member in that case; but supposing, in fact, that by paying up he has ceased to be a member because he has paid up all he had to pay, or all it was supposed he would have to pay, yet his covenant remains, and he is liable on that. As to the other pleas, I agree with my Lord. I think the matter is substantially decided by the former cases. The point arises thus: The statute says that provision shall be made by the rules for referring disputes to arbitration; it does not say all disputes, but only such disputes as the members of the society think fit. What disputes does the rule in this case say shall be referred? [His Lordship read the rule.] It seems to me this dispute is not within that rule. It refers only to such disputes as arise between the trustees and the shareholders generally, and not particular disputes. This is not a dispute as to the construction of any rule of the society, as is a question between mortgagor and mortgagee, arising on a covenant in a mortgage-deed.

*CHANNELL*, B.—I also am of opinion that the plaintiffs are entitled to judgment on the demurrer to the pleas. As to the third plea the declaration, which is good on the face of it, charges the defendant on an absolute covenant to pay money. The defendant pleads he has ceased to be a shareholder: it is not very clear what he means, but the plea is clearly no answer to the declaration, which charges him on an absolute covenant. As to the fourth and sixth pleas also, I think the plaintiffs are entitled to our judgment. The fourth plea is to the special count, and the sixth, substantially the same, is to the money counts. As to these the plaintiffs

ADM.]

THE VICTOR—REG. v. FRANCIS LOOSE.

[C. CAS. R.]

are *prima facie* entitled to sue. They declare on a covenant by the defendant with certain trustees and their successors to pay the subscription on his shares. They aver that 80*l.* has become due in respect of his shares; that all things have been done to entitle them to have the money paid, yet the defendant has not paid it. They show that *prima facie* they are entitled to sue. The defendant, however, by his plea sets up that the right which these plaintiffs would otherwise have to sue in this court is taken away from them by the operation of the 10 Geo. 4, s. 56, s. 27, as applied to the rules of the society, which is enrolled under the 6 & 7 Will. 4, c. 32. The question therefore is, whether or not is the jurisdiction of the court ousted by those statutes and by the rules. I am of opinion that it is not. I think the rule applies only to disputes between the trustees or officers and the shareholders, that is to disputes between them and the shareholder or shareholders. In this case defendant, by becoming a mortgagor and executing the mortgage-deed, has acquired a new character, and the trustees have acquired a new remedy on the security in the event of his nonpayment. I cannot but think the rule as to arbitration was intended to apply to such a case as this. The 27th section of the statute gives a remedy which is apt for the exigencies of the case to which I think it is intended to apply, but which is totally inapplicable to such a case as this. The defendant has assumed a new character, and new relations have arisen between him and the trustees to which, when disputes arise, new remedies are applicable. I think this is not a dispute between the trustees and the defendant as a shareholder, to which alone I think the rule applies, and therefore the plaintiffs are entitled to judgment.

*Judgment for the plaintiffs on the demurrers to the third and fourth pleas; the second count and all pleadings on it to be struck out.*

*Lewis and Sons, attorneys for the plaintiffs.*

### MARITIME LAW CASES.

[NOTE.—This will contain a Digest of all important Cases relating to Maritime Law decided in other than the Superior Courts that are regularly reported here.]

#### THAMES POLICE COURT.

*Monday, May 7.*

(Before Mr. SELFE.)

THE VICTORY STEAM-TUG.

(*Mitchell's Register, March*)

*Penalty for steam-tug not consuming its own smoke.*

This was a prosecution against Mr. B. T. Harris, the master of a steam-tug called the *Victory*, belonging to the Steam-towing Company, for a penalty on account of using on board the tug furnaces so constructed as not to consume their own smoke.

The superintendent of the company appeared in place of the defendant. He expressed a doubt whether smoke-consuming furnaces could be applied to steam-tugs, the power of which, in proportion to their size, so greatly exceeds that of other steam-vessels; but he offered to carry out anything practicable which the Government surveyor could suggest.

The Government inspector stated that there would be no difficulty in finding effectual means to consume the smoke on board of the *Victory*, although the means hitherto adopted on that vessel were of little use.

Mr. SELFE, referring to the case of *Walker v. Evans*, 35 L. T. Rep. 59, Q. B., relative to a steamer, the *Tam O'Shanter*, belonging to the same company, where it was held that a steam-vessel plying between London-bridge and the Nore is within the meaning of the Act, fined the company 5*l.*, and intimated that on a second conviction the fine would be increased to 10*l.*

### CROWN CASES RESERVED.

Reported by JOHN THOMSON, Esq., Barrister-at-Law.

*Saturday, April 28.*

REG. v. FRANCIS LOOSE.

*Friendly Society—Trustee—Larceny by—Treasurer—In whom property vested—18 & 19 Vict. c. 63, s. 18.*

*The prisoner was a trustee of a friendly society (a lodge of Odd Fellows) and appointed, by resolution of the society to receive money from the treasurer and carry it to the bank. He received the money, but instead of taking it to the bank he applied it to his own purposes. He was indicted as a bailee of the moneys of the treasurer R. C., feloniously converting the money to his own use; and also for a common law larceny of the money of R. C.*

*The Friendly Societies Act, 18 & 19 Vict. c. 63, s. 18, vests the property of such societies in the trustees and directs the property to be laid in the names of the trustees in indictments:*

*Held, that the prisoner could not be convicted of feloniously converting or stealing the moneys of R. C. as charged in the indictment.*

Case reserved by Williams, J. for the opinion of this court.

In this case the indictment alleged that on the 20th July 1859 the prisoner became and was bailee of moneys of Richard Carraway, deceased, to the amount of 40*l.*, and that being such bailee he fraudulently and feloniously did take and convert the said moneys to his own use, and that the prisoner in manner and form aforesaid feloniously did steal, &c. the said moneys.

There was another count for a common law larceny.

The deceased R. Carraway, whose money the 40*l.* was alleged to be, was at the time in question the treasurer of a lodge of Odd Fellows, which was a friendly society duly enrolled.

The prisoner was one of its trustees.

On the 20th July 1859, at a lodge meeting, it was proposed and resolved that 40*l.* should be sent to the bank of Messrs. Gurney at Fakenham, and that the prisoner should take it there. The 40*l.* in gold and silver was taken from a box which was in Carraway's keeping as treasurer, by a person who acted for him, and having been counted, was put into a bag and carried away by the prisoner. Instead of taking it to the bank, he dishonestly applied it to his own purposes, and no such sum was ever placed to the credit of the society.

On these facts it was submitted by the counsel for the prisoner, that the money was not shown to be the property of R. Carraway as alleged in the indictment. *Cairn's case*, 2 Mood. C. C. 204, it was argued, did not apply, because that case was decided on the construction of the stat. 10 Geo. 4, c. 56, by which the property of a friendly society was vested in the treasurer or trustee for the time being: whereas by the Act now in operation (stat. 18 & 19 Vict. c. 63, s. 18) the property is vested in the trustee or trustees of the society. And that supposing the treasurer to have a special property in the 40*l.*, such property ceased as soon as the resolution of the lodge meeting was acted upon by payment of the money into the hands of the prisoner who was nominated by the lodge, and not the treasurer, to carry it to the bank. It was further urged that, independently of the statutes, assuming the treasurer to be the owner, the prisoner received the money not as the servant of the treasurer, but as a person not bound to take it, and he was therefore only guilty of a breach of trust. Lastly, it was argued that the prisoner was not bound to pay in that particular 40*l.*, but that any sum of 40*l.* would have sufficed, whereas by the statute he must hold something specific.

The prisoner was convicted, but I respite the judg-

ment until the opinion of this court should be taken whether the above objections were well founded.

*Metcalf* (*Drake* with him) for the prisoner.—It is submitted that the property is not well laid in Richard Carraway's name, in any of the counts of the indictment. The case of *Rex v. Cain*, 2 Mood. C. C. 204; S. C. 1 Car. & M. 309, relied upon on the part of the prosecution, is not applicable; for that was the case of a benefit society enrolled under the 10 Geo. 4, c. 56, and the 4 & 5 Will. 4, c. 40, and it was held that the property of the society might in an indictment be laid to be in the treasurer by his proper name, for sect. 21 of the 10 Geo. 4, c. 56, provided expressly that the property in such societies "for all purposes of suit, as well civil as criminal," should be deemed and taken to be, and in every such proceeding where necessary, stated to be the property of the treasurer or trustee of the society for the time being, in his or her proper name, without further description. The 18 & 19 Vict. c. 63 (the Act now in force relating to friendly societies), sect. 18, vests the property of such societies in the trustees, and directs that in all actions, or suits, or indictments, or summary proceedings before magistrates, touching or concerning any such property, the same shall be stated to be the property of the persons for the time being holding the office of trustees in their proper names as trustees of such society, without any further description. So that Richard Carraway being treasurer only, and not a trustee, had no property vested in him by virtue of the statute, and the property ought to have been laid in the indictment as the property of the trustees. Then, as to R. Carraway's having any special possession of the money stolen, it is found as a fact that it was the duty of Carraway to pay over the money to the prisoner, whose duty it was to take it to the bank. There could not therefore be a felonious taking by the prisoner, who was a trustee and legal owner of the money, as well as being the person specially appointed by the resolution of the society to receive the money from Carraway and take it to the bank. It does not appear by the 18 & 19 Vict. c. 63, how a trustee is to be made liable to the criminal law for his felonious acts.

No counsel appeared for the prosecution.

POLLOCK, C. B.—We are all of opinion that the indictment in this form cannot be sustained. In *Cain's* case the prisoner had obtained the money wrongfully, and the property in it was vested by the 10 Geo. 4, c. 56, in the treasurer of the society; but in this case the property was not vested in the treasurer, but in the trustees. Moreover, as the prisoner was specially appointed by resolution to take the money to the bank, how can it be said that he stole the money of Richard Carraway as charged in the indictment? For as soon as Carraway parted with the money he had nothing more to do with it. The prisoner may have been guilty of a breach of trust as against the other trustees; but it cannot be said that he stole the money of Carraway. The conviction therefore cannot be sustained.

*Conviction quashed. (a)*

REG. v. SAMUEL HUDSON, JOHN SMITH AND JOHN DEWHIRST.

*Conspiracy to cheat—False pretences—Gaming and wagering—8 & 9 Vict. c. 109, s. 17.*

*The prisoners were at a public-house in the same room with the prosecutor; one of them placed a pencase on the table and left the room to get writing paper.*

(a) The explanation of this decision is, that the prisoner, as the trustee of the society, was the legal owner of the property, and not merely in legal possession of it. He could not, therefore, be guilty of larceny of his own money. It was a breach of trust as against his co-trustees, and possibly as against the secretary, for which the remedy was a civil one; but it was not criminal.

*Whilst he was absent, one of the two who remained took the pen out of the case and put a pin in its place. The two remaining prisoners then induced the prosecutor to bet the other prisoner when he returned, 50s. that there was no pen in the case. The prosecutor put his money down, and one of the prisoners snatched it up to hold. The pencase was then turned up into the prosecutor's hand, and another pen, with the pin, fell into his hand, and then the prisoners took the money:*

*Held, that the evidence was sufficient to support a count for conspiracy, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to cheat, &c.*

Case reserved for the opinion of this court, by J. B. Maule, Esq., barrister-at-law, sitting as deputy for the Recorder of York.

At the Epiphany sessions 1860, held for the city of York, the prisoners were jointly indicted and tried before me upon an indictment, the two first counts of which charged them with an offence under the 8 & 9 Vict. c. 109, as follows:—

First count charged, "That on the 18th Nov. 1859, by fraud, unlawful device and ill practice in playing at a certain game or sport, to wit, in and by a wager with one Abraham Rhodes, whether a certain pencil case had a pen in it or not, unlawfully and fraudulently they did win from the said Abraham Rhodes, to a certain person to the jurors unknown, a certain sum of money, to wit, 2l. 10s. of the money of the said A. Rhodes, and so did then and thereby unlawfully obtain such money from the said A. Rhodes by a false pretence, to wit, by the fraud, unlawful device and ill practice aforesaid, with intent then to cheat and defraud the said A. Rhodes of the same, against the form of the statute in such case made and provided," &c.

The second count charged the prisoners that they unlawfully and fraudulently did combine, confederate and conspire together, and with divers other persons to the jurors unknown, by fraud, unlawful device and ill practice in playing at a certain game or sport, and by divers other fraudulent devices and false pretences, unlawfully to win from the said A. Rhodes a certain sum of money, to wit, the sum of 2l. 10s., of the money of the said A. Rhodes, and so then and thereby unlawfully to obtain from the said A. Rhodes the said sum of money in this count mentioned, by a false pretence, with intent then to cheat and defraud the said A. Rhodes of the same, against the form of the statute, &c.

Third count.—The prisoners were charged with a conspiracy to cheat in the following form:—"That they unlawfully and fraudulently did combine, confederate and conspire together with divers other persons to the jurors unknown, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to obtain from the said A. Rhodes the sum of 2l. 10s. of the money of the said A. Rhodes, and unlawfully to cheat and defraud the said A. Rhodes of the same, against the penance, &c.

The evidence disclosed that the three prisoners were in a public-house together with the prosecutor A. Rhodes, and that, in concert with the two prisoners, the prisoner John Dewhirst placed a pencase on the table of the room where they were assembled, and left the room to get writing-paper; whilst he was absent the other two prisoners, Samuel Hudson and John Smith, were the only persons left drinking with the prosecutor, and Hudson then took up the pencase, and took out the pen from it, placing a pin in the place of it, and put the pen that he had taken out under the bottom of the prosecutor's drinking-glass, and Hudson then proposed to the prosecutor to bet the prisoner Dewhirst, when he returned, that there was no pen in the pencase. The prosecutor was induced by Hudson

Q. B.]

REG. v. JUSTICES OF MACCLESFIELD.

[Q. B.]

and Smith to stake 50s. in a bet with Dewhurst upon his returning into the room that there was no pen in the pen-case, which money the prosecutor placed on the table, and Hudson snatched up to hold. The pen-case was then turned up into the prosecutor's hand, and another pen, with the pin, fell into his hand, and then prisoners took his money.

Upon this evidence it was objected, on behalf of the prisoners, that no offence within the meaning of the 8 & 9 Vict. c. 109, was proved by it, and that the facts proved in evidence did not amount to the offence charged in the third count.

I thought the objection well founded as to the offence under the 8 & 9 Vict. c. 109, but held that the facts in evidence amounted to the offence charged in the third count, and directed the jury to return a separate verdict on each count, a case having been asked for by the prisoners' counsel, for the consideration of the Court for Crown Cases Reserved.

The jury returned a verdict of guilty on each of the three counts.

The prisoners were sentenced to eight months' imprisonment, and committed to prison for want of sufficient sureties.

If the Court for the consideration of Crown Cases Reserved shall be of opinion, that the above facts in evidence constituted in law any one of the offences charged in the indictment, and was evidence to go to the jury in support thereof, the verdict is to stand for such of the counts in which the offence is laid to which the evidence applies.

*Price for the prisoners.*—It is submitted that the prisoners have not been guilty of any of the offences charged in the several counts of the indictment. The first two counts of the indictment are framed upon the Games and Wagers Act, 8 & 9 Vict. c. 109, s. 17, which enacts "that every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly." The object of that provision was not to meet a case like the present. Sects. 8 and 15 show that the provision was directed to the ordinary games played at common gaming houses, and not against tricks like the one in this case.

POLLOCK, C.B.—You may confine your argument to the offence charged in the third count.

*Price.*—As to the third count. To sustain that, the evidence should have shown such a false pretence as *per se* would constitute the ordinary misdemeanor of false pretences.

POLLOCK, C.B.—Why so? This is a count for conspiracy to cheat.

*Price.*—Yes, by false pretences.

CHANNELL, B.—If the count had said merely to conspire, and had omitted the words "by false pretences," it would have been good.

BLACKBURN, J.—Here the prisoners cheated the prosecutor into the belief that he was going to cheat, when in fact he was to be cheated.

*Price.*—This is a mere private deceit not concerning the public, which the criminal law does not regard, but is a deceit against which common prudence might have guarded. There is no evidence of any indictable combination to cheat and defraud.

CHANNELL, B.—If two persons conspire to puff up the qualities of a horse, and thereby secure an exorbitant price for it, that is a criminal offence.

*Price.*—That affects the public. At the trial the present case was likened to that of *Rex v. Barnard*, 7 Car. & P. 784, where a person at Oxford, who was not a member of the university, went for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods. This was held a sufficient false pretence. The present case, however, was nothing more than a bet on a question of fact, which the prosecutor might have satisfied himself of by looking at the pencil-case. It is more like an ordinary conjuring trick. Besides, here the prosecutor himself intended to cheat one of the prisoners by the bet.

No counsel appeared for the prosecution.

POLLOCK, C.B.—We are all of opinion that the conviction on the third count is good, and ought to be supported. The count is in the usual form, and it is not necessary that the words "false pretences" stated in it should be understood in the technical sense contended for by Mr. Price. There is abundant evidence of a conspiracy by the prisoners to cheat the prosecutor, and though one of the ingredients in the case is that the prosecutor himself intended to cheat one of the prisoners, that does not prevent the prisoners from liability to be prosecuted upon this indictment.

*Conviction affirmed. (a)*

## COURT OF QUEEN'S BENCH.

Reported by JOHN HEZLET and WILLIAM BARLOW, Esqrs.,  
Barristers-at-Law.

Thursday, May 24.

REG. v. JUSTICES OF MACCLESFIELD.

20 & 21 Vict. c. 43—Order to justices to state special case—Jurisdiction—Error in point of law—Determination.

The court refused a rule to justices, ordering them to state a special case for the opinion of the court, where the objection was that they had improperly received evidence.

To enable the court to interfere it must appear that the determination of the justices was wrong.

Kenealey moved for a *certiorari* to bring up the conviction of John Holland, with a view to its being quashed. The conviction was under the 17 Geo. 3, c. 56, ss. 10 & 14, for having materials suspected to be purloined or embezzled concealed in his dwelling-house, outhouse, yard, garden, or other place, for which offence the justices had imposed a penalty of 20*l*. The objections to the conviction were, first, that the 17 Geo. 3, c. 56, was repealed by the 6 & 7 Vict. c. 40; that the justices who heard the complaint were interested, being connected with the silk trade, and members of the Macclesfield Silk Throwers' Association, and that the attorney for that association conducted the complaint, to whom a portion of the penalty was ordered to be paid as informer; but these two latter were waived. There was a further objection, that the justices had improperly refused to grant a special case for the opinion of this court. He therefore moved for a rule under 20 & 21 Vict. c. 43, s. 5, ordering a case to be stated. It appeared from the affidavits that during the hearing of the case a witness of the name of David Welch, one of the constables who made the search, used a certain paper or memorandum for the purpose of refreshing his memory as to certain material facts, and as to the silk seized, and where it was found, and other

(a) It should be observed that this conviction was sustained upon the third count only, charging a conspiracy to cheat: the first count, charging an obtaining of the money by false pretences, was not supported; and the second count, charging a conspiracy to obtain the money by false pretences, was held to fail. This case, therefore, is an authority only to the extent of determining that, if the jury was satisfied that, in fact, the prisoner intended to cheat the prosecutor by some fraudulent contrivance, the conviction could be sustained.

material circumstances, and on cross-examination as to whether the paper was the original memorandum, or a copy, he admitted that it was a copy made by himself on the morning of the trial, and offered it to the defendant's counsel, who put out his hand for it, when Norris, the attorney for the prosecution, ordered the witness to stop, and not to show the paper, but to put it in his pocket, which he did. Norris then objected that no notice to produce it had been given; notice was at once given, and on the magistrates being appealed to they held he should not be bound to produce it, but permitted the witness to continue to refresh his memory by referring to the memorandum, although the defendant and his counsel were prevented seeing it; this, it was contended, was contrary to law, and that, therefore, the defendant was entitled to have a special case stated under the power given by 20 & 21 Vict. c. 43. [WIGHTMAN, J.—You must show how the conviction is wrong in point of law. CROMPTON, J.—It is consistent with your affidavit that the termination of the justices was right. The court cannot interfere in every case where justices have admitted improper evidence as it does in granting rules for new trials; although that determination might be wrong, there may have been other evidence justifying the conviction.]

COCKBURN, C. J.—We are not of opinion that the Legislature has given us power to do as you ask; we think we are confined in our consideration of the case to the determination of the justices.

*Rule nisi for a certiorari on the ground that the part of the statute under which the conviction took place is repealed by 6 & 7 Vic. c. 40.*

*Rule to justices requiring them to state a case refused. (a)*

*Lewis and Sons, attorneys.*

*Saturday, May 26.*

PATTEN (appellant) v. RHYMER (respondent).

*Innkeeper—Conviction—Offence against the tenor of his licence—Suffering gaming—Private friends—9 Geo. 4, c. 61, s. 21—Terms of licence.*

*It is an offence against the term of an innkeeper's licence (under the 9 Geo. 4, c. 61, s. 21), punishable upon summary conviction, for him to permit even his personal friends privately to game for money in his house; and this though they were merely playing cards there in pursuance of a friendly arrangement by which they all (including the innkeeper) in turns played a friendly game at the houses of each other.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices at Chelmsford of the defendant, an innkeeper, for an offence against the tenor of his licence, for knowingly suffering several persons to play at cards for money.

The case stated that this was an information under the 9 Geo. 4, c. 61, s. 21, against the appellant, who is an innkeeper and builder at Great Baddow, in the county of Essex. It was proved by the evidence of two police officers that about twelve o'clock on

the night of the 10th Jan. 1860, they entered the inn kept by the appellant at Great Baddow, as a party then in the house were in the act of breaking up and leaving; that they found cards and also money upon the table in the bar-parlour, where five persons had been assembled, and four of whom were in the room, the landlord (the appellant) being one of them. The appellant admitted that they had all been playing cards together for money at a very low stake, and that the other four persons had come there by his invitation. On behalf of the defendant (appellant) it was satisfactorily proved that the parties present were respectable tradesmen of the parish, moving in the same sphere of life as himself, and that they had come to his house upon the occasion in question as his private friends, and by his special invitation; that they had all been in the habit of visiting each other's houses for the purpose of playing a friendly game of cards, and it had arrived at the appellant's turn to invite them to his house; that the room where they assembled was a private room of the appellant, and that there were no other persons in the house but the five persons before mentioned. It was contended before the justices on behalf of the appellant that the law was never intended to deprive the innkeeper of his right to invite his private friends to his house for the purpose and under the circumstances proved. The justices were of a contrary opinion, and held that, under the words of the Act of Parliament and the tenor of his licence, an innkeeper was not entitled knowingly to permit cards to be played for money in any part of his licensed house and premises; they therefore convicted the appellant in a mitigated penalty and costs. The justices, however, considered the case one of great importance to the innkeeper, as well as to the public, and upon application made in due time by the appellant, who was advised that the decision of the justices was erroneous in point of law, granted a case.

By sect. 21 of the 9 Geo. 4, c. 61, it is enacted that "Every person licensed under this Act who shall be convicted before two justices . . . of any offence against the tenor of the licence to him granted shall . . . be adjudged by such justices to be guilty of a first offence against the provisions of this Act," &c.

The form of the licence as provided by the statute contains the prohibition as follows: "And do not knowingly suffer any unlawful games or any gaming whatsoever therein."

Barrow appeared for the appellant, and contended that he was not within the meaning of the statute, which applies only to an innkeeper permitting gaming in his house in his character of an innkeeper, and not to him in his character of a private individual, for that if this were not so he might be finable if he had a christening party at his house, and he were to suffer the young people to game: (*Overton v. Hunter*, 1 L. T. Rep. N.S. 366.) There are some games at cards which are not unlawful. [CROMPTON, J.—The words are, "or any gaming whatsoever;" the statute does not merely prohibit unlawful games.] There may be some games at cards the playing of which does not amount to gaming under the statute 8 & 9 Vict. c. 109, s. 18. [COCKBURN, C.J.—The question submitted is, whether this is less a gaming against the tenor of the licence because the innkeeper asks his private friends to a friendly game?] It is not an offence as an innkeeper; his house at such a time becomes his private dwelling. [CROMPTON, J.—It is the house which is to be kept without any gaming in it.]

No counsel appeared for the respondent.

COCKBURN, C.J.—The words are certainly large enough to embrace the case and justify the conviction. I own that I was very much struck with the distinction as to what a man may do as a private individual and not as a publican. Still the Legislature

(a) It may be gathered from this that an appeal does not lie against the decision of magistrates on the ground of reception of improper evidence. The court conceives that its jurisdiction extends only to the determination of the justices, and not to the means by which they arrived at their conclusion. There is, in truth, but one question. Assuming the facts to have been proved, was the law correctly applied to them. It is, however, difficult to understand the principle of the decision. Crompton, J. said: "There might have been other evidence justifying the conviction." But that argument would be equally applicable to new trials and to criminal appeals. The ground upon which the courts act in cases of reception of improper evidence is, that it is impossible to determine what amount of influence that bit of evidence may have produced upon the minds of the jury. Justices are both judges and jurors, and being equally liable to be misled by improper evidence, the objection should be equally applicable to their decisions.

C. B.]

PEDGRIFT v. CHEVALIER.

[C. B.]

may have intended to have put a restraint upon a man keeping a house of public entertainment in respect of anything that might act as a bad example to others frequenting such a house as to lead them into practices which the statute intended to prevent. I own I am not quite satisfied with this construction, but as my learned brothers are in favour of it I will not dissent. The words are certainly capable of this construction, and though perhaps a somewhat severe one, it is in all probability that which was intended by the Legislature.

WIGHTMAN, J.—I think the words are sufficient to fulfil what I consider to have been the intention of the Legislature. Now, although the appellant invited his private friends, yet it is within the meaning of the Legislature, which is not to allow gaming in the house. It would be exceedingly easy, under pretence of inviting private friends, to allow gaming. It certainly appears to me that it was the intention of the Legislature not to allow any gaming in a licensed house.

CROMPTON, J.—The real point is, whether, when an innkeeper invites his friends to a friendly game at cards, it is within the words of the licence? I think that it is, and that the meaning of the Legislature is, that in this house, which is licensed, there shall be no gaming whatever. I think the conduct of the appellant is within the mischief of the Act. He clearly, according to the facts, committed no intentional misdemeanor; but nevertheless it was against the tenor of his licence.

BLACKBURN, J.—I do not think that the offence is dependent upon whether or not the gaming was by friends, the object of the Legislature being that the house should be quietly conducted; and whether, therefore, the gaming was by private friends or not, it is still gaming. I think the justices were right.

*Conviction affirmed. (a)*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAUGHAN WILLIAMS, ESQs., Barristers-at-Law.

Monday, May 28.

PEDGRIFT (appellant) v. CHEVALIER (respondent).

*Appeal from justices—The Medical Act—Surgeon—Statute 21 & 22 Vict. c. 90.*

*Sect. 40 enacts that any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding 20l. P. had a plate on the door of his house, with "P. surgeon" thereon. He was not registered under the Act as a surgeon:*

*Held, that the facts stated were not sufficient to support a conviction under the above section, for wilfully and falsely pretending to be a surgeon.*

This was an appeal from the decision of justices.

A case being stated for the opinion of the court, under 20 & 21 Vict. c. 43. Halesworth (Suffolk) Petty Sessions, Oct. 26th, 1859. Informant, Barrington Chevalier; defendant, Frederick Woodcock Pedgrift. Alleged offence, for that the defendant

did on the 12th day of October 1859, at Halesworth, in the said county, wilfully and falsely pretend to be a surgeon, contrary to the form of the statute in that case made and provided.

On the hearing of this case a book was produced, which was stated to be a copy of a medical register, published in pursuance of the Medical Act. On the cover of this book are the words "By authority;" and the following is a copy of the title-page:—"The Medical Register, pursuant to an Act passed in the 21 & 22 Vict. c. 90, to regulate the qualifications of Practitioners in Medicine and Surgery. 1859. London: Published and sold at the Office of the General Council of Medical Education and Registration of the United Kingdom, 32, Soho-square. Price 7s. 6d." The book then contains an account of the fees for registration, the names of the members and officers of the general council of medical education and registration, in which Dr. Francis Hawkins is stated to be registrar of the general council, some explanatory notes by Dr. Hawkins, the Medical Acts of 1858 and 1859, a table of abbreviations; and then follows the names of medical men, with date of registration, residences, and qualifications, extending over 355 pages, and headed with the words and figures, "The Medical Register 1859." It was also proved that on a door of the house in which the defendant and Mr. Richard Phibbs Irwin, a registered surgeon, lived, and for which they were jointly assessed to the rates, was a plate in a wooden frame, on which was engraved "Mr. Pedgrift, Mr. Irwin, surgeon accoucheur, &c." It appeared that the name of Mr. Pedgrift was on a separate piece of plate from the rest, but there was no division between the names of Mr. Pedgrift and Mr. Irwin, except the line which was necessarily apparent where the two pieces of plate joined. It also appeared that "Surgery" was written on another door, and "Surgeon accoucheur" on the lamp over the door.

Nathaniel Palmer, as counsel for the defendant, objected—first, that the book produced was not a copy of the register within the meaning of the 27th section of the Medical Act, and was therefore improperly admitted in evidence; secondly, that there was no evidence that the defendant pretended to be a surgeon; thirdly, that there was no evidence that he was not a surgeon.

We considered that the words surgeon and accoucheur on the plate were intended to apply equally to Mr. Pedgrift and Mr. Irwin; we therefore considered that the defendant did, on the 12th Oct. wilfully and falsely pretend to be a surgeon, and we convicted him of the offence with which he was charged in the penalty of 10l., and 1l. 13s. 8d. costs; and he having served us with a notice that he was dissatisfied at our determination as being erroneous in point of law, and made application for a case for the opinion of her Majesty's court of Common Pleas at Westminster, we submit the case for the opinion of the court, in order that, if our determination be right, the conviction may be affirmed, or, if wrong, may be reversed.

THOMAS RANT, } Justices of the Peace  
HENRY OWEN, } of the County of  
ANDREW JOHNSTON, } Suffolk.

This case was last term sent back to the justices, and was returned with the following answer:—

"We the undersigned, two of the above-named justices (the Rev. Henry Owen the third justice being in Africa), in accordance with an order dated 23rd April instant, state that we had no other grounds for holding the appellant to have falsely pretended to be a surgeon than those stated in the case, namely, that his name did not appear in the medical register, from which we assumed he was not a surgeon, and there was a plate on the door mentioned in our case with the word 'surgeon' upon it, from which we considered he

(a) This important case decides in effect that an innkeeper cannot, without liability to the penalty, permit his friends to play cards in his private apartment, if they play for money. A game of penny *vingt-et-un* would be his ruin were he to be informed against. It appears that this prohibition extends to the persons having wine licenses under the new Act.



pretended he was a surgeon. Dated this 28th April 1860.

"THOS. RANT,  
"ANDREW JOHNSTON."

*Lush*, Q.C. (with whom was *Bulwer*) for the appellant.—In the absence of any statement to the contrary, I have a right to assume that at the time of the passing of the Act, 21 & 22 Vict. c. 90, the appellant was in practice as a surgeon. If he was, there being at that time no qualification necessary to constitute a surgeon, he was a person "recognised by law as a surgeon" within the meaning of the 40th section, and cannot be convicted of wilfully and falsely pretending to be so. Those who practised before may practise now. The only effect which the Act has upon them is, that by reason of the 32nd section they cannot recover their fees in a court of law, and by reason of the 36th section they cannot hold certain appointments. The 31st section enacts that "every person registered under this Act shall be entitled according to his qualification or qualifications to practise medicine or surgery, or medicine and surgery as the case may be, in any part of her Majesty's dominions, and to demand and recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients; provided always, that it shall be lawful for any college of physicians to pass a bye-law to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any court of law; and thereupon such bye-law may be pleaded in bar to any action for the purposes aforesaid commenced by any fellow or member of such college." The only effect of that is, that registered persons may now practise in any part of her Majesty's dominions, no matter where the diploma was granted, and may recover their fees. It gives an additional privilege to registered persons, but does not affect persons who are not registered. [WILLIAMS, J.—If the Act had said no person without being registered shall be a surgeon, the conviction would be right.] Yes, but it does not say so.

No counsel appeared in support of the conviction.

EARLE, C. J.—This is a question raised upon an Act of a very widely extended application. We are bound not to confirm the conviction unless we find the statement of facts sufficient. The statement here is very scanty. There is nothing to show that the appellant was not in practice before Act passed, or had not a diploma, or was not recognised as a surgeon. It shows only that he called himself a surgeon, and was not registered. I don't think that is enough. I don't think that every one who calls himself a surgeon without being registered can be convicted. As to the objection that the words "by authority" upon the books were not sufficient to make it evidence, I am against that.

WILLIAMS and BYLES, JJ., concurred.

*Conviction quashed. (a)*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, June 2.*

(Before COCKBURN, C.J., MARTIN, B., CROMPTON, J., WILLES, J. and BRAMWELL, B.)

REG. v. BRADFORD AND OTHERS.

*Railway—Obstruction of line—Line in course of con-*

(a) It is difficult to discover what it is that this case decides. Was the conviction quashed on the ground of there being no sufficient evidence that the defendant had assumed the title of "surgeon," or that, having done so before the passing of the Act, he was entitled to do so ever afterwards, however falsely in fact? It appears to me that the question is still open, whether the 46th section of the Medical Act does or does not prohibit, under penalty, the using of the titles of doctor, surgeon, &c., in that he is registered under the Act, without being so.

*struction—Not completed—3 & 4 Vict. c. 97, s. 15-21.*

*A line of railway was constructed under the powers of an Act of Parliament, and was intended for the conveyance of passengers in carriages drawn by steam-engines, but at the time of the alleged offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of workmen and materials. A railway truck was placed by the prisoners across the line so as to obstruct the passage of any carriage and to endanger the safety of the persons therein, but its position was discovered, and the truck removed before any collision occurred:*

*Held, that the so placing the truck across the line was an offence within the 3 & 4 Vict. c. 97, s. 15, although the line was not completed and opened, and no actual obstruction took place.*

Case reserved by the assistant judge of the justices for the county of Middlesex.

John Bradford, Joseph Dimart, Frederick Cleaver, Richard James Bradford, John Butler, Henry Durban, and George Dimart, were tried before me at the general sessions of the peace for the county of Middlesex, holden at Westminster on the 7th May 1860, upon an indictment, of which the following is a copy:—

Middlesex.—The jurors for our lady the Queen, upon their oath present, that John Bradford, Richard James Bradford, John Butler, Henry Durban, George Dimart, Joseph Dimart, and Frederick Cleaver, on the 8th day of April, in the year of our Lord 1860, at the precinct of Norwood, in the county of Middlesex, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there put and place a certain truck, called a trolley, upon and across a certain railway, there called the Great Western and Brentford Railway, in such manner as to obstruct a certain engine, to wit, a locomotive steam-engine, then and there using the said railway, against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Bradford, James Bradford, John Butler, Henry Durban, George Dimart, Joseph Dimart, and Frederick Cleaver, afterwards, to wit, on the same day and in the year aforesaid, at the precinct aforesaid, in the county aforesaid, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there put and place a certain truck, called a trolley, upon and across the said railway, called the Great Western and Brentford Railway, in such manner as to obstruct a certain carriage, to wit, a railway carriage, then and there using the said railway, against the form of the statute in such case made and provided.

Third count.—And the jurors aforesaid, upon their oath, do further present, that the said John Bradford, James Bradford, John Butler, Henry Durban, George Dimart, Joseph Dimart, and Frederick Cleaver, on the said 8th day of April, in the year of our Lord 1860, at the precinct aforesaid, in the county aforesaid, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there put and place a certain truck, called a trolley, upon and across the said railway, called the Great Western and Brentford Railway, in such manner as to endanger the safety of persons conveyed in the said carriage against the form of the statute in such case made and provided.

Fourth count.—And the jurors aforesaid, upon their oath, do further present, that the said John Bradford, James Bradford, John Butler, Henry Durban, George Dimart, Joseph Dimart, and Frederick Cleaver, afterwards, to wit, on the same day and in the year aforesaid, at the precinct aforesaid, in the county aforesaid, unlawfully and wilfully did do a certain thing, that is to say, unlawfully and wilfully did then and there

put and place a certain truck, called a trolly, upon and across the said railway, called the Great Western and Reading Railway, in such manner as to endanger the safety of persons conveyed upon the said railway, against the form of the statute in such case made and provided.

The prisoners severally pleaded guilty, and judgment was respite until the decision of the Court of Criminal Appeal was obtained upon the case hereinafter stated.

Jos. Bradford, Josh. Dimart and Fredk. Cleaver were committed to the House of Correction for the county of Middlesex, and the other prisoners were discharged on recognisance of bail to appear and receive judgment at a future sessions.

The indictment was framed on the 3 & 4 Vict. c. 97, by the 13th section of which it is enacted, "That every person who shall wilfully do or cause to be done anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or to aid or assist therein, shall be guilty of a misdemeanor."

By the 21st section of the same Act, it is enacted, "That whenever the word 'railway' is used in this Act, it shall be construed to extend to all railways constructed under the powers of any Act of Parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam, or by any other mechanical power.

The railway in question was constructed under an Act of Parliament, and was intended for the conveyance of passengers in carriages drawn by the power of steam, but at the time of the committing the alleged offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and of workmen who were from time to time conveyed upon the railway by carriages drawn by the power of steam.

A railway truck was placed by the prisoners across the railway, and was so placed as to obstruct the passage of any carriage, and to endanger the safety of persons conveyed therein, but its position was discovered, and the truck removed before any collision occurred.

It was objected that upon these facts the case was not within the statute, because, first, the railway was not used for the conveyance of passengers for hire; and secondly, because no actual obstruction took place.

I overruled both objections, and I have now to submit to the justices of either bench and barons of Exchequer whether I was right in so doing.

W. H. BODKIN, Assistant Judge.

*Notes for the prisoners.*—There was no offence committed within the meaning of the 3 & 4 Vict. c. 97, which expressly states that the railway must be one intended for the conveyance of passengers. In the present case the railway at the time of the commission of the alleged offence was not used for the conveyance of passengers. This statute was passed for the protection of the public, and the provisions were all aimed at the prevention of accidents to the public, and for this simple reason, because the Legislature could not control a railway not yet made. Until the railway was completed and opened, the works remained a mere private enterprise, and private property as much as if they were in a private garden. The only words which could bring the case within the Act are to be found in the interpretation clause, that the word "railway" is to mean a railway intended for the conveyance of passengers. But the word "intended" does not necessarily mean *in futuro*, but merely means intended at the time when the railway is constructed and finished; and this view is consistent with the preamble (Dwarria on Stat. 705.) If the word "intended" meant *in futuro* from the date of the first step, then it would lead to absurd consequences, for it

[MAG. CAS.]

might be held that after the first sod was turned, and though no line was yet laid down, this stringent penal statute would apply to every obstruction put upon the line. [COCKBURN, C.J.—Suppose a railway finally completed, and not opened, but ready to be opened, and that a trial trip was taken, and some one wilfully put some obstruction on the line, would that be within the statute?] That would be nearer than this case, but it would not be within the statute. [CROMPTON, J.—If the works had only been partly laid down, it might not be within the statute, which speaks of it as a railway.] In this case it was not a complete railway. It could not be opened, for the Government inspector had to examine it previously. [BRAMWELL, B.—Suppose there had been a goods train only, and an obstruction had been put. Would that be within the Act?] I think not. That however assumes that there is a complete railway opened and used. Here there were no passengers to be endangered, and no railway opened. [COCKBURN, C.J.—Still there was one carriage and engine upon the line. It has been constructed and is intended to be used, though not actually opened. This is within the mischief of the Act.] This is a highly penal statute, and the court will not give a construction to the word "intended" which would bring within the Act all those who put anything on the line after the first sod had been taken up. There is another objection: there must be an actual obstruction—that is, some train or engine must be actually obstructed. [MARTIN, B.—You say that if a person put a stone or piece of iron on a line of railway, it is no offence within the Act, unless and until some engine is actually obstructed. CROMPTON, J.—The statute says—"Shall wilfully do or cause to be done anything in such manner as to obstruct." Does not that mean if the obstruction is put in such a place and such a manner that any engine coming along may be obstructed?] That is not the plain meaning of the words. It would be a question for the jury whether the thing put did endanger the safety of passengers. The Act merely means where the person shall actually obstruct an engine. [BRAMWELL, B.—Suppose the Act provided against throwing things out of a window in such a manner as to endanger the passengers. Would not the act of throwing out of the window in such a manner be an offence, though no passenger was actually hurt?] I think not. Again, there were no passengers in the sense of the statute. They were merely workmen carried along the line for the private convenience of the railway contractor. They were not passengers or persons conveyed for hire. [COCKBURN, C.J.—Surely, the workmen are "persons conveyed." The meaning of those words seems to be "passengers for hire." It could not be said, where there is a train of goods and nobody but the guard or driver is with it and there is an obstruction, that that would be within the Act. [COCKBURN, C.J.—If there are a guard and stoker only on the train, would they not be passengers within the statute? They are "persons conveyed."]

COCKBURN, C.J.—I am of opinion that there is really no difficulty in this case. We must assume as a fact that the railway was completed, and all that was required to be done was to open it for the public traffic. In the mean time, and before this final stage, the workmen were occasionally conveyed to and from particular spots of the line where their presence was necessary in order to complete it and make all ready for the purpose of the line being thrown open. The question is, whether persons who placed obstructions on the line under these circumstances committed an offence within the 15th section of the 3 & 4 Vict. c. 97? It appears the parties were mere boys, and it might be a question whether it was worth while to prosecute them; still the prosecution was instituted, and we are to take the facts as they are stated. The prisoners did put an obstruction

[BAIL.] REG. v. SHAW—REG. v. JUSTICES OF LEICESTERSHIRE, *ex parte* GEORGE COMPTON. [BAIL.]

on the line, and they put it in such a position as to endanger the safety of the persons conveyed. I am of opinion that such a case comes within both branches of the alternative stated in the section. There was an obstruction put on the line, and it was put so as to endanger the safety of the persons conveyed. It was contended by the counsel for the prisoner that there can be no obstruction until some train be actually obstructed; but such a construction cannot be maintained. The object of the Legislature was obviously to prevent any disaster to those using the railway, and to punish those who put obstructions in such manner as was likely to cause such disaster. This case is, therefore, within the intention of the statute, and, though in the ordinary course of things it would generally be after the railway was fully opened that the public required to be protected, yet an obstruction put before that time is within the mischief as well as the words of the statute. The conviction will therefore be affirmed.

MARTIN, B., CROMPTON and WILLES, JJ. and BRAMWELL, B. concurred. *Conviction affirmed.*

### BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Monday, June 11.  
(Before HILL, J.)

REG. v. SHAW (Poor Law Auditor).

*Poor-law—Unions formed under Gilbert's Act—22 Geo. 3, c. 83—One union supporting in its workhouse the poor of another union.*

*One union of parishes formed under the 22 Geo. 3, c. 83 (Gilbert's Act), cannot unite with another such union, so that there shall be a joint occupation of one poorhouse for the paupers of two unions.*

*The union of A. was formed under the above Act, and the union of B. was afterwards similarly formed. The latter union not having any poorhouse, arranged with union A. that its paupers should be received into the workhouse of union A., and the charges and expenses of maintenance be paid by union B. The workhouse was enlarged to afford this additional accommodation, and union B. was charged with the interest upon the money borrowed. The auditor of the district, in auditing the accounts of one of the townships in union B., disallowed certain items as paid to the treasurer of union A., on account of the paupers of the said parish and the before-mentioned debt:*

*Held, that he was right in his disallowance, for that the arrangement between the two unions was unlawful.*

In this case a rule had on a former day been obtained by Maule, calling upon William Shaw, Esq., the auditor of the West Yorkshire audit district, to show cause why a *certiorari* should not issue, to remove into this court the certificate of disallowance made by him on the 10th Nov. 1859, of the sum of 12l. 7s. 6d. in the accounts of the overseers of the township of Horsforth, in the West Riding of Yorkshire.

The township of Horsforth was one of three townships of Horsforth, Silsden and Ripton, which in the year 1826 were duly formed into a union, called the Horsforth Incorporation, under Gilbert's Act, the 22 Geo. 3, c. 83. Previously to this, in the year 1819, thirty-one townships were formed into a similar union, called the Carlton Incorporation. Horsforth Union not having any poorhouse, it was arranged that its paupers should be sent to, and maintained in, Carlton poorhouse, and the same being enlarged to afford the increased accommodation, Horsforth was charged with the interest upon money borrowed for the purpose. The charges due from Horsforth to Carlton were periodically paid to the treasurer of the Carlton incorporation. The auditor, in auditing the accounts of the township

of Horsforth, disallowed items amounting to 12l. 7s. 6d. in respect of payments made by the overseers to the treasurer of the Carlton incorporation in respect of the interest so as aforesaid due upon the debt, and for the maintenance of the paupers of Horsforth in such workhouse, and also in respect of certain of their lunatics sent to Wakefield Asylum from such poorhouse, the cost of whom was in the first instance charged to the treasurer of the Carlton incorporation.

*Bliss, Q.C. and Tomlinson* showed cause.

*Pickering, Q.C. and Maule* contra.

The facts and arguments sufficiently appear in the following judgment.

HILL, J.—This is a rule calling upon the poor-law auditor to show cause why a writ of *certiorari* should not issue to remove into this court his certificate of disallowance of certain items in the overseers' accounts; and I am of opinion that the rule should be discharged. According to the facts of the case, it appears that in 1819 a union was formed under Gilbert's Act, the 22 Geo. 3, c. 83, of thirty-one townships; that another similar union of six townships was formed in 1824, and a third union was formed in 1826, called the Horsforth Union. Now, it seems that neither of the two latter unions had any poorhouse, and that each used the poorhouse belonging to Carlton Union. The Horsforth Union had agreed in some way or other, the exact manner being kept back, to pay a sum of money in enlarging the Carlton workhouse so as to obtain increased accommodation, and down to the present year they acted as though they were a part of the Carlton Union, and as though the workhouse had been that of the three incorporations. The sum of 12l. 7s. 6d. consists of three classes of payments. First, charges of the poorhouse; secondly, proportion of arrears of the debt; thirdly, sums paid to the Wakefield Asylum in respect of lunatic paupers belonging to Horsforth township, all of which the auditor disallowed, on the ground that the said township is not included in the agreement of incorporation of the Carlton Union in 1819, and is not a part of the Carlton incorporation. I think the auditor was right in making this disallowance, and that there was no power in Horsforth to unite with Carlton. If Horsforth desired to have a workhouse, power is given to them for the purpose by Gilbert's Act; but there is no power to join with Carlton for such a purpose. The case is not like that where a workhouse of a union has more space than it occupies, and another union rents such space for its paupers, for here all the machinery and the management belong entirely to Carlton Union, and the Horsforth union has been admitted as though they were a portion of the Carlton Union, and the payments to the treasurer have been as treasurer of the Carlton Union, and not as treasurer of the Horsforth Union. It is the same as regards the debt and the lunatics who were sent to Wakefield Asylum, in which case it is the Carlton treasurer who is charged in the first instance. I am of opinion that all this is illegal, and could not be lawfully done; it is not sanctioned by the Act of Parliament, and the charges were properly disallowed. I have been asked, what is to be done? My answer is, that Horsforth Union must comply with the Act of Parliament. They cannot make a new Act. I cannot assist them in their difficulties, and they must therefore take the consequences on themselves.

*Rule discharged.*

REG. v. THE JUSTICES OF LEICESTERSHIRE, *ex parte* GEORGE COMPTON.

*Church-rate—Summons for nonpayment—Bond filed objection—53 Geo. 3, c. 127, s. 7.*

*If upon an application to justices for a warrant to levy the amount of a church-rate, the defendant makes it appear that he bonâ fide disputes the validity of the rate, though he does not in express terms ob-*

[BAIL]

REG. v. SMITH.

[BAIL]

ject to their jurisdiction, the justices ought to forbear to give judgment.

In this case a rule had been obtained calling upon the Rev. J. M. Echallaz and Thomas Mowbray, Esq., two justices of Leicestershire, and George Compton, to show cause why the said justices should not issue their warrant to levy by distress and sale of the goods of the said George Compton, the sum of fourpence being the sum rated and assessed upon him in the churchwarden's rate for the parish of Sweptone, in the said county, and also the sum of 12s. 6d. for costs.

It appeared that Mr. Compton was summoned for the nonpayment of a church-rate, and he objected to pay on the ground that the rate was excessive, and that the overseers ought to have made an application to the parishioners for voluntary contributions, as had been agreed upon at a former vestry. The affidavits were conflicting, as to whether any formal objection was taken to the jurisdiction of the justices; but it appeared that the defendant's attorney told the justices that if they made an order they would expose themselves to legal proceedings.

By the 53 Geo. 3, c. 127, s. 7, after giving justices power to enforce church-rates under a certain amount, it is provided "That if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon."

Willis now showed cause against the rule, on the ground that it sufficiently appeared that Mr. Compton disputed the validity of the rate: (*Reg. v. Milnrow*, 5 M. & S. 248; *Dale v. Pollard*, 10 Q. B. 504.)

Huges, Serjt. and Manly Smith, in support of the rule, argued that the defendant had no right to lead the justices on to hear the case, take the chance of a decision in his favour, and then turn round and deny their jurisdiction: (*Reg. v. The Justices of Salop*, 29 L. J. 39, M. C.; *Reg. v. Colling*, 17 Q. B. 816.)

R. H. Palmer appeared for the justices.

HILL, J.—I am of opinion that this rule should be discharged. This case is distinguishable from *Reg. v. The Justices of Salop*. In that case an order had been made, and an application was made for a *certiorari* to bring it up that it might be quashed, with the view of bringing an action against the justices. The power to grant a *certiorari* is always in the discretion of the court, and this court will not grant it where the party has assented to the act which he desires to be quashed, and there the court thought that he had invited the justices to make the order, and they would not allow him to turn round and seek to quash such order. But this case is different. Now, according to the rule laid down in *Reg. v. Colling*, my brother Crompton says, in his judgment, "Before we make the rule absolute we must see reasonable ground to believe that the act we call upon the justices to do will be lawful." I must do the same thing here. Now the application to the justices was to enforce a church rate, and the statute enacts "that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon." Now, was the validity of this rate *bonâ fide* disputed, and had the justices notice of that fact? If so, they ought to have forbore. Now upon the affidavits it is said that no notice was given to the justices. The affidavits in showing cause distinctly show that, although in the first instance the validity of the rate was not disputed, yet the cross-examination shows that it was, and the attorney, in addressing the justices, urged that the rate was invalid, and he stated that any attempt to enforce it would subject them to legal proceedings. The conclusion I come to is, that the validity of the rate was *bonâ fide* disputed, and that notice was given to the

justices. If so, it is directly within the statute, and inasmuch as mere acquiescence will not give jurisdiction, the rule must be discharged. Rule discharged.

Tuesday, June 12.

REG. v. SMITH.

*Appeal—Costs—Order upon informant for the costs though not a party—13 & 14 Vict. c. 45, s. 5.*

*By the 12 & 13 Vict. c. 45, s. 5, the quarter sessions may, upon an appeal, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable:*

*Held, that, under this provision, the sessions upon quashing a conviction may order the informant to pay the costs, notwithstanding he is not nominally a party to the appeal; the nominal parties being the convicting justices.*

On a former day in this term T. C. Foster obtained a rule calling upon William Smith, Esq., one of the justices for the borough of Sheffield, to show cause why a writ of *mandamus* should not issue, commanding him to issue a warrant of distress, pursuant to the 11 & 12 Vict. c. 43, to levy upon the goods and chattels of James Ellis the sum of 30l. 19s., the amount of costs and charges, by an order made at the general quarter sessions of the peace, holden at Pontefract, for the West Riding of Yorkshire, upon the 2nd April last, upon the appeal of Henry Whittington against a conviction, ordered to be paid by the said James Ellis to the clerk of the peace for the said riding, to be by him paid over to the said Henry Whittington.

It appeared that on the 27th Jan. last the said Henry Whittington was summoned before certain justices of Sheffield, to answer a complaint laid by the said James Ellis, assistant overseer of the poor for the township of Sheffield, for wilfully refusing and neglecting to support his wife, whereby she became chargeable to the said township, upon which occasion the complaint was dismissed. That on the 5th March following another information upon the same charge was again laid by the same party, and was again heard before other justices, when he was convicted as an idle and disorderly person under the Vagrant Act, 5 Geo. 4, c. 83, s. 3, and ordered to be committed to the Wakefield House of Correction for one month with hard labour. That he thereupon gave the convicting justices notice of appeal for the next quarter sessions, at which his appeal accordingly came on, and that the said James Ellis also attended and gave evidence, and admitted that he was the informant against the said Henry Whittington. That the sessions quashed the conviction, and by their order directed "that James Ellis, the assistant overseer of the poor of the said township of Sheffield, the complainant before the said justices and the real respondent in the said appeal, do on notice of this order within one week pay or cause to be paid unto Charles Heneage Elsley, the clerk of the peace of the said court, the sum of 30l. 19s., to be by him the said Charles Heneage Elsley paid over unto the said Henry Whittington, the appellant, the party entitled to the same, for his costs and charges in attending at this sessions to appeal against the said conviction." This order having been disobeyed by the said James Ellis, an application was made to a justice of Sheffield for a warrant to enforce the said order for costs. This application was adjourned, and upon a subsequent occasion another application was made to Mr. William Smith (the present defendant), who ultimately, upon being indemnified by the attorney for the said James Ellis, declined to issue his warrant unless commanded to do so by this court. It further appeared that the said James Ellis had been bound over by the convicting justices to appear at the quarter sessions to give evidence in sup-

port of the conviction, and that no notice of appeal was given to him.

By the 5 Geo. 4, c. 83, s. 14 (Vagrant Act), a power of appeal is given against a conviction, the appellant "giving to the justice or justices of the peace whose act or determination shall be appealed against, notice in writing of such appeal, and of the grounds thereof, within seven days," &c.

By the 12 & 13 Vict. c. 45, s. 5, it is enacted that "upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided, to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by an Act passed" in the 11 & 12 Vict. c. 43.

By the 11 & 12 Vict. c. 43, s. 27, it is enacted that "if upon any such appeal the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid;" and if the same shall not be paid within such time, then upon application to a justice he may enforce payment by a warrant of distress.

*Bliss*, Q.C. and *Maule* now showed cause against the rule, and contended that the quarter sessions had no jurisdiction to make any order for the costs against *Ellis*, who was not a party to the appeal, no notice of appeal having been given to him, and his name in no way appearing as a respondent; that the statute of the 12 & 13 Vict. c. 45, only applies to the parties in the position of either appellant or respondents, and not to a stranger, however much he may be interested in the result.

*T. C. Foster*, in support of the rule, argued that the order upon *James Ellis* was good, for that he was the party really interested in resisting the appeal, the information in the court below having been laid by him, the convicting justices having no interest whatever in the result, and that the words of the Act of Parliament were sufficient to include him: (*Venables v. Hardman*, 28 L.J. 33, M.C.).

*HILL, J.*—This is a rule for a *mandamus* to a justice, commanding him to issue his warrant of distress to levy on the goods of *James Ellis* the sum of 30*l.* 19*s.*, the costs of an appeal against a conviction, and the question is this, whether the court had or had not power to award costs to be paid by *Ellis*. That depends on the construction of the 5th section of the 12 & 13 Vict. c. 45. [His Lordship read the section.] Now it is argued in support of the rule that the words "party or parties" bear the same meaning as respondent or respondents. It appears in this case that a complaint and information were laid by *Ellis* before justices at Sheffield, charging *Whittington* with an act of vagrancy, and upon that he was convicted. He appealed to the sessions, and under the Vagrant Act he properly served the justices alone. *Ellis*, who was the complainant, was bound over to give evidence. The appeal was entered as *Whittington* appellant and the justices respondents, but the party who appeared and really defended was *Ellis*. The merits of the appeal were gone into, and the court quashed the conviction, and ordered *Ellis* to pay the costs, and I think properly.

I was at first struck with the argument of Mr. *Bliss*, because the notice of appeal is directed to be given to the justices. But there is an authority directly in point, namely, *Rez v. The Justices of Hants*, 1 B. & Ad. 654, where a party was convicted under the Turnpike Act, which gives an appeal, first giving notice to

the justice by whose act the party is aggrieved. The party appealed, and the sessions quashed the conviction, and ordered the informer to pay the costs, the justice being the formal party. The words in that case were, that the justices should award costs "to the party appealing or appealed against." The argument of Sir William Follett was, that the costs ought to have been awarded against the convicting justices, as they were the parties to the appeal; but Lord Tenterden in his judgment says, "The next question is, whether the justices had power to charge the prosecutor with costs? It is true the Act directs notice to be given to the justices, not to the party prosecuting or defending. But it would be a great anomaly to cause a justice who acts *bond fide* in the discharge of his judicial duty to pay costs. The question is, what is the meaning of the words "the party appealing or appealed against?" The party appealing here is manifestly the party convicted; and if that be so, the informer is the only person who can satisfy the words "party appealed against." He must therefore pay the costs if such costs be adjudged. Now I think that I am not straining the words of the section of the statute if I give them the same meaning as in the case I have referred to. If this were not so, it would follow that in all cases in which notice of appeal is given to the justices, an exemption would be given to the real party, which would be unjust to the justices. I am of opinion, therefore, that the rule should be made absolute. *Rule absolute.*

## EXCHEQUER CHAMBER.

Reported by F. BAILEY, Esq., Barrister-at-Law.

### ERROR FROM THE EXCHEQUER.

Friday, May 11.

SULLEY v. THE ATTORNEY-GENERAL.

(Before COCKBURN, C.J., and WILLIAMS, CROMPTON, WILLES, BYLES and BLACKBURN, JJ.)

*Income-tax*—Some partners of a firm resident in England and others in the United States—What returns should be made—What income-tax paid.

A partnership firm consisting of seven members carried on business together in copartnership. One of them lived at Nottingham, where there was a counting-house, warehouse, &c. The other six partners resided in the United States of America. The partner at Nottingham did all the business required by the firm in England, which was to buy goods and ship them to America for sale, and where they were always sold. Sometimes goods were bought by the firm in America, France and Germany, but all goods bought, whether in England or elsewhere, were sold only in America, which was their principal house or place of business. No money was ever received in England except from America. The partner residing in England made a return upon his own share of the profits of the partnership business, and paid the income-tax thereon. An information was filed by the Attorney-General for a return by the partner resident in England of the whole profits of the entire firm, and that income-tax be paid thereon:

*Held* (reversing the judgment of the Court of Ex.), that the partner resident in England was not bound to make a return of the entire profits of the whole firm, nor were the other six members of the firm, by their partner in England, or themselves, liable to pay income-tax upon their portions of profit.

The defendant Mr. Edward Sulley is a partner in the firm of Messrs. Lottimer, Large and Co., of Nottingham, and of New York, in the United States of America, and the proceedings in which the special verdict now argued was entered were commenced against him for recovery of the penalty of 50*l.*, imposed by the Income-tax Act on persons who, being chargeable to that duty, neglect to make return of their profits, in

EX. CH.]

SULLEY v. THE ATTORNEY-GENERAL.

[EX. CH.]

order to obtain the opinion of the court, whether or not the mode in which the firm transacted business in this country is such as renders it chargeable under the Income-tax Act in respect of profits.

The Act which grants the duty now levied imposes under schedule D the tax—1. On the profits accruing to any person residing in the United Kingdom from any trade wherever carried on. 2. On the profit accruing to any person, whether a British subject or not, and wheresoever he may reside, from any trade exercised within the United Kingdom. 3. On interest of money, annuities, and other annual profits not charged by virtue of any other schedule of this Act.

The facts to which these rules are to be applied are as follows:—

The firm of Messrs. Lottimer, Large and Co. consists of seven persons, six of whom reside at New York, in the United States of America, and one Mr. Sulley, the defendant, at Nottingham.

The firm has an establishment at Nottingham, consisting of a counting-house and warehouses, with the name of "Lottimer, Large and Co." on the door. The defendant, together with clerks and servants employed by him on behalf of the firm, occupy these premises, books of account are there kept, and the firm have an account with a banker at Nottingham.

The business of the firm in England is carried on by the defendant and other persons purchasing goods at Nottingham and elsewhere, in England, and shipping them for exportation. The goods so purchased are in some cases sent direct by the vendors to the nearest port and then shipped; in other instances they are sent to Nottingham, and are there packed, and afterwards exported.

The goods purchased are in no case manufactured or resold in England, nor is any profit made by the firm by means of any manufacture or resale of goods in England, the profit on such goods consists of the increase in price obtained by the resale in America—a large part of the profit of the business carried on by the firm at New York is obtained from goods purchased in France, Germany and America.

Remittances are made by the firm from New York to defendant, and by him paid to the bankers at Nottingham to the credit of the firm, and payment for the goods purchased in England, and for the cost of packing, shipping, &c., and for the current expenses of the business premises of the firm at Nottingham, and of carrying on so much of the said business as is carried on in England, is made by means of cheques drawn by defendant for and in the name of the firm on the bankers.

The books kept at Nottingham merely show the purchases and warehouse expenses, and the remittances made from New York to pay those items, and no moneys are ever received in England except from New York.

The information stated that defendant, before and at the several times hereinafter mentioned, was one of several persons carrying on jointly and in copartnership a certain trade and business, to wit, of general merchants and dealers in Great Britain, to wit, at the North Ward South, in the county of the town of Nottingham, to wit, at Westminster, &c., to wit, under the name, style and firm of Lottimer, Large and Co. And that the defendant, before and at the several times hereinafter mentioned, resided in the North Ward South, in the county of the town of Nottingham aforesaid, to wit, at Westminster, &c. And that the other persons so carrying on the said trade and business, and whose names are unknown, before and at the several times hereinafter mentioned, resided in parts beyond the seas, and not within or in any part of the United Kingdom of Great Britain and Ireland, to wit, at New York, in the United States of America, to wit, at Westminster, &c.

That the said copartnership before and at the several times hereinafter mentioned were chargeable and liable for and in respect of certain of the duties imposed by certain Acts of Parliament made and passed A.D. 1853, and intitled "An Act for granting to her Majesty duties on profits arising from property, professions, trades and offices," and made and passed A.D. 1854, for granting to her Majesty an increased rate of duty on profits arising from property, professions, trades and offices, and made and passed A.D. 1855, for granting to her Majesty an increased rate of duty on profits arising from property, professions, trades and offices, to wit, for the year ending on the 5th April 1856, to wit, in respect of certain profits and gains arising to them as such copartnership as aforesaid, to wit, according to schedule D of the first-mentioned Act, the said trade having been so carried on in manner aforesaid for more than three years next before, and ending on the said 5th April 1856. And that after the passing of the said several Acts within the time directed by the precept of the commissioners in that behalf, to wit, on the 1st May 1855, one Thomas Underwood, then being an assessor of the duties by the said Acts imposed in and for the said ward within which the said Ed. Sulley so resided as aforesaid, to wit, for the year ending on the 5th April 1856, did as such assessor leave at the dwelling-house and place of residence of the said Ed. Sulley within the said ward, to wit, at Westminster, &c., a certain notice such as by the said Acts and the Acts incorporated therewith or referred to therein is required, signed by him, the said assessor, and requiring the said Edward Sulley to prepare and deliver to him, the said assessor, or at the office of the commissioners or the district, situate at King's-place, Peter-gate, in the county of the town of Nottingham aforesaid, in manner by the said Acts directed, such a list, declaration and statement as he, the said Edward Sulley, was required to deliver by the said Acts within a certain time in the said notice mentioned in that behalf. And although he, the said Edward Sulley, according to the said Acts, was liable to prepare, make out and deliver, and could and might and ought to have prepared, made out and delivered to the said assessor, or at the office of the said commissioners, a true and correct statement such as by the said Acts is required, stating, amongst other things, the balance of the profits and gains arising to the said copartnership from the said trade and business so by them carried on as aforesaid, and in respect of which said balance of profits and gains certain of the duties by the said Acts imposed, to wit, for the said year ending on the 5th April 1856, to wit, under schedule D of the said first-mentioned Act, were then and there chargeable and payable to her Majesty. And although the time in the said notice mentioned has long since elapsed, of all which said several premises he, the said Edward Sulley, afterwards and before the day of exhibiting this information, to wit, on the 1st Jan. 1858, to wit, at Westminster, &c., had due notice, yet the said Edward Sulley did not nor would prepare, make out and deliver to the said assessor or commissioners, duly authorised to receive the same, or to their clerk at their respective offices, described in the said notice and as therein directed, or to any other assessor appointed under or by virtue of the said Acts, or either of them, or to any other person, or at any other place whatever, such a statement as aforesaid, or any list, declaration, or statement whatsoever, such as by the said Acts in that behalf is required, but so to do, and to obey the provisions of the said Act in that respect, he the said Edward Sulley has at all times hitherto wholly neglected and refused, and still doth neglect and refuse, contrary to the said Acts. Whereby and by force of the statutes in that case made and provided, the said Edward Sulley not having been assessed in treble the duty at which

Ex. Ch.]

SULLEY v. THE ATTORNEY-GENERAL.

[Ex. Ch.]

he ought to be charged according to the statutes in such case made and provided, has for his said offence forfeited the sum of 50*l*. Wherefore the said Attorney-General prays judgment in the premises.

Plea, the general issue.

The special verdict stated:—That after the passing of a certain Act of Parliament made and passed A.D. 1853, and intituled "An Act for granting to her Majesty duties on profits arising from property, professions, trades and offices," and of two other Acts of Parliament made and passed respectively A.D. 1854, and in A.D. 1855, and intituled respectively, "An Act for granting to her Majesty an increased rate of duty on profit arising from property, professions, trades and offices," that is to say on the 6th April 1855, and from thence continually until the day of exhibiting the information herein, the defendant resided in Great Britain, that is to say, in the parish of Lenton, in the county of Nottingham, and did during all that time, under the name, style, and firm of Lottimer, Large and Co., carry on business in manner hereinafter mentioned in copartnership with six other persons, all of whom did during all that time reside, and always have resided, at New York in the United States of America, and not within the United Kingdom; and the jurors aforesaid, upon their oath aforesaid, further say, that the said copartnership as aforesaid, consisting of the defendant and the said six other persons, have always carried on, and do carry on, their business aforesaid in manner following. They have a place of business at New York in the United States of America, where they carry on business under the above-mentioned name of Lottimer, Large and Co., and they have also a place of business within the ward, called the North Ward South, in the county of the town of Nottingham, in which neighbourhood the defendant dwells and resides, consisting of a counting-house and warehouses, with the said name of Lottimer, Large and Co. on the door, and which are occupied by the defendant and by clerks and servants employed by him on behalf of the said copartnership for the purpose of carrying on the business of the said copartnership in England as hereinafter mentioned. Books of account for the same purpose are also kept at the said place of business of the said copartnership at Nottingham, which merely show the purchases and warehouse expenses, and the remittances made from New York to pay those items, and no moneys are ever received in England except from New York, and the said copartnership has a banking account in their said name of Lottimer, Large and Co. with the Nottingham and Notts Banking Company at Nottingham aforesaid. The business of the said copartnership in England is carried on by the defendant and other persons purchasing for the said firm goods at Nottingham and elsewhere in England, and shipping them for exportation. All goods are sent direct to the port except Nottingham goods, and small quantities insufficient themselves for a package. The goods so purchased are in some cases sent direct by the vendors in behalf of the said copartnership to the nearest port in England, and are then shipped for exportation, and in other cases are sent by the vendors to Nottingham to the said place of business there of the said copartnership, and are there packed, and afterwards exported by the defendant on account of the said copartnership; the goods so purchased are in no case manufactured or resold in England prior to their shipment and exportation, nor is any profit made by the said copartnership by means of any manufacture or resale of goods in England, the profits of the said copartnership in respect of goods purchased in England consisting entirely of the increase in price or value obtained by the resale in America of such goods so purchased by them in England and exported as above mentioned. A large part of the profits of the business carried on by the

said copartnership at New York aforesaid is obtained from goods purchased in France, Germany and America. Remittances are from time to time made by the copartnership at New York to defendant, and by him paid to the said bankers at Nottingham to the credit of the copartnership, and payment for the goods purchased in England, and for the cost of packing, shipping and exporting such goods, and for the current expenses of the said business premises of the copartnership at Nottingham, and of carrying on so much of the said business as is carried on in England, is made by means of the cheques drawn by the defendant for and in the name of the said copartnership on the said bankers at Nottingham. And the jurors aforesaid, upon their oath aforesaid, further say, that profits and gains have arisen and accrued to the said copartnership from the said trade so by them carried on as aforesaid for and during the said year ending on the 5th April 1856, and for and during each of the said two preceding years, the said trade having been during all that time so carried on in manner aforesaid to a large value and amount, that is to say, 10,000*l*. And that if all the persons of whom the said copartnership so consisted as aforesaid had resided in the United Kingdom, or if the said business of the said copartnership had been wholly exercised within the United Kingdom, the said copartnership would have been chargeable and liable jointly and in one sum for and in respect of certain of the duties by the said Acts imposed, that is to say, of the duties mentioned in schedule D of the said first-mentioned Act for the year ending on the 5th April 1856, in respect of their said profits and gains. And the jurors aforesaid, upon their oath aforesaid, further say, that after the passing of the said Acts, and within the time limited by the precept of the commissioners in that behalf, that is to say, on the 1st May 1855, one Thomas Underwood, then being an assessor of the duties by the said Acts imposed in and for the said ward within which the defendant so carried on the said business as aforesaid, for the said year ending on the 5th April 1856, did, as such assessor, leave at the said place of business of the defendant, and personally deliver to him within the said ward, a notice such as by the said first-mentioned Act and the Acts incorporated therewith is required in that behalf, signed by him, the said assessor, and requiring the defendant to prepare and deliver to him, the said assessor, or at the office of the commissioners of the district, situate at King's-place, Peter-gate, in the said county of the town of Nottingham, within a certain time therein specified, in manner directed by the said Acts, a list, declaration and statement of the profits and gains arising to the said copartnership of Lottimer, Large and Co., in respect of the said business so by them jointly carried on as aforesaid made and stated by and on behalf of him, the defendant, and the several other persons so as aforesaid forming and constituting the same copartnership, jointly and in one sum, and separately and distinctly from any other duty chargeable on the same persons, or either or any of them. And the jurors aforesaid, upon their oath aforesaid, further say that, although the time for the defendant's complying with the said notice, and for his preparing and delivering such an account and return as aforesaid, elapsed before the exhibiting of this information, yet to prepare and deliver such return he, the defendant, has always neglected and refused; that the defendant had not been assessed in treble the duty at which he ought to be charged by virtue of the said Act or any of them in respect of the premises in case he ought by law to have prepared and delivered such an account and return as aforesaid. But whether or not, upon the whole matter aforesaid, the defendant has by reason of the several premises, by the jurors aforesaid in form aforesaid found, and of such his neglect and refusal

as aforesaid, forfeited the sum of 50*l*. in manner and form as in the said information is alleged, the jurors aforesaid are altogether ignorant, and they pray the advice of the barons of her Majesty's Court of Exchequer in the premises. And if upon the whole matter aforesaid it shall appear to the barons aforesaid that the defendant has by reason of the several premises, and of his said neglect and refusal by the jurors aforesaid in form aforesaid found, forfeited the sum of 50*l*., then the jurors aforesaid, upon their oath aforesaid, say that the defendant has forfeited to her Majesty the sum of 50*l*., in manner and form as in the said information in that behalf is alleged. But if, upon the whole matter aforesaid, it shall appear to the barons aforesaid, that the defendant has not, by reason of the several premises in form aforesaid found, and of his said neglect and refusal, forfeited the sum of 50*l*.; the jurors, upon their oath aforesaid, say that the defendant has not forfeited, nor does he owe, or is he liable to pay to her Majesty the said sum of 50*l*. in manner and form as in the said information is alleged. Therefore, &c.

Stat. 16 & 17 Vict. c. 34, grants duties on profits arising from property, professions, trades and offices, *inter alia* (schedule D):

For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, whether the same shall be carried on in the United Kingdom or elsewhere.

For or in respect of the annual profits or gains arising to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any trade exercised within the United Kingdom.

And for and in respect of all interest of money, annuities and other annual profits and gains, not charged by virtue of any other schedule contained in this Act.

Sect. 5. The duties to be assessed under the regulations of the 5 & 6 Vict. c. 35, and the several Acts therein referred to.

17 Vict. c. 10; 17 Vict. c. 24; 18 Vict. c. 20.—These Acts increase the rate of duty from 7*d*. to 1*s*. 4*d*. in the pound, but make no alteration in the mode of assessing the same.

5 & 6 Vict. c. 35, a. 3.—Duties placed under the management of the Commissioners of Stamps and Taxes (now Commissioners of Inland Revenue, 12 Vict. c. 1).

Sect. 4 prescribes the mode of appointing commissioners for the general purposes of the Act in their several districts, from amongst the persons executing the Land Tax Act.

Sect. 36. Commissioners for general purposes to appoint assessors and collectors of the duties in like manner as assessors and collectors may be appointed under Acts relating to assessed taxes.

5 & 6 Vict. c. 35, sect. 47.—Assessors to cause general notice to be affixed on or near to the doors of the church of the parish for which they act, requiring all persons liable to the duties to make out and deliver lists, declarations and statements.

Sect. 48. And also to give notice to every person chargeable in respect of any property or profits requiring every such person to deliver a return in respect thereof.

Sect. 52. Every person chargeable under this Act shall, when required so to do, whether by any general or particular notice within the period mentioned in such notice paper, prepare and deliver to the person appointed to receive the same a true and correct statement in writing of the amount of the profits and gains arising to such person from all and every the sources chargeable under this Act, according to the respective schedules thereof.

Sect. 55. If any person who ought by this Act to

deliver any list, declaration, or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice, such person shall forfeit any sum not exceeding 20*l*., and treble the duty at which such person ought to be charged; and every person who shall be prosecuted for any such offence by action or information in any of her Majesty's courts, and who shall not have been assessed in treble the duty as aforesaid, shall forfeit the sum of 50*l*.

Sect. 100. Rules for charging the duties contained in schedule D.

First case. Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade.

Rule 2. The duty shall extend to every person, company, &c., and to every art, mystery, adventure, or concern carried on by them respectively in the United Kingdom or elsewhere.

Rule 3. The computation of duty arising in respect of any trade, manufacture, adventure, or concern, or any profession carried on by two or more persons jointly, shall be made and stated jointly and in one sum, and separately and distinctly from any other duty chargeable on the same persons, or either or any of them, and the return of the partner who shall be first named in the deed, instrument, or other agreement of copartnership (or where there shall be no such deed, instrument, or agreement, then of the partner who shall be named singly, or with precedence to the other partner in the usual name, style, or firm of such copartnership, or where such precedent partner shall not be an acting partner, then of the precedent acting partner), and who shall be resident in Great Britain (and who is hereby required under the penalty herein contained for default in making any return required by this Act, to make such return in behalf of himself and the other partner or partners whose names and residences shall also be declared in such return), shall be sufficient authority to charge such partners jointly, provided always that where no such partner shall be resident in Great Britain, then the statement shall be prepared and delivered by their agent, manager, or factor resident in Great Britain jointly for such partners, and such joint assessments shall be made in the partnership name, style, firm, or description, and no separate statement shall be allowed in any case of partnership except for the purpose of the partners separately claiming an exemption as herein directed, or of accounting for separate concerns.

Sect. 106. Every person engaged in any trade, manufacture, adventure, or concern, shall be charged by the respective commissioners acting for the parish where such trade, &c., shall be carried on, whether such trade, &c., shall be exercised wholly or in part only in the United Kingdom.

The case was argued in the Court of Ex. The court took time to consider its judgment, and Martin, B. subsequently delivered the judgment of the court as follows:—The learned counsel on both sides in this case have stated to us in writing the question upon which they desire our judgment, namely, whether the defendant is liable to make a return of the whole of the profits earned by the firm of which he is partner, by the exportation of goods from England and the sale of them in the United States, for the purpose of assessing the whole firm to the income-tax. The material facts stated in the special verdict are these:—The defendant was a partner in a firm of Lottimer, Large and Co. He resided near Nottingham, the other partners resided at New York in the United States of America. The firm had a place of business there, and also a place of business at Nottingham, namely, a counting-house and warehouse. The name of the firm was over the door, and they had clerks and servants to carry on the business, and had a banking account with the Nottingham and Notts Banking Company. Books



were kept at Nottingham, but they merely showed the purchases in England, the warehouse expenses and the remittances from New York. No money was ever received in England except from New York. The business of the firm in England was carried on by the defendant and others purchasing and shipping goods for exportation. All the goods were shipped, and none were manufactured or resold in England. No profits were made in England; the profits arose from the increased prices obtained on the resale of the goods in America. A large part of the profits of the firm was obtained by the resale of goods in America, purchased there and in France and Germany. Remittances were from time to time made from New York, and were paid to the Nottingham and Notts Banking Company. The payments for the goods and the expenses of the establishment incurred in England were paid by cheques drawn by the defendant in the copartnership name. The substantive question is, whether the firm are liable to pay income-tax upon the profits earned by them on the sale of the goods in America bought in and exported from England in the manner above mentioned. In the writing signed by the learned counsel it is admitted that the defendant is liable to pay income-tax upon the whole of the profits which he received from the business of the firm, and the first part of schedule D, in the 2nd section of 16 & 17 Vict. c. 34, is conclusive upon the point. The point in controversy depends upon the second part of the same schedule. By it the duty is granted for and in respect of the annual profits accruing to any person whatsoever, whether a subject of her Majesty or not, and although not residing within the United Kingdom, from any trade exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits. Now, supposing the firm in question was composed of a single individual, and he resided in New York and employed an agent in England, who acted in the same manner in the purchase of goods as the defendant did, we think there is no doubt that he would exercise a trade within the United Kingdom. He would exercise in England the trade of buying goods for exportation and resale, though the resale was out of England—a well-known and extensive trade—and there is a provision made in the 100th section of the 5 & 6 Vict. c. 35, for the return or statement to be made under such circumstances. In the present case a partner was the acting manager, and we think it quite clear that every exercise of the trade by him is an exercise of it by the whole firm of which he is a member, and that they all exercise it within the United Kingdom. This is corroborated by sect. 106 of the 5 & 6 Vict. c. 35, by which it appears that there may be a trade carried on jointly, partly in and partly out of the United Kingdom, and be within the enactment. It was said that the buying without selling was not trading, but we think buying in the manner stated in the special verdict, with the intention of selling, was trading. The cases cited in the argument show that the defendant was subject to the bankruptcy laws as a trader. Suppose the question asked, "Did the defendant carry on trade?" the obvious answer would be in the affirmative, that he carried on the trade of buying goods for exportation. The third rule of the third set of rules, and the 100th section of the same statute, shows how the return or statement is to be made; it must be made by the defendant being the partner resident in Great Britain, and in one sum, but upon payment credit should be given for the payment made by the defendant in respect of his part of the profits in the English trade, he being charged with that in the amount of duty imposed upon himself by the first part of the schedule D. Or perhaps the better way would be, the firm should be assessed for the profits of the English trade, and the defendant separately for his share of the German, French and American profits. For these reasons we are of opinion,

in answer to the question submitted to us, that defendant is liable to make a return of the whole of the profits earned by the firm of which he is a partner, by the exportation of goods from England, on the sale of them in the United States, for the purpose of assessing the whole firm to the income-tax.

From this decision the defendant appealed.

Points of argument for the Crown.—That under the circumstances stated in the special verdict, the defendant is chargeable with income-tax on the profits and gains which have accrued to the copartnership of Lottimer, Large and Co. for the trade carried on by them as stated in the special verdict.

That under the 5 & 6 Vict. c. 35, and 16 & 17 Vict. c. 34, it was the duty of the defendant to prepare and deliver to the assessor an account and return of the profits and gains arising to the said copartnership in respect of the business so carried on by them as stated in the special verdict.

For the defendant.—That under the circumstances stated in the special verdict, the defendants, partners, resident in New York, do not exercise any trade within the United Kingdom so as to be liable to be assessed to the income-tax under the 1st section and the 2nd clause of schedule D in the 2nd section of the 16 & 17 Vict. c. 34.

That a person resident in a foreign country does not, by exporting goods from the United Kingdom to such foreign country, exercise a trade within the United Kingdom, although one of his partners may reside in the United Kingdom for the purpose of assisting in the exportation of such goods, and that a person resident abroad is not liable to pay income-tax as a person exercising a trade within the United Kingdom, unless such trade is carried on wholly, or at any rate principally, within the United Kingdom.

*Mellish* for the appellant.—This is a question of very great importance, and which prior to this case has never been raised for the opinion of any court. The court must lay down the rule by which partnership firms consisting mainly of persons resident abroad and having their principal place of business abroad, but trading with this country are to be assessed, how far their profit by carrying on of trade partly in England and partly abroad by a firm principally resident abroad, but having one partner or having an agent in this country, is assessable to the income-tax. The partner resident in England, it is admitted, is liable to make a return and to pay income-tax on the entire of his own share. All the goods, wherever they are bought, are sold in the United States. This firm buy goods in England, Belgium, Germany and in the United States, but wherever they buy they sell them only in the United States. The income-tax is a tax on profits—not a tax on carrying on a trade, nor on exporting goods from England to foreign countries. A person may carry on business to the largest possible extent, but if no profits are earned he pays no income-tax. The other side say the Legislature has taxed the profits of American citizens situate exclusively in New York, the profits never having been in England at all; the Crown does not distinguish or separate the profits of that portion of the trade derived from carrying on the business in England from that derived from their sale at New York. There is but one profit, that is an entire profit, and does not exist till the goods are resold at New York. A person resident in the United Kingdom is responsible for any profit, no matter where it is derived. As to persons resident abroad, the profit must be received in the United Kingdom in one of two ways—by being earned here; or that the principal house of business is here, and the profits, wherever earned, returned here to be distributed amongst the partners. If a foreigner were to become a member of the well-known firm of *Baring* or *Rothschild*, or *Brown*, *Shipley*

and Co., or any of those great firms where the principal portion of the house of business is in England, where the books are kept, the profits returned and distributed among the partners from here, there would be the existence of gains and profits in England, on which the Crown may be entitled to ask for a share of these profits for income-tax; but if the profits and gains never exist here at all, they are not liable. It never was the intention of the Legislature to violate the rights of the citizens and subjects of foreign countries, nor to tax a person who is not a subject of the Queen. A person resident in the United Kingdom is clearly made liable to pay in respect of the profits derived by him from any trade, whether exercised in the United Kingdom or elsewhere; but a person not resident in the United Kingdom is only made liable to pay from any trade, profession, or vocation exercised in the United Kingdom. Can it have been the meaning of Parliament that every foreign firm which trades with the United Kingdom, and a portion of whose trade is carried on here, should be liable to income-tax? The Court of Ex. say that it does not depend upon one of the partners being resident in the United Kingdom, but that the rule would be the same if, instead of having a partner in the United Kingdom, their business here was carried on through an agent. There are many shipping companies which carry on business by running ships between England and the United States, and between the United States and England, carrying passengers and goods both ways—there are American companies carrying on precisely the same trade and competition. The English company has a partner resident in New York, and the American company either a partner or an agent resident at Liverpool or Southampton. Can it be doubted that the entire proceeds of the English firm, including the profits of the partner resident at New York, are assessable to the income-tax, but that the profits of the American company, unless it be the profits belonging to the partner resident here, are not assessable to the income-tax? The Legislature did not mean to impose a tax on the profits derived by the American shipping company for running ships to England and back, a simple trading with the United Kingdom. The English company is a company established in England; its principal place of business is here—books, profits, whether earned here or in America, are returned here for distribution, and the partners, whether they live in England or anywhere else, draw out their profits from here; the profits are here, and may be assessed here. But in the American company it is the reverse, and therefore the partners are not subject to income-tax. It was never intended by the Legislature to put such an impediment on the trade of the country as to say that no foreigner shall trade with England without being subject to income-tax. He then referred to the 16 & 17 Vict. c. 34, s. 5; 5 & 6 Vict. c. 35, schedule D, ss. 1, 39, 41, 42, 44, 48, 51, 52, 53, 55, 100; *Allan v. Cannon*, 4 B. & A. 418; *Alexander v. Vaughan*, 1 Cowp. 398; 7 & 8 Vict. c. 110, s. 2 (the Joint Stock Companies Act); 19 & 20 Vict. c. 47, s. 4 (Joint Stock Companies Act 1856); 20 & 21 Vict. s. 14, s. 28.

Sir Fitzroy Kelly (*Beavan* with him) for the Crown.—The question presented to the court is one, no doubt, of very great importance; perhaps at certain points it may be thought also a case of very great difficulty, and the result may perhaps be to show that it is a case of considerable hardship; but, if these Income-tax Acts are to be construed upon any principle depending upon hardship, either of this case or hypothetical cases, which may not unreasonably be suggested, it would be impossible to give effect to these Acts at all. It is necessary to consider separately the two elements which are to be found in this question—the person to be taxed and the trade in respect of which the tax is imposed.

[MAG. CAS.]

It will be necessary to refer to the two provisions in 16 & 17 Vict. c. 34, s. 1, sched. D, beginning "for and in respect of the annual profits," &c., and then the next article of provision "and for and in respect of the annual profits or gains," and the 106th section, together with the portion of the 100th, in the first, the original Act, 5 & 6 Vict. c. 35. These three sections, or provisions rather, taken together, present the whole case complete; they deal with the persons who are liable, distinguishing between individuals resident in England and resident abroad, between individuals subjects of this realm, and individuals who are aliens and the subjects of foreign states, distinguishing also between individuals sole traders and firms consisting of several parties, one or more of whom may be resident in this country and one resident abroad; they also provide for the case of trades which may be divided into three categories—a trade carried on wholly in England, a trade carried on wholly abroad, or a trade carried on partly in England and partly abroad. It is the effect of these three provisions taken together, just or unjust, hard or equitable and fair, that where a person who carries on a trade is resident in England, so that he comes within the reach of the law of this country, whether he is a sole trader or carries on a trade in partnership with others; and whether if he carry on trade in partnership with others his partners are resident with him within the United Kingdom, or one resident abroad, or some are resident in the United Kingdom and some are resident abroad; and again, as to the trade, if the trade be carried on altogether in England, or altogether abroad, or partly in England and partly abroad, if there be a person in England—in any one of those states of things within the reach of the law he is liable to be assessed in respect of the profits of that trade. That is the effect of those three provisions taken together, and is what the Court of Ex. has held to be their effect. [These provisions were then minutely examined, criticised and commented upon.] Looking to the effect of these three provisions together they are this: that a person is liable to pay income-tax upon a trade which is carried on in this country, whether that person be resident in this country or non-resident, and whether he be a British subject or not, if the trade be carried on in this country; and, taking the three sections together, the trade must be taken to be carried on in this country, though the same trade is also carried on elsewhere, if a trade be carried on elsewhere, consisting of the buying of large quantities of goods in this country, the exporting them from the United Kingdom, and then selling them abroad at profits, is liable to the income-tax. [COCKBURN, J.—If the profits are not realised in England but are realised elsewhere, I do not see how they can be subject to income-tax in England. If a man is established here as a merchant, if he buys at New York and sells at Constantinople, and the profits of that buying and selling come back to him here, they are profits realised by him here. It is not because the sale is at Constantinople; but if the profits never find their way into this country, they are not a portion of the income of this country, and are not subject to be taxed.] Is it material where they find their way if they are profits which are made in this country? Suppose, instead of one partner residing in England and six others in New York, the whole resided in England, upon the question of trade, not of person, what is the trade and what is the profit? Would not those seven persons be liable, the firm all residing here, to pay the entire amount of income-tax upon the entire amount of net profits they received? It is not persons only who are made liable—they can only be made liable upon trade, such as is defined by Act of Parliament. Would not these persons be said to have received a profit upon this trade, although it happens to be received, the last com-

U

EX. CH.]

SULLLEY v. THE ATTORNEY-GENERAL.

[EX. CH.]

ponent part of the transaction has taken place, in New York? The profit is received in New York, but it is profit upon a trade which consists of acts done in England. The mere place of the receipt of the money, where the money may be payable, is perfectly immaterial. [CROMPTON, J.—After all, it is whether we must not put a sensible construction on this, "from any property whatever in the United Kingdom, or any profession, trade, employment or vocation exercised within the United Kingdom." Whether that can possibly mean everywhere a person sends his goods—whether that can mean exercising his vocation, or whether it does not mean the place where the principal vocation is carried on. All this is merely ancillary to the main business of the house in New York.] Throughout these Acts of Parliament there is no question of degree, as to how much is necessary to be done in one country and how much in another to constitute trading in this country. Nottingham is the place of business, not of the defendant alone, but the firm; and that being their place of business in this country, they are liable, one and all, to be taxed. The capital of the whole concern, as far as regards the purchase, is in England. [COCKBURN, C.J.—It is sent from America; it comes from America and goes back to America.] After the distribution of profits the income-tax is attached. [COCKBURN, C.J.—The profits result only from the sale.] Wherever there is a house of business established a trade is carried on. The great house of Rothschild have commercial houses in five of the capitals of Europe, one being in London; they carry on their trade at all five of those places, and if there were an income-tax in all five of those countries they would each be liable to the income-tax. [The sections referred to by the other side were again brought to the attention of the court; also the 3rd clause in schedule D, and rules; and the cases in bankruptcy.] Suppose Lottimer and Co., consisting of several partners, are all residing in this country, they carry on business exactly as this is carried on, but instead of conveying or consigning these goods to America, they consign them to a commission agent at Havre, and he sells the goods for them and remits that money to some other part of the world, where they have transactions; is it to be said that they are not assessable to this income-tax? If they are, and there can be no doubt that they are, are they the less so because some of them, one only, or more, be resident here, and the rest may be resident abroad? The section I have referred to shows that the return, where there is a firm, must be made, although perhaps by one partner of the firm only, the one that happens to be resident in England; yet it must be the return of the whole firm, of the whole trade, and of the whole profits of the trade, and it is then upon that return to be considered how those profits are to be assessed. There is no provision, no machinery at all, for separating the rights or liabilities of one or more members of any firm. Wherever there is a copartnership firm which is liable in respect of any trading to any income-tax at all, it is the firm that is liable, it is the firm that must make the return, or one member of the firm, and on behalf of the firm, and it is the profits of the entire trade that are thus made liable. That this is the meaning to be applied to the word "trade" (I rely upon the view taken by the Court of Ex. on this subject also), appears by the cases in bankruptcy already referred to. The Legislature must have intended that persons in the situation of the defendant and his partners should be liable to the payment of income-tax upon a trade which, although the whole trading is not complete, is yet carried on to such an extent in England as that it would amount to what would ordinarily and popularly be called a trading in England. The Act of Parliament points out no distinction whatsoever between the areas or proportions in which each partner may be entitled to the profits of the trade. Wherever there is a

trade carried on by a mercantile firm, whether it is partly in England and partly elsewhere, or altogether in England or altogether elsewhere, if it comes within the income-tax at all, there is no distinction of partners: it is the carrying on of a trade and realizing of profits by the firm, it is the firm or some member of the firm that is to make the return, it is the firm that is liable, and liable in respect of the entire profits to which the firm are entitled.

*Mellish* was not called upon to reply.

COCKBURN, C.J.—With all respect for the judgment of the Court of Ex., I must say, that after having given the best attention I could to the reasons set forth in the judgment, and to the argument which has been urged upon us on the part of the Crown, I cannot bring myself to entertain the slightest doubt whatever that the judgment of the Court of Ex. should be reversed, and that our judgment should be for the defendant below. The facts are simply these: There is a firm established at New York for the purpose of buying goods in this and other European countries, and conveying them to America for the purpose of being sold there, and upon the sale of these goods so purchased in Europe and America, all the profits of the partnership accrue. The principal firm being established at New York, it appears that they have branch houses in this and several other European countries for the purpose of purchasing goods manufactured in those countries, and sending them to America for the purpose of sale. Now the defendant is sought to be made chargeable in respect of income-tax accruing not only upon his own share as one of the members of this general firm, but in respect of profits accruing to the firm generally. Now the body of the firm are neither resident in this country, nor are they subjects of this country, but they are American citizens, and it must necessarily be admitted that they are only liable under the Acts of Parliament relating to the income-tax, which we are now called upon to interpret, in case profits accrue to them derived from a trade exercised by them or on their behalf in this country. The question is, and the whole turns upon that one simple narrow question, whether persons circumstanced as these American subjects are who constitute this firm, carry on under the circumstances of the case a trade in this country. I think that they do not, as the term is used in the 1st section of the Income-tax Act, namely, a trade exercised in the United Kingdom properly with reference to the subject-matter of the charge. It is perfectly true that wherever a merchant is established in the course of his dealings in buying and selling, with a view to profit, the details of his trade must necessarily extend over various places. He buys in one place; he sells in another, and the place where he sells is not always that where his business is established. He buys in one country; he sells in another, but he has one given place of business, in which and at which he may be said to trade, and his profits always come home to himself wheresoever they may, in the first instance, be realised: that I take to be the true meaning of trading, or exercising a trade within the terms of this Act of Parliament, and it would lead to the most serious and the most unjust consequences if it were otherwise. If it were to be said that because a man in the course of a trading transaction touches at a variety of places—buys in one place, barter in a second, sells that for which he has bartered the goods originally bought at a third—that at every one of these he is carrying on a trade which would bring him within the income-tax of each particular country, if an income-tax were there established. That would seem to me fraught with consequences as unjust as they would be inconvenient. That I take it is not the true sense in which this ought to be construed; and, indeed, the argument of the Crown must be carried to this length, if it is good for anything—that the mere employ-

EX. CH.]

CLERK v. THE QUEEN.

[EX CH.]

ment of an agent in another country to buy goods which the merchant requires for sale somewhere else, would make that a trading within the country which would subject the profits eventually realised to income-tax; as for instance, to try the case, suppose this defendant were not a member of the general firm buying here, but that the defendant were simply an agent of the firm, see what the consequence would be, that because the American merchant buys in this country, he is to be liable to have his profits which are realised in America taxed in this country as well as in that. In other words, we should be doing that which is about the most impolitic thing which as a nation we could do—taxing those who come as customers to this country. It never could have been the intention of the Legislature to do anything so impolitic or unjust. It is not merely when you look to the provisions of the first section, and see what is the meaning of exercising a trade in this country with reference to realising a profit, that this construction at once suggests itself as the just, equitable and proper one; but when you come to look at the rest of the machinery of the Act of Parliament, to which our attention was called by Mr. Mellish in his very lucid and able argument, the thing becomes clear beyond the possibility of a doubt. The foreign subject who carries on business in this country not being resident here, cannot possibly be made amenable to our law—personally he is not chargeable. Then by what machinery are the profits which accrue from a business which he actually carries on in this country to be made amenable to this fiscal law? Why simply by holding that whoever carries on his business for him and receives the profits shall be liable to make a return, and to be assessed and pay the income-tax. Well, but in this case that machinery could not by possibility apply, and for this simple reason: there is no one here who receives the profits, because they are not received in this country, which plainly shows that they are not profits accruing from a trade exercised within this country in the true sense of the word, because the profits are received in America. There is no one who receives them here, and who can be made responsible? I think, when the sections come to be looked at, if light were wanting—which I do not think it is—they shed an abundant light on the question in discussion, which is, whether the trade which is only so far incidentally carried on in this country that they buy here as they might buy anywhere else, for the purpose of that which is the main object of their business—selling in America—whether such a trading can be a trading within the meaning of this section of the Income-tax Act. I think, therefore, that in point of what is the reasonable construction of this Act, it clearly must be the policy of the law, and it certainly is the equity of it—especially when you come to look at all the other sections in the Act of Parliament, and the machinery to which our attention has been called—that there is only one construction which we can put on this Act of Parliament, which is, that the profits to the firm in America did not accrue to them in respect of any trade exercised in this country, but they accrued in respect of a trade exercised at the place where the firm is established, where its main and principal establishment is fixed, and where its main business is carried on, and where the eventual profits accrue and are realised, and where therefore alone they can be considered as forming a portion of the income of the country, and therefore are chargeable to the income-tax. The profits which come home here as the share of the individual partner in the business—who is established here more as agent than as a partner, performing the duties of an agent far more than of a partner, because he does not act for the general purposes of the house, but only for the purpose of buying the goods for them to sell—they coming home to this country as his individual profits, and

forming a portion of the income of this country, are properly taxable here. Therefore, as far as regards his share, it is not disputed for a moment that he is properly made liable. With respect to the main profits of the firm, which go into the pockets of the partners in America, they are not, and ought not to be, subject to be taxed in this country; and therefore I have no doubt in my mind that the judgment of the Court of Ex. ought to be reversed.

WILLIAMS, J.—I am of the same opinion.

WILLES, J.—I agree in everything which has been said, except in thinking that this is so very clear a case. If I had had to construe the Act of Parliament without the assistance of the able argument of Mr. Mellish, I should have come to the same conclusion which the Court of Ex. did. Having heard that argument, for the reasons stated by the Lord Chief Justice, I agree that the judgment of the court below should be reversed.

BYLES, J.—I am of the same opinion.—My brother Crompton has been obliged to go to chambers, and he desires me to say that he also is of the same opinion, for the reasons assigned by the Lord Chief Justice.

BLACKBURN, J.—I am of the same opinion. I do not think it necessary to say anything more.

*Judgment of the Court of Ex. reversed.*

For the Crown, *Solicitor of Inland Revenue.*

Attorney for the defendant, Mr. Edwin Wilkins Field.

ERROR FROM THE QUEEN'S BENCH.

*Thursday, June 14.*

(Before WILLIAMS, J., MARTIN, B., WILLES and BYLES, JJ., CHANNELL and WILDE, BB.)

CLERK v. THE QUEEN.

*Quo warranto—Office of town councillor—Venue—Mistrial.*

*Information in the nature of a quo warranto against a person for exercising the office of a town councillor of a municipal borough in the county of Lancaster. The original venue was laid in the county of Lancaster, but the issue was tried in Middlesex by order, on a suggestion on the record that it might be more conveniently tried there, and after verdict of guilty the judgment of the court was given thereon:*

*Held, that the court had power to order the issue to be tried in Middlesex upon this suggestion, and that there was no mistrial on this ground.*

This was a writ of error brought by the defendant on a judgment of the Court of Q. B. in favour of the prosecutor after the trial of issues joined on an information in the nature of a *quo warranto*.

Liverpool. Be it remembered that C. F. Robinson, Esq., &c., at the relation of Thomas Rigby, of the borough of Liverpool, &c., gives the court here to understand and be informed that the borough of Liverpool is one of the boroughs named in schedule A in the 6 & 7 Will. 4, c. 76, and that there are of right and ought to be divers, to wit, sixteen wards of the said borough, one whereof is called and known as No. 4, or St. Paul's ward, and that within the said borough, there are and of right ought to be divers, to wit, forty-eight councillors of the said borough; that is to say, three councillors of and for each of the said sixteen wards of the said borough, to be elected in the manner in the said Act specified, and that the place and office of a councillor of the said borough is a public office of great trust and pre-eminence within the said borough touching the rules and government of the same (that is to say) at the borough of Liverpool aforesaid, in the county of Lancaster, and that John Clerk, late of the said borough of Liverpool, merchant, to wit, on &c., at the borough of Liverpool aforesaid, in the county of Lancaster, did use and exercise, and from thence continually afterwards to the time of exhibiting this information, hath there used

EX. CH.]

CLERK v. THE QUEEN.

[EX. CH.]

and exercised, without any legal warrant, royal grant or right whatsoever, the office of a councillor of and for the said ward called No. 4, or St. Paul's ward, in the said borough, and for and during all the time aforesaid hath there claimed and still doth there claim to be a councillor of and for the said ward, and to have and enjoy all the liberties, privileges and franchises to the said office of a councillor of and for the said ward belonging and appertaining, which said office, liberties, privileges and franchises, he the said John Clerk for and during all the time aforesaid upon our said lady the Queen, without any legal warrant, royal grant or right whatsoever, hath usurped, and still doth usurp. In contempt, &c.

Plea.—Protesting that the said information and matters therein contained are not sufficient in law, and that the said John Clerk need not, nor is obliged by law to give any answer thereto, yet for plea in this behalf he says that he did not use or exercise the said office of a councillor of and for the said ward, nor claim to be a councillor of and for the said ward, nor to have, use, or enjoy the liberties, privileges and franchises to the said office of a councillor of the said ward belonging or appertaining, or any part thereof.

Issue thereon.

And now on the 2nd March 1859, it is suggested and manifestly appears to the court here that the trial of the said issue above joined between, &c., may be more conveniently had in the county of Middlesex than in the county of Lancaster; therefore, according to the statute in such case made and provided, let a jury of the said county of Middlesex come, &c.

The record then set out, in the usual way, the verdict of guilty and the judgment of the court thereupon.

Upon this judgment the defendant alleged error, and after joinder in error delivered the following points for argument:—

1. That it appears by the record that the issue joined on the information was tried in and by a jury of the county of Middlesex, and not by a jury of the county or place where the venue in the said information is laid.

2. That there is no statute or law to warrant the trial of the said issue by a jury of the county of Middlesex, upon a suggestion that a trial of the said issue might be more conveniently had in that county, than in the said county of Lancaster.

3. That there has been a mistrial of the said issue.

The points for the defendant in error were the following:—

1. That the Court of Q. B. had power to direct the issue to be tried in Middlesex by a jury of that county, by virtue of its supreme common law jurisdiction.

2. That this is an action within the 3 & 4 Will. 4, c. 42, s. 22.

3. That the court had power to direct the issue to be tried in Middlesex under the 6 & 7 Vict. c. 89, s. 5.

4. That an information in *quo warranto* is a proceeding in which the prerogative of the Crown is concerned, and in which therefore the trial may be had in any county.

Brett for the plaintiff in error.—The point is, whether the venue was rightly changed to Middlesex. The venue was originally laid in the county of Lancaster, and so it appears by the record, but the parties went before Williams, J. at chambers, who, upon the mere suggestion that the information could be more conveniently tried in Middlesex than in Lancashire, ordered the venue to be changed to Middlesex, and the information was subsequently tried in Middlesex before a Middlesex jury. This it is submitted was a mistrial and a ground of error. The venue in this case is local in its nature, as the matter of the information could only have arisen in the

borough of Liverpool, Lancashire, and therefore there was no power for a judge to change the venue.

[MARTIN, B.—By the record it appears to be the suggestion of the court, and not the order of Williams, J.] An information is not an action within the meaning of the C. L. P. A., and there is no power to change the venue on such a suggestion. If the suggestion were that a fair trial could not be had in the county in which the matter arose, no doubt the venue might be changed. That was decided in *Rex v. Hunt*, 3 B. & Ald. 444; and also that the suggestion need not state the facts from whence it is to be inferred that a fair and impartial trial cannot be had in the county where the venue is laid. In the statute of *Quo Warranto*, 18 Edw. 1, there is an express enactment, "that for sparing the costs and expenses of the people of this realm, pleas of *quo warranto* from henceforth shall be pleaded and determined in the circuit of the justices, and that all pleas now depending shall be adjourned into their own shires until the coming of the justices into those parts." And in commenting on this part of the statute Lord Coke (2 Instit. 498) cites the *Archbishop of York's* case: "The Archbishop of York was in possession of prisage of wines in the port of Hull, and in the reign of Edw. 2, in the time of John Archbishop, the same franchise was seized into the king's hands. After the decease of John Archbishop, William Archbishop, his successor, sued in Parliament in the reign of Edw. 3, by petition of right, to be restored to the said franchise; and afterwards, by Parliament, the petitioner was restored to the possession of the said franchise, and by the same award it was adjudged that the said William Archbishop, the petitioner, should answer the King when and where he pleased; and the like award was made upon the petition of the said William Archbishop in the Parliament the morrow after the feast of St. Catherine, in the fourth year of the same king, whereupon the King brought a writ of *quo warranto* against the said William Archbishop, returnable in the Court of Common Pleas, to know by what warrant he claimed to have prisage of wines in the port of Hull. Parning, Serjt. of counsel with the archbishop, pleaded to the jurisdiction of the court, and demanded judgment if the archbishop ought to make any answer there, for that King Edward, grandfather of Edw. 3, made a statute (intending this statute of 18 Edw. 1) which provided that the pleas of *quo warranto* should be pleaded before justices in eyre in the counties, and that it was ordained by a statute, made in the time of Edw. 3, at his Parliament at Northampton (which was in 2 Edw. 3), that by a writ under the great or privy seal no disturbance should be that common right should not be done to all, and we intend not (saith he) that against the said statute, which is a law common to all, that we ought to answer in this court. The matter concerning this Act of 18 Edw. 1 was not denied, but Sir W. Herle, chief justice that gave the rule, relying upon the award in Parliament that the archbishop should answer the King when and where he would, and there it is said that the award of Parliament was the highest law that could be, and thereupon Serjt. Parning answered over." [WILLIAMS, J.—Lord Coke is there speaking of the old obsolete writ of *quo warranto*, which was very different from an information in the nature of a *quo warranto*.] The 6 & 7 Vict. c. 89, s. 5, only gives power to the court to order the venue in an information in the nature of a *quo warranto* to be laid in Middlesex or London when the application is made at the same time as for leave to file the information; but in the present case no such order was made. In Corner's Crown Practice it is stated that an information in the nature of a *quo warranto* has all the incidents of a writ of *quo warranto*, and the alteration in the practice from the old writ to the modern proceeding by way of information, has not changed the

[BAIL.]

*Ex parte* MERRETT, *re* THE PORTSMOUTH RAILWAY COMPANY.

[BAIL.]

law as to the venue. This is a point affecting the privileges of municipal corporations generally, as to the right to have such issues tried in their own counties, which, it is submitted, cannot be abridged, as done here on a mere suggestion of convenience.

*Milward*, contra, was not called upon.

By the COURT.—There was no mistrial, and the objection cannot be sustained. *Judgment affirmed.*

### RAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Tuesday, June 12.

(Before HILL, J.)

*Ex parte* MERRETT, *re* THE PORTSMOUTH RAILWAY COMPANY.

*Tenant from year to year—Claim to compensation—Railway—Lands Clauses Consolidation Act—8 Vict. c. 18, s. 121—Mandamus.*

*A tenant from year to year of land required by a railway company has no claim to compensation under sect. 121 of the 8 Vict. c. 18, if he has received legal notice to quit, and his land is not required until the expiration thereof.*

In this case a rule had been obtained for a *mandamus* to be directed to certain justices of Hampshire, requiring them to hear and adjudicate upon an application of a Mr. Merrett upon a claim for compensation against the above company.

By the 8 Vict. c. 18, s. 18, the promoters of an undertaking requiring any land are to give notice to the parties interested, and are to require the particulars of their estate, and by sect. 121, "If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year, or from year to year; and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands," &c., and the amount is to be determined by two justices in case the parties differ as to the amount.

In this case the Portsmouth Railway Company required the land occupied by the applicant, and gave him notice pursuant to the 18th section, whereupon he replied that he was tenant from year to year of the premises. He then had due notice to quit given him by his landlord, in order that the railway company might have possession. Not having received any compensation, he applied, under sect. 121, to two justices to assess compensation, but they held that he was not entitled to any, and dismissed the application.

*Milward* now showed cause, and contended that, as the company did not require and take the premises until after the term of the applicant had expired, he had no claim under the 121st section of the Act.

*Digby* being called upon to support the rule, argued that the first notice was in part a taking of the land, for it disabled the tenant from cultivating it, or obtaining any goodwill upon leaving: (*Reg. v. The Commissioners of Woods*, 17 L. J. 341, Q.B.)

HILL, J.—All that the notice says is, "We require to purchase this land; let us know what interest you have in it;" an answer is given some time after, and shows that the tenant is such from year to year. He then has a regular notice to quit, and is therefore not damaged.

*Rule discharged.*

REG. v. HOOLE AND ANOTHER (Justices.)

*Poor-law—Overseers of the poor—In whom the right to nominate—43 Eliz. c. 2, s. 1.*

*The right to appoint overseers of the poor is vested by law solely in the justices, who may make such appointment, whether the inhabitants have nominated persons for the office or not.*

On a former day *Whigham* obtained a rule nisi for a *certiorari* to remove into this court an order of justices, made at the special sessions for the hundred of Blackburn, Lancashire, appointing overseers for a parish within that hundred. The rule was obtained upon several grounds, and the affidavits there used and those in answer were so conflicting as to the precise facts that the counsel respectively agreed to leave the only question really in dispute, namely, whether or not justices have power to appoint overseers of the poor without or in disregard of a previous nomination by the inhabitants in vestry, as one of law for his Lordship's decision.

*Mellish* showed cause, and contended that the right to appoint was wholly in the justices, that right being founded upon the 43 Eliz. c. 2, s. 1, which enacts "That the churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly in Easter week, or within one month after Easter, under the hand and seal of two or more justices of the peace in the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, shall be called overseers of the poor of the same parish," &c. That the assent of the inhabitants had nothing to do with the appointment.

*Whigham* was called upon to support his rule, and argued that the statute of Elizabeth must be read with reference to the Acts before in force; the first statute, 27 Hen. 8, c. 25, requiring the churchwardens to make collections for the poor, which was followed by the 5 & 6 Edw. 6, c. 2, of a similar character, and the 5 Eliz. c. 3, whereby the parishioners were to appoint the collectors of alms for the poor. [HILL, J.—Nolan, in his Poor Laws, lays down the practice. The question is, whether the consent of the inhabitants is necessary. Lord Kenyon, in *Rez v. Forrest*, 3 T. R. says: "But we are to decide this question on the statute of 43 Eliz. c. 2, the first section of which expressly declares that the overseers shall be nominated by two or more justices of the peace, whereof one shall be of the quorum. Unless there is a legislative authority for it, it is not necessary that there should be the sanction of the vestry."] The practice from the earliest times has been invariably for the proper persons to be nominated by the inhabitants in vestry. The statute of Elizabeth has reference to the practice under the earlier statutes, 59 Geo. 3, c. 12, s. 6.

HILL, J.—I am of opinion that the consent of the inhabitants was not necessary for the appointment. The overseers derive their authority from the 43 Eliz., which enacts "That the churchwardens of every parish, and four, three, or two substantial householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes to be nominated, yearly in Easter week, or within one month after Easter, under the hand and seal of two or more justices of the peace in the same county," are to be the overseers of the poor. They are therefore nominated under this enactment, and all that the justices are by law required to do, is to exercise their discretion and act jointly, as was decided in *Rez v. Great Marlow*, 2 East, 244, and the very fact that the matter is for their discretion shows that the appointment is not to be the act of any other body. It is a remarkable circumstance that Nolan's Poor Laws, which is a very great authority, is altogether silent as to the nomination of the overseers by the vestry. At page 46 it is said "The appointment of fit persons for the discharge of this office is a discretionary power vested in the justices, who are to select such householders as they may think most proper, having respect to the circumstances of the place and the condition of the individual;" and the case of *Rez v. Forrest* and the one already

cited confirm this. I am therefore, on this short ground, of opinion that the persons in fact appointed by the justices being substantial householders, and only objected to because they were not appointed by the vestry, who it appears sanctioned other parties, were properly appointed by the justices, and that none other can be appointed.

*Rule discharged.*

### ROLLS COURT.

Reported by GEORGE WHITLEY, Esq., of the Middle Temple, Barrister-at-Law.

July 7 and 9.

Re STORIE'S UNIVERSITY GIFT AND THE 52 GEO. 3 AND THE CHARITABLE TRUSTS ACT 1853, 1855.

*Charity—Scheme—Ambiguity.*

*A testator gave funds to maintain three boys at one of the universities for three years, to be taken from those poor children on whom he had settled lands for their teaching at a petty school at Wakefield until they should be fit to go to the free school at Wakefield, and to be sent from thence to the University. The boys were to be natives of Wakefield. By a scheme sanctioned by the court, it was directed that the boys should be chosen first from those born in the town of Wakefield, who "shall have been" three years at the free school, then from boys born within the parish who "have been" three years at the school, and then from other boys who have been three years at the school:*

*Held, that the three years need not be next preceding the election of a boy, and therefore the court refused to set aside an election of a boy who had been three years at the school, but had left five years before the election, and had since gone to Shrewsbury school.*

John Storie, of Hasleborough, in the county of Derby, by his will, dated in 1674, gave and bequeathed certain lands, both copyhold and freehold, within the county of York "for the maintaining and bringing up of three boys, the children of such parents as were not able to bring them up alone, at the universities of this nation, viz., Cambridge or Oxford, for three years, and his mind and will was that the said three boys should be chosen out of those poor children that he had lately settled lands upon for their teaching at a petty school until they should be fit to go to the free school in Wakefield, and to be sent from thence and maintained at one of the universities also for three years, and after that time other three boys of the same to be sent up and maintained there three years successively for ever."

The testator had by indentures of lease and release of 25th and 26th May 1674 conveyed and surrendered certain freehold lands and a copyhold close to the governors of the Free Grammar-school of Wakefield, upon trust to provide and pay a schoolmaster to teach and prepare twelve poor children of Wakefield until they should be ready and fit for the free school aforesaid, choice to be made from children living in particular streets of the town of Wakefield. It being found that there were not sufficient objects of the charity founded by the testator's will, a petition was presented to the Court of Ch., and a scheme was drawn up and confirmed by an order of the court, dated in July 1826, for regulating the said charity, by which it was declared as follows:—"That the said governors shall be at liberty to apply the rents, revenue and income of the said estate, called Storie's University Gift, to maintain and bring up three boys born in the town of Wakefield, at one of the Universities of Oxford or Cambridge, for four instead of three years, such boys to be elected out of the boys who shall have been three years at the Free Grammar-school at Wakefield, and that in case there

shall not be any boy fit to be elected born within the town of Wakefield, the said governors shall be at liberty to elect boys born within the parish of Wakefield who have been three years at the Free Grammar-school at Wakefield; and if there shall be none fit to be elected born within the parish of Wakefield, then that the governors shall be at liberty to elect any other boys who have been three years at the Free Grammar-school at Wakefield; and in case there shall be no boys candidates for such charity from the said Free Grammar-school, then that the said governors might be at liberty to invest the surplus revenue of the said charity in the public funds or in the purchase of lands, to accumulate for the future use of the said charity."

In June 1859 an election took place of a boy to be sent to and maintained at the University of Oxford or Cambridge, there being three candidates: the petitioner, Fitzherbert Astley Cave, who was not a native of Wakefield, but had been at the school three years then immediately preceding; Joseph Westmoreland, who alone of the three candidates was born within the town of Wakefield, and had been formerly three years at the Free Grammar School, but had left it five years previously and gone to Shrewsbury school; and another boy. The governors elected Joseph Westmoreland.

This petition was presented by Fitzherbert Cave, praying a declaration that the said election was null and void, as not being justified by the provisions of the will and of the scheme.

*R. Palmer, Q.C. and Kerekeke for the petitioner.*

*Selwyn, Q.C. and Kay for the trustees of the charity.*

*Follett, Q.C. and Druece, for Westmoreland.*

The MASTER of the ROLLS.—The further consideration which I have given to this case has led me to the conclusion that the petitioner has put a wrong construction on the scheme settled by the court. The proposition of the petitioner is undoubtedly just, that, if the scheme is ambiguous, the original directions of the will of the founder must be followed; but these are not sufficiently distinct to control what I conceive to be the scope of the scheme. The question to be determined is, whether a boy who has been a scholar for three years next preceding the election of a boy to be sent to college, but who is not a native of Wakefield, is to be preferred to a boy born in the town, who has been at the school three years, but has left it previously to the election taking place. The objects of the testator's gift were three boys, natives, who should be educated at the petty school, established by the testator at Wakefield for natives of the town, and then at the Grammar-school at Wakefield, to be sent from thence to the University. In the scheme which was settled under the sanction of this court, for the purpose of defining and carrying into effect the testator's objects, precedence is given to boys born in the town of Wakefield, who "shall have been" three years in the school; then to boys born in the parish; and in default of these, foreigners are to be elected. In every case boys must have been three years at the Grammar-school; but the question is, must they have been at the school for the three years next preceding? The two expressions used in the scheme, "who shall have been," and "who have been," at the free school, are not, I think, distinguishable—they are in substance the same, and denote "attendance at any time" at the school, and not for the three years next preceding. The scheme ought to be construed in a liberal spirit, and so as to include as many objects as possible. Precedence is to be given to boys natives of the town and of the parish of Wakefield; and there is nothing to show that it is to be an indispensable condition that the boys chosen shall have been the three last years at the school, excluding boys who had left the school for another. If it were otherwise, assuming that there is a competent scholar born in the town or parish who had

Q. B.] OVERSEERS OF ST. BOTOLPH WITHOUT v. WHITECHAPEL BOARD OF WORKS.

[Q. B.]

been three years at the school, but had left it, it would not be possible to elect him, which would, I think, defeat the object of the will and of the scheme. I shall therefore make no order on this petition.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTFORD, Esqrs., Barristers-at-Law.

June 6 and 9.

THE OVERSEERS OF THE POOR OF THE PARISH OF ST. BOTOLPH WITHOUT, ALDGATE (appellants) v. THE BOARD OF WORKS FOR THE WHITECHAPEL DISTRICT (respondents).

*Metropolis Local Management Act, 19 & 20 Vict. c. 120—District board—Principle of rating parishes within district.*

*The object and effect of the Metropolis Local Management Act, 19 & 20 Vict. c. 120, are to substitute districts for parochial government, not only as regards management, but as regards expenditure and taxation; and under it, a district board may assess a parish to an amount greater than is required for the outlay within its own limits, if such assessment be by a general rate throughout the district to meet the expenses of the district at large; though it is competent to the board in the exercise of their discretion, in cases where the outlay is for the exclusive benefit of a part of a district, to exempt from the rates that part which enjoys no benefit; with the exercise of which discretion, however, this court will not interfere.*

This was a case stated by a metropolitan police magistrate for the opinion of the court under the 20 & 21 Vict. c. 43.

It appeared that an order having been made by the above board pursuant to the 19 & 20 Vict. c. 120 (*Metropolis Local Management Act*), for the payment by the before-mentioned overseers of the sum of 564*l.* 1*s.*, 141*d.* of which was to be levied as a sewers rate, and 423*l.* 9*s.* as a general rate, and the overseers having declined to levy such rate, they were pursuant to the said statute summoned before Mr. Yardley, one of the metropolitan police justices, to show cause why they should not pay the same, and the magistrate having decided in favour of the application, a case was demanded and stated accordingly. It appeared that considerable discussion had from time to time taken place at the board of works as to the principle to be adopted in determining the contributions to be paid by the various places within the district. It was ultimately resolved that the expense of keeping the pavement in repair and every other expense ought to be charged in the same manner on each parish in proportion to its rateable value; but as some portions of the district are not paved at all, and other portions are very insufficiently paved, the expense of bringing the paving of those portions of the district into as good a condition as the well-paved portions of the district ought to be borne by the parishes in which those unpaved or insufficiently paved portions are situated. Accordingly a call was made upon the several parishes of the Whitechapel district, St. Botolph, Aldgate, being one of them. One of the sums, viz., 2225*l.* charged to another parish under the general rate, was composed of its share of the call according to the rateable value, and a sum of 855*l.* 4*s.* 9*d.*, being a sum required for special paving, chargeable exclusively on Whitechapel, according to the aforesaid resolution. The other sums, with the exception of 285*l.* for bond debt and interest charged exclusively upon the parish of Holy Trinity, Minorities, represented the shares of the call according to a rateable value payable by each parish in the district. Prior to the passing of the *Metropolis Local Management Act*, the parish of St. Botolph had been

separately rated for drainage, paving, cleansing, lighting and other purposes named in the said Act, except sewerage, and the affairs of the parish were managed under the 47 Geo. 3, c. 38 (local). If each parish of the Whitechapel district had been required to contribute to the "sewers rate" and the "general rate" for the district, upon the principle of apportioning the whole amount of those rates among the several parishes in the district according to the outlay for those purposes within such parishes respectively, or according to the benefit directly derived by such parishes respectively therefrom, and not, as was done, upon the principle of requiring each parish to contribute according to the principle laid down by the board, then the sum to be contributed by the parish of St. Botolph, both as regarded the "sewers rate" and the "general rate," would have been considerably less than the sum which the board had required the parish to contribute towards the said rates respectively. The several parishes within the district were all benefited indirectly by the expenditure, to meet which the sum directed to be levied was required. Upon these facts it was contended by the overseers before the magistrate that the order was made upon an erroneous principle, both as regarded the sum to be contributed for "sewers rate," and the sum to be contributed for "general rate" and that it was null and void. On the other hand, the board contended that the order was made upon a correct principle, and also that they had determined the proportion of benefit according to their discretion, and that their decision was conclusive.

The Attorney-General (*Bovill*, Q.C. and *Honyman* with him), appeared for the respondents.

Sir F. Kelly, Q.C. (*Manisty*, Q.C. with him) appeared for the appellants.

The following statutes and cases were cited:—18 & 19 Vict. c. 120, ss. 66, 68, 71, 72, 84, 86, 88, 135, 136, 137, 149, 150, 158, 159, 161, 164, 169, 170, 171, 248, 249; 47 Geo. 3, c. 38 (local); 11 & 12 Vict. c. 112; *Howell v. The London Dock Company*, 8 Ell. & Bl. 212; *Reg. v. The Great Western Railway Company*, 1 Ell. Bl. & Ell. 130; *Dorking v. The Local Board of Epsoth*, 5 Ell. & Bl. 471; *St. Catherine's Dock Company v. Hicks*, 10 Q. B. 641; *Metropolitan Board of Works v. Vauxhall Bridge Company*, 7 Ell. & Bl. 964; *Rea v. The Tower Hamlets*, 9 B. & C. 317; *Goodchild v. Lamb*, 1 Ell. Bl. & Ell. 451.

The arguments sufficiently appear from the following judgment:—

COCKBURN, C. J.—I am of opinion that the decision of the magistrate from whose decision this appeal is brought was right, and ought to be affirmed. The contention, upon the part of the appellants is, that although the parishes under this Metropolitan Local Management Act have been united into aggregates called districts, nevertheless that the expenditure incurred by the district board is to be so apportioned as that each parish shall only contribute the amount of the outlay that takes place within its own limits; it being contended that the purpose and effect of the Act was simply to substitute districts for parochial management, but not districts for parochial expenditure and taxation. I am of opinion that that is an erroneous view of the effect of this Act of Parliament, and that the object and effect of the Act seems to substitute districts for parochial government, not only as regards management, but as regards expenditure and taxation. The Act has united various parishes into certain districts, and has appointed in each district a board to be created by election and representation to do those things which before were done by various local bodies, commissioners, and parish officers and others, appointed under a variety of Acts of Parliament, and substituted districts for parochial government and management. Powers with reference to



paving, lighting, watering, sewerage, and various other purposes have been conferred by the Act of Parliament upon these boards; and then we find under the 158th section, the board which has these powers conferred upon it, and which is authorised to make an outlay and expenditure in the performance of the various duties imposed upon it, is authorised to levy the sum required for the execution of the Act by orders to be made upon the different parishes which, in the aggregate, constitute the district of which the board is for these purposes the governing body. Now, I think, if the intention of the Legislature had been that each parish should contribute only in respect of the outlay which takes place within it, the language of the 158th section would have been very different from that which is found. The language of the section is, that the district board (and we have nothing to do with vestries in parishes for united districts) "shall from time to time require the overseers of their parish, or of the several parishes in the district, to levy the sums which such vestry or board may require for defraying the expenses of the execution of this Act." Now, the language being quite general, having no reference to the amount of outlay which may be incurred in each particular parish, the general provisions being the substituted districts are for parochial management and government, I think it must be taken, on the whole, that the intention was, that the rate to be levied should be a general rate throughout the district to meet the expenditure of the district at large. Then, inasmuch as that might occasionally operate to do serious injustice as regards individual parishes, or parts of parishes, or parts of a district, the Act goes on, in the 159th section, to provide that where the outlay is for the special and exclusive benefit of any part of the district, or for any part of the district there was no benefit from the outlay, in that case the expenditure may be thrown upon that part of the district which exclusively enjoys the benefit: there the part of the district which derives no benefit may be exempted from it. That, however, is a matter which, so long as the board takes into consideration the special circumstances which would call for the application of that 159th section, it is not for this court to consider whether, in the exercise of the discretion vested in them by the section, the board have acted rightly or wrongly. It may well be, if they refuse to take such circumstances into consideration, this court would interpose to compel them to do so, and so long as they appear to have taken the matter into consideration, which is the case here, this court will not take on itself to control the exercise of their judgment. Taking the 158th and 159th sections together, it seems to me plain that the whole expenditure is to be raised by a taxation which is to extend over the whole of the district, not with reference to the outlay incurred in any individual parish, but with reference to general outlay for the district at large. It is very true, as was pointed out by Sir Fitzroy Kelly in the course of the argument, there may be instances in which, from the preponderance of any one parish or more than one parish over others, occasionally inconvenience may occur and injustice may be done by the superiority of the number of votes, and the influence they would exercise. But it was matter for the Legislature to take into their consideration in fixing these various districts; it is not for us to give a different construction of the Act on account of that which the Legislature may be well supposed to have taken into consideration in fixing the number of parishes. Therefore, with regard to the general power of this Act and the general taxation to be raised under it, I own I entertain no doubt whatever as to what is the true construction as to the intention of the Legislature. The only difficulty which I have felt about it arises from the question of sewerage; and I think a complete answer has been given by the lucid and able argument

of the Attorney-General on this point. Sewerage is one of the subject-matters of the powers given to the district boards under this Act of Parliament. There is no provision for any separate taxation in respect of the sewerage, except thus far, it is to be raised under the powers given by the 158th section, to raise the necessary amount of the expenditure incurred in the execution of the Act; then there is a provision that a distinction shall be made in the orders between the sums to be levied for general purposes and the sums to be levied in respect of the sewerage. It was said that this created some difficulty; that it might have some reference to the application of the principle of law which Sir Fitzroy Kelly brought so prominently before us in his argument, and according to ancient law the sewerage rate was not leviable on persons whose property did not benefit from the sewers. A full explanation has been given of that. Then the 164th section has reference to what the overseers have to do, and not to the contribution to be made by the board of the taxation to be levied for the purposes of the Act. It was pressed upon us, no doubt with considerable force, that this difficulty might present itself; that whereas the Act of Parliament provides that the taxation of the rate shall be levied upon the rateable value of the property in the different parishes; that there might be a considerable difference between property rateable to the poor and property assessable in respect of sewerage matters; and if there should be some great disproportion between the rateable value of one parish as compared with the rateable value of property in another (I mean property rateable to the sewers rate), it may be it would be the duty of the board to take that into consideration, and not, in distributing the aggregate sum among the various parishes, to look merely to the rateable value of property liable to the poor-rate; but, in making their order to levy the sum under the head of sewerage expenses, to take into consideration the difference there might be between the amount of property rateable in respect of the two different heads of poor-rate and sewers rate. There is nothing in this case to show us that the board did not take that matter into consideration in distributing the amount to be levied in each parish for sewerage expenses, and did not take into consideration any inequality there might be in this respect, supposing any such inequality to exist, or to show any defect in the sewerage rate in that respect. Therefore, it seems upon this broad ground that the sewerage expenses being to be defrayed under the 158th section, the only objection here made is, that in assessing, or rather in distributing the amount of the taxation necessary to be levied for the common purposes of the district, the board have not taken into consideration the amount expended in each individual parish. I think they were not bound to do that. They were perfectly right in looking to what was required for the general expenditure of the district, and in apportioning that among the different parishes according to the amount of rateable value in each. That, I think, was the intention of this Act of Parliament, which has superseded the old parochial boundaries and the whole system of parochial government, merging various parishes into one district, for the general purposes of local management and government of the district. It is a new system begun on a new principle, the principle of general representation in this system of local government. I think we must look to this Act of Parliament, and this Act of Parliament alone, and it is not enough to tell us that it supersedes the old principle of parochial government, when the fact is it was intended to do so. The boards in making these orders have acted in conformity not only with the Act which authorised them to do so, but with the intention of the Legislature. Therefore, this decision of the magistrates was right.

WIGHTMAN, J.—I was unfortunately obliged to

leave the court last Wednesday before Sir Fitzroy Kelly had finished his argument, and I had not the advantage of hearing the whole of it. I feel, therefore, that I ought not to take a part in this judgment. I do so merely to say this, that, as far as I have considered the question raised upon this special case, I am of the same opinion as the rest of the court.

CAUMPTON, J.—I am of the same opinion. We are bound to say the magistrate is not made out to have acted improperly. But it is a question left to us, and unless we see most clearly that this rate on the parties complaining is an invalid one, we cannot so decide. I do not think that is at all made out. Now the main question between the parties originally would be on the general construction of this Act of Parliament, as to whether it really was intended, according to Sir Fitzroy Kelly's argument, to transfer merely the management of parochial matters and the whole parochial government to the hands of this new representative board, or whether it did not really mean the new district, independent of parishes, for which rates were to be made to carry out the expenses of the Act. I am satisfied by the Attorney-General's argument, and was from the outset of the case, and I never entertained any doubt that the Act of Parliament did not mean merely to transfer the management of the different parishes, keeping each distinct, as Sir Fitzroy Kelly pressed so much by supposed analogy to poor-law unions, when it intended to create a new district for social government purposes, drainage and sewerage; they included that. Therefore I come clearly to see whether this was intended to be a district tax. That is the main question between the parties. Then we come to the principle and the mode of taxation. Now the mode is this, that the expenses in the district are to be ascertained, and then they are to be distributed. Now it was said that a great difficulty arises in the mode of distribution; for this Act of Parliament does not in express terms say on what principle it is to be distributed. I think they meant to leave it in a great measure to the discretion of the representative government to do what is fair in the distribution. It was pressed by Sir Fitzroy Kelly that each parish is to be taxed only according to the outlay in the parish. It seems to me, if it is to be a district rate, it is almost the same question, and does not need any argument, because it is to be a district tax, and it is not clear how the expense in the ambit of the parish is to be kept up. There is nothing in the Act of Parliament to show that; on the contrary, the words are for the expenses of the district in the very distribution clause as to rating. Therefore, I think it is not at all intended to be confined to the expenses in the district. The other suggestion was, it was only to be for the direct benefit of the parish. It seems to me that could not be the principle, because the indirect may be a very much greater benefit than the direct. An Act of Parliament of this kind, creating the whole remedy for what is called sewerage goes very much beyond the principle of sewers. We inquired several times, in order to know, what the actual principle was on which the appellants stated this distribution ought to proceed; and except in two instances, which were unintelligible to me, nothing was suggested. Then it comes to this, was there any actual direction, and have they done what really is within the general direction of the Act of Parliament? Now, the Act of Parliament does not say how they are to do it. It is not unreasonable as a *prima facie* rule perhaps, to say we think the rateable value shall be ascertained, and we will make it on that. With one exception that would only be fair. Now it seems in the present case, they have passed a resolution that they would distribute according to the rateable annual value; and I understand that to be according to the poor-rate. As to sewerage

[MAG. CAS.]

and as to the general rates, it would not do to say it was mathematically correct apart from all the other circumstances. Then by the 164th section there are to be exemptions and allowances; and if you are to collect what is the amount to be distributed according to what the rateable value is, I think they ought to take into their consideration that there is in some cases only to be a fourth taken, and in some others the property is not to be charged at all. If they did not take that principle, it would seem they were making it a parochial tax instead of a district tax; in other words, throwing the exemption on the rest of the parish instead of the district, whereas the basis of the respondents' argument is, it is a district tax. If it was for 2000*l.* for general purposes on one parish, on that which is rateable to the poor-rate, and 1000*l.* is struck off that, it is taking the rateable value; and when you come to see how much of that would be according to that, I do not think it would be mathematically fair. It may be—I do not know that there are any such exemptions—it may be there may be other circumstances that may make it fair; whether there are or are not one cannot tell. I do not think that sufficiently raised by the case that there was anything improperly done whatever in their resolution. There may be many cases where the direct benefit may be so much greater in one part than the other as to overbalance this exemption. I think the duty of the parties is to look at all the circumstances under the 158th and 159th sections, and say what was fair to be done under all the circumstances. I think, as this body is elected by representation as representing all the parishes, that may have been the meaning of the Legislature. Now there is no appeal given against it; it is to be left in their discretion. I think the judgment of this court in the case referred to shows it is discretionary. My notion of the rule for distribution is this: they are to look at all the circumstances of the case and say whether they think that this benefit principle, amongst others, is to be applied in favour of any portion of the parish or any part of the parish. Now, the 159th section is pointed to that expressly. I think it very likely, under the 158th section, they would look to the rateable value of the whole; then by the 159th section it would seem, if they do not get the full benefit they are to have the power to exempt; that is left to the district board, and not to the magistrate or this court. I think, if they decide wrong, we ought still to say they have exercised their discretion. If I were advising them I would say, do not make such a positive rule as to say you will take the annual rateable value of the property, entirely excluding everything else; do not do that, but look at it entirely how you ought to distribute it under the 158th and 159th sections. That is not the point, however, before us. I am clearly of opinion we cannot say the order is invalid; and even if they had not taken all the matters into their consideration, we think we cannot interfere with their discretion. In the present case they seem to have considered the matter; all we can do, and all we have said we will do, is, if they will not make a proper application, to take the matter under the 159th section, relieved from liability on the ground of it not being an equal benefit, and if they have not taken that into consideration, we will make them consider it. It never can be for one moment supposed, and it would be contrary to all the general rules of law, if we were to make them not only consider, but decide one way. Our judgment therefore ought to be against the appellant.

BLACKBURN, J.—I am of the same opinion. This case comes before us on an appeal from the decision of a police magistrate, under the 20 & 21 Vict. c. 43. Under that we have no jurisdiction to say anything but whether the magistrate did right or wrong, and to answer the questions submitted to us by him. The

X

question he asks, and the only question he could ask us, was this, whether the order was valid. He was called upon, under the 166th section of the Metropolis Local Management Act, to enforce an order that had been made by the overseers of this parish, and he was bound so to do unless the order was shown to have been invalid. Now, was the order void? It is said—and facts are brought before us to show—that in making the order to apportion the whole sum of expenses amongst the different parishes in the district, the vestry board acted on an erroneous principle in apportioning it amongst the parishes; that they ought to have apportioned less to this parish and more to the others. I think, even if that were so, that would not make the order void, which is the only question we have before us here. I find that the jurisdiction of the district board is given by the 128th and 129th sections; all expenses incurred by the district are incurred in carrying out this Act, including every different expense—the whole make one fund. I think the Attorney-General quite right in saying the whole of the amount of expenses incurred for district expenses is to be taken out of the whole district, and the manner in which they were to be apportioned by the parishes was to be given by these two sections: when you look at sect. 158 it says, “they shall make an order to pay the sums which such vestry or board may require for defraying the expenses of the execution of this Act.” The Act is silent as to the principle upon which they are to apportion those sums. If it stood solely on sect. 158, I should have thought the principle on which the board was to act was, as nearly as they possibly could do, to divide the sum equally and rateably amongst the parishes according to the value. But sect. 159 brings in another principle; it is that which gives the jurisdiction to do it. Sect. 158, if it stood alone, gives them jurisdiction to consider whether or no any particular sum shall be expended for the special benefit of one part of the district more than another—not for the benefit of any part of the district as regards the general power to make allowance for it, not even to benefit any particular parishes, unless under circumstances just and proper. Now, here the board have made a decision as to the rule on which they would go, and have not made such allowances as it was said by Sir F. Kelly ought to have been made. I do not inquire whether they have done right or wrong in that. I think an absolute discretion is given them, and they have jurisdiction to apportion it, not acting capriciously, but acting judicially and properly; and having made it, the Legislature has given no appeal, certainly no appeal to a police magistrate, to say what they are to do, unless the case can be carried so far as to say that after having made an error in the principle of apportionment, however small the error might be, and however slight the effect might be, the whole order was void, and every one of the ratepayers might refuse to pay the rate. If we decide the case in favour of the appellants, it certainly would be a most inconvenient construction to put on the power; and the only other construction that occurs to me is this—and what my brother Crompton has already stated—that the scheme of legislation was to give to the local Parliament, if I may so call it, a jurisdiction to determine, not acting capriciously, but keeping equality and fairness in view—equality in the general principle and fairness in the mode of applying the allowances to be made, before they took steps in their discretion and within their jurisdiction, without any appeal to us, and without any power in this court to review their decision.

*Judgment for the respondents.*

*Thursday, June 7.*

REG. v. JOSH. ARMITAGE AND OTHERS, JUSTICES OF THE WEST RIDING OF YORK.

*Practice—Certiorari—Case stated by justices.*

*A. was convicted for having woollen materials sus-*

*pected to have been embezzled on his premises; he applied for and obtained a case for the opinion of the court, which was in due course entered in the Crown paper; he afterwards, but before the argument of the case, ascertained that the convicting justices were connected with the woollen trade, contrary to 6 & 7 Vict. c. 40, s. 25. Under the above circumstances the court granted a rule nisi for a certiorari, to be heard at the same time as the special case.*

Keane moved for a certiorari to bring up a conviction of Joseph Armitage, Joshua Moorhouse and Wm. Willans, three of the justices of the West Riding of York, with a view to the same being quashed. It appeared from the affidavits that on the information of one R. H. Kaye a search-warrant was issued, alleging that there was cause to suspect that a quantity of pilloined and embezzled materials used in the worsted, woollen, cotton and silk manufactures were concealed in the dwelling-house, outhouse, yard, garden, or other place in the possession of Titus Thewlis, of Huddersfield, cotton twister. Search having been made, certain cotton materials were found, which were taken before two justices of the West Riding, who heard the case under the 17 Geo. 3, c. 56, and discharged the same, and the informant thereupon applied for and obtained a case for the opinion of the judges of this court under 20 & 21 Vict. c. 43, upon which an order was made remitting the case to the justices, and ordering them to hear the information under 6 & 7 Vict. c. 40. The case was heard before Joseph Armitage, Joshua Moorhouse and Wm. Willans, three of the justices of the West Riding, when they convicted the applicant under the 6 & 7 Vict. c. 40, s. 2, in the penalty of 10*l*. for embezzling the cotton materials found on his premises in the sum of 2*l*., the value of the materials, and the sum of 6*l*. for costs, and in default of payment ordered him to be imprisoned for one month. Defendant thereupon applied for and obtained a case for the opinion of the judges of this court, and such case was duly entered for hearing, but has not yet been heard. Joseph Armitage, one of the convicting magistrates, is the father of several persons engaged in the woollen manufacture, in the immediate neighbourhood of Huddersfield. One of his sons is chairman and treasurer of the Huddersfield Manufacturing District Association, established for the purpose of supporting prosecutions of this nature, of which association the said Richard Henry Kaye is the salaried inspector. William Willans, one of the convicting justices, is also a merchant in the woollen trade, and carries on business at Huddersfield, and has several sons in the same trade. Joshua Moorhouse, the other convicting justice, is part owner of and interested in a woollen mill at Holmfirth, is acting trustee of a woollen mill, and has a son-in-law a woollen manufacturer. John Tallents Fisher, one of the justices who previously heard the case, is engaged in the woollen business, and owner of woollen mills at Marsden. It was further alleged that the said proceedings were not commenced within six months after the commission of the offence. Sect. 25 of 6 & 7 Vict. c. 40, provides that, in all convictions or adjudications under this Act, one at least of the convicting or adjudicating justices shall be a person not engaged in any manufacture, trade, occupation, or employment to which this Act extends, and shall not be the father, son, or brother of any such person; and sect. 34 limits the trades to which the Act extends, amongst which are the manufacture of woollen, worsted, linen, &c. This case is distinguishable from *Reg. v. Justices of Macclesfield*, 2 L. T. Rep. N. S. 352, which was before this court, inasmuch as here there was no waiver. The defendant was not aware of the objection to the justices at the time of hearing, or for a long time afterwards. No step has been taken by the defendant with regard to

[Q. B.]

REG. v. HERFORD.

[Q. B.]

the special case since the objection has come to his knowledge.

By the COURT:

*Rule nisi; to come on with the case in the Crown paper.*

June 9 and 11.

REG. v. HERFORD.

*Coroner—Jurisdiction—Fire—Prohibition.*

*The jurisdiction of a coroner to hold inquests is, with reference to felonies, limited to the case of "on view of the body." And he has no jurisdiction to hold an inquest in cases of fire, unless it be by custom.*

*A writ of prohibition will lie to restrain the exercise of an excess of jurisdiction by criminal as well as civil courts.*

*Rule nisi for a writ of prohibition to be directed to the coroner of Manchester to restrain him from proceeding with an inquiry into the cause of a fire which occurred on the premises of Levy Kreisfeld.*

The affidavit of the coroner stated that he understood and verily believed that it was the duty of coroners to hold inquests in cases of fire, and such inquests had been made, and were now holden by the coroners of London, Lincoln, county of Middlesex, Doncaster, county of York, Rotherham, Nottinghamshire, Bedfordshire, Flintshire, Anglesea, and other places, by virtue of the general law of England; that he had held such an inquest three years ago, and no objection was made to his jurisdiction; that the present inquest was held on the written information of Mr. Palm, chief constable of the city of Manchester, and he charged the jury that it was their duty to inquire whether such fire was caused by accident or design, and if by design, then by whom; that he had examined on oath the said W. Kreisfeld, against whom no charge whatever was made, and another, and that he had not held the said inquest by or at the instigation of the said insurance company.

The *Solicitor-General*, Dr. Wheeler and A. Fonblanque showed cause.—The first question to be discussed is, whether prohibition is the proper way to test the authority of the coroner; and the second, has the coroner jurisdiction in cases of fire to summon a jury to inquire into their origin? As to the first point, the coroner is an officer intrusted with a criminal jurisdiction only, and prohibition is not applicable to criminal cases. In the present case a jury has been summoned, an inquiry has taken place, and Kreisfeld has been examined. In Bla. Com. lib. 3, c. 7, the cases there referred to as being cases for prohibition are all civil. [CROMPTON, J.—In Com. Dig. tit. "Prohibition," F. 6, "Prohibition lies if there be a suit before a spiritual judge for perjury in a temporal cause," or "if a suit be *ex officio*, which requires an answer upon oath to a criminal matter." 1 Sid. 374, is referred to. And the heading there is, "If the suit be for a criminal matter," on what ground should it be confined to civil suits? Suppose a court of sessions choose to try a man for perjury, why should not prohibition go? There is only one case on record (*Gould v. Gould*, 2 Hy. Bl. 100), and that was in the case of a court-martial. [BLACKBURN, J.—What then is the remedy? If a man is injured he has his remedy by action, or he may bring up the judgment to have it quashed. [CROMPTON, J.—Suppose they proceed to hang a man.] Probably they would subject themselves to the same punishment. [BLACKBURN, J.—You don't show any case in which a writ of prohibition has been refused on the ground that the court to which it was to be directed was exercising a criminal jurisdiction. *Mellish* referred to 12 Co. Rep. 302.] That was a case of suit: (2 Inst. 599, 638; 3 Inst.; Fitzh. Nat. Bre.) All the forms are there framed as applicable to civil proceedings: (Com. Dig. "Prohibition," A.) [BLACK-

BURN, J. referred to *Pomfret's* case, Lit. Rep. 153.] That was a proceeding by the justices in a civil suit. [COCKBURN, C.J.—Have you anything to negative the jurisdiction of the court? It is often of greater importance that the subject should not be vexed by criminal proceedings than by civil process. CROMPTON, J.—I have no doubt the court may grant the writ *ex mero motu*.] The coroner was an ancient common law officer; his functions are laid down: (1 Bla. Com. lib. 1; Hale's P. C. c. 8; Magna Charta, c. 17; Com. by Lord Coke, 2 Inst. 30; Historical and Political Discourse of Law and Government of England, by Bacon, 1689, c. 67, s. 23; Jervis on Coroners, 24, 32, 44; Hawk. P. C. c. 9, s. 35; lib. 2, c. 9; Horne's Mirror of Justice, 54, 58, s. 13; stat. 52 Hen. 3, c. 24; 1 Edw. 3, c. 10; 4 Edw. 1, c. 2; 1 Bla. Com. 337, lib. 1, c. 9; 59 Geo. 3, c. 4; *Ashford v. Thornton*, 1 B. & Ald. 405; 59 Geo. 3, c. 46; 18 Edw. 3, stat. 1, s. 2, 3; 5 & 6 Will. 4, c. 13, were also referred to. [BLACKBURN, J.—Are there any instances upon record of the exercise of such a jurisdiction between Magna Charta and the commencement of Queen Victoria's reign? I know there have been some recently, but are there during the period I name?] The burden of proving the non-existence of the jurisdiction now claimed lies on the other side. The statute *De Officio Coronatoris*, 4 Edw. 1; Bracton, bk. 3, c. 5, fol. 121; Britton, 11, 25; Fleta, were then referred to, to show that jurisdiction was once given by the statute using the word "burnings," and it was urged that non-user could not defeat the jurisdiction if once given: (*Garnett v. Ferrand*, 6 B. & C. 620.)

*Mellish* (Fearnley with him) in support of the rule.—The coroner has no jurisdiction to hold an inquest, except *super visum corporis* of a man. The uniform practice agrees with Lord Coke's Commentary, 2 Inst. 32: "And what authority had the coroner? The same authority he now hath in case when any man come to violent or untimely death, *super visum corporis*, &c. abjurations and outlawries, &c., appeals of death by bill, &c." There is some difficulty in distinguishing between the authority of the coroner and the sheriff in his own court. The coroner is elected in the County Court, and makes the proclamations in cases of outlawry in the Sheriff's Court. In ancient times prosecutions were instituted by way of appeal to the coroner, who was to institute a preliminary inquiry, and to direct whether the accused was to be imprisoned or pledges were to be taken: (4 Edw. 1; Bracton, c. 7, 8, 22, 27.) Fleta agrees with Bracton. The Mirror states so many things respecting the office of coroner, which are clearly not law, that the book is not of much authority on the point. In the part immediately preceding the passage relied on by the other side, the Mirror speaks of the practice of inquiry by the coroner into burnings as obsolete then. Lord Coke, 2 Inst. 271; Hale P. C. 57; Staundford P. C. 51; and Com. Dig. "Officer Coroner," G. 5, all agree that the coroner's jurisdiction to hold inquests exists only in cases of *super visum corporis*. (He was then stopped by the court.)

June 11.—COCKBURN, C.J.—I am of opinion that this rule must be made absolute, on the ground that a coroner holding an inquest in case of a fire is acting beyond the proper limits of his office and jurisdiction. We have the authority of three of the very greatest writers who have expounded and illustrated the law of England for saying that the office of a coroner to hold inquests is, with reference to felonies, limited to the case of "on view of the body." And Lord Coke and Hale both lay down that law in very clear, distinct, and explicit terms; it is adopted by Comyn in his Digest, without the expression of any doubt on his part; and I should conceive that those authorities are sufficient, in the absence of statutory enactments to the contrary, to make good the proposition of law which

Q. B.]

REG. v. HERFORD.

[Q. B.]

is supported by such authority. Besides that, there seems to have been—certainly from the time of 24 Hen. 6, down to the last ten or twenty years—an uniform abstinence from the exercise of any such jurisdiction. It is difficult to conceive that if it had formed any part of the duty of a coroner to hold inquisitions not only in the case of homicide, but in the case of other felonies, arson included, that duty would not have been exercised; and the total omission of any act of the kind, so far as we can ascertain, during a period of several hundred years, combined with the authorities to which I have referred, satisfies my mind that such a jurisdiction cannot exist. But independently of that, we have a certain degree of exposition of the law in what has been done by the Legislature, for the office of coroner having ceased to be held by the great men in the counties, and having become for the most part exercised by professional men, who could not afford to give their time and trouble without remuneration, the Legislature has upon several occasions since the time of Henry VII. provided for the remuneration of coroners with respect to the duties they had to discharge; and we find that the remuneration of coroners has in these statutes been limited to the cases of inquests held upon the bodies of persons killed either by design or by misadventure. Now I think from that we may very fairly infer that the Legislature did not consider that coroners possessed the jurisdiction now contended for; because, if they did, it would have been their duty to exercise that jurisdiction in discharge of the duties of the office; and, as the Legislature has proceeded upon the principle of not calling upon them to discharge duties gratuitously, I cannot but think that the Legislature, if it had considered it was part of the duty of coroners to hold inquests in cases of fire or arson with a view to ascertain if arson had been committed, it would have taken care that they should be remunerated, there being no conceivable reason why, if it was their duty to hold such inquests, they should not be remunerated. The only difficulty which the question presents is, that which arises upon the statute *De Officio Coronatoris*, and upon the authorities of Fleta and of Britton which have been referred to in the course of the argument. And certainly the language of the statute 4 Edw. 1, *De Officio Coronatoris*, would, at first sight, present some difficulty, inasmuch as that speaks, not only of men suddenly slain and wounded, but of houses broken, which, at first sight, might seem to imply that it was the duty of a coroner, in case of burglary and housebreaking, to hold an inquest upon the place with a view to ascertain the circumstances attending it. I think that Mr. Mellish has removed any difficulty which at first sight might have been created by the language of the statute, by showing how plainly, beyond all possibility of doubt, it was more or less an abridgment of the law as it had been expounded by Bracton, and with a view of more clearly commenting on what the law was from which the language of the statute was taken. And, in the terms of Bracton, one finds that he was speaking either of the case of appeal on felony, or other appeal, or of the inquest to be held by the coroner *super visum corporis* in case of homicide or sudden death. I think, if there was any, that difficulty is removed by looking to see what is to be found in Bracton as affording a satisfactory exposition of what was the meaning of the language used. I think also with regard to the language of the statute of Marlbridge, Mr. Mellish has given, so far as a statute so obscurely worded can be explained, a satisfactory explanation; but I do not go the length of saying that all doubt or difficulty is entirely removed. But when we find that from the time these statutes were passed, so far as we have evidence upon the subject or light has been thrown upon it, this jurisdiction has never been exercised except on a contemporaneous

exposition of the statute conformable to that of the great authors to whom I have referred, and from the time of the passing of the statutes we find there are these great authorities who declare in terms wholly unambiguous, clear, explicit and positive, what the law is, I think it is not because we find in what I cannot but conceive is a very inferior authority as compared with that to which I have referred, namely, the authority of Hawkins, the contrary laid down, that even there the expression of a doubt ought not to shake our confidence in the authority of such men as Lord Coke, Hale and Comyn. With regard to its importance to the public two opinions may be entertained. I do not express any; all I can say is, if such a jurisdiction is to be exercised on the part of coroners as to other felonies—for the argument goes the length of contending that they have the right, as well in the case of other felonies as in case of burning houses—if they are to exercise such a jurisdiction after the lapse of 500 or 600 years, let the jurisdiction be confirmed by the authority of the Legislature, and not revived by the simple arbitrary discretion of the coroners themselves, some of whom think they have that jurisdiction, others do not choose to exercise it, and some think it is better to abstain from it. If it is desirable for the public good that such a jurisdiction should be exercised by coroners, the Legislature would no doubt have interposed. As it now stands, it is not the law, and all we have to do is to interpret the law.

WIGHTMAN, J.—This is a case of a very singular application, and, as I understand it, new; and as there have been many inquests of late holden on questions of burning, and as there is no decision which has been cited as to the extent of the jurisdiction of the coroner, I should have wished to have compared the different cases that have arisen upon this subject, and to have looked more accurately than I have had an opportunity of doing into the different authorities upon the subject. But as my Lord Chief Justice and my brother Blackburn entertain a clear opinion upon the subject, and as I am disposed to agree with them, I do not think it necessary to raise any doubt that may cause any delay in our decision. It appears to me that the view taken by my Lord Chief Justice is entirely well founded, and it is in accordance with my own view of the case; and whatever the original jurisdiction of a coroner may have been, it was in the first instance limited to a great extent by the statute of Magna Charta, and that has ever since confined the jurisdiction in some particular cases that have been mentioned. The statute *De Officio Coronatoris*, which is chiefly directed to the holding of inquests on deaths, though there are other matters mentioned, namely, one as to inquiring of housebreaking; that is stated by my Lord Coke only to relate to such inquiries of housebreaking as concerned the death of a man. With respect to the other powers that are given to the coroner with respect to appeals, they stand on an entirely different footing from the inquisition *super visum corporis*. But the great point on which I am chiefly resting is this, that from that time downwards there has been no instance that has been brought before us, that has not been explained. There are only two or three (although there have been several lately at different times), there are only two or three instances in which the sheriff has taken any inquest of office except those which were upon the death of the body. Now, Lord Coke, in terms—and his authority is of the highest—says that a coroner has no power to hold any inquest of office except on treasure trove, or some other matter not now in question. But he cannot make any inquiries of any felonies except it be touching the death of a man; as he says, the sheriff can make no inquiry of the death of a man, though he might at criminal law have made inquiries of all other felonies.

Q. B.]

REG. v. HERFORD—REG. v. WHITE AND ANOTHER

[Q. B.]

But he contracts the duties and powers of sheriffs and coroners in that manner. Anciently, sheriffs could hold any inquisitions of any felonies except of death; and for the same reason anciently coroners could hold no inquisitions respecting felonies, except it was on the death of a man. I find that is fortified by the very high authority of Lord Chief Baron Hale, who says that without custom the coroner hath no authority to take any inquisition other than on death. Now, it is true there is a *dictum*, though no authority, to the contrary, except it is in Hawkins' Pleas of the Crown. There Serjeant Hawkins says, the statute being only directory, the coroner cannot be charged with any breach of duty for what is lawfully performed, though not mentioned in it. There are some offices mentioned as to inquiries, and burning is one. But all those are open to this observation, that there is a great obscurity in those ancient offices; they are not uniformly agreed upon or always certain to be perfectly understood. After all, the best exposition that is found of those ancient duties and offices is that of the custom; and I do not find, except in very late periods, there has been any instance of the exercise of such a duty as that which is now sought to be established, or that coroners have held any such inquisition as that now contended for. It is said the exercise of such an office may be beneficial. I know not how that may be. On the other hand, it is said, on many occasions it may lead to great vexation; and there may be very good ground for that. On the whole, it seems to me, it has not been made out to my satisfaction that the coroner has jurisdiction or authority to hold such inquests as this in question.

BLACKBURN, J.—I am of the same opinion. In this case we are called upon to prohibit a coroner from proceeding to hold an inquest on a burning, on the ground that the coroner in holding it would be acting beyond his jurisdiction; and that we have power to do so, where he is acting beyond his jurisdiction, I think was sufficiently established in the early course of the argument. The question that now remains is, whether a coroner has or has not jurisdiction to hold such an inquest. It is said that he had at common law that jurisdiction with many others more extensive; and that though Magna Charta has taken away many parts of his jurisdiction, that jurisdiction which he had at common law is still left untouched, either by Magna Charta or any subsequent statute. Now in the first place, considering that the jurisdiction has not been exercised, certainly, till quite recent times—it has not, in fact, practically been exercised for a very long time—I think it lies on those who say it existed at common law to show reasons for believing it existed at common law, and was not taken away by the earlier statutes—Magna Charta and others. The manner in which jurisdiction is shown to exist at common law, is by proving it has been used in practice, showing it by evidence of records and other ways to show that the jurisdiction has in fact been exercised, or to show by a decided case that it has been supported, or on the authority of the great writers that such common law jurisdiction is laid down by them. In this case, as far as I can perceive, there is a total failure of anything to show any such jurisdiction on the part of the coroner. As to the authority of text-writers I think I am not wrong in saying that Staundford's Pleas of the Crown is one of the highest; and if I find the greatest authorities—Lord Coke, Hale, and Chief Baron Comyn—and all the text-writers lay down the same doctrine that a coroner has no right to hold an inquisition except in the one case upon the view of a body lying dead, then, if the authority of decided cases and entries on the records show that the jurisdiction has been exercised in only two decided cases that have been brought before us, I cannot doubt that the coroners who started this new jurisdiction have made

research and brought everything they can forward. The only two instances are those in the city of London—two inquisitions concerning burning, held before the sheriff and the coroner, not (be it remarked) by the coroner on view, but in the court of the sheriff and coroner, and before the sheriff and coroner. Mr. Mellish explained in the course of the argument, and there is much ground for saying, that that has reference to the ancient court, and these two instances are not in point. Now the other instance we have is as early as the 27 Edw. 3, in the Book of Assizes: we have there the King's Bench acting by sending back an indictment set before them by the coroner with other indictments, giving as a reason, according to the reporter of the Book of Assizes, that the coroner cannot hold any inquisition except upon the view of the body on a special writ sent to him for that purpose—certainly a strong authority to show what was considered to be the law at the time of Edw. III. Again, in the reign of Hen. VI. we find the same point stated, though it was not the point of decision before the judges. It appears there—but whether it was one of the serjeants arguing as counsel or one of the judges discussing the matter does not appear on the face of the book—but we find it stated as clear law, except of custom the coroner cannot hold an inquisition of a felony save in the case of the view of a dead body, and no authority or instance is brought to the contrary. The only authority that has been brought before us to show its existence is that of Magna Charta and other statutes. The passages are very obscure and difficult to interpret, and which if they stood alone might lead one to suppose the coroners held something of the sort. Beyond these there are the passages in the Mirror, Fleta and Bracton. I think there is sufficient to show, if ever the jurisdiction existed then, the ancient Magna Charta took away some of the jurisdiction; and I think the common office having been continued for many hundred years, and considering the universal opinion of the text-writers—the only doubt being suggested by Hawkins, who is not to be considered in the same class of great authorities and text-writers with Hale, Comyn and Lord Coke—that being so, I doubt exceedingly if, by the ancient common law, the coroner had jurisdiction, if not upon the construction of the early statutes; we must take it there has been a construction put on them which we are bound to follow, and we are bound by that to say it is taken away. It is true, if there had been a statute giving them jurisdiction, that is not to be abrogated by mere non-user. But the fact that a particular meaning has been put upon a statute, and the law has been taken to be such as it has existed for many hundred years, that is conclusive and abundant reason for saying the construction of the early statute is this, if it is asserted to give a jurisdiction it has not been used for a hundred years, and jurisdiction never has been taken away in the early times by the construction of a statute. I need only say further, my brother Crompton, who has been obliged to leave the court, has authorised me to say he is perfectly agreed in taking this view of the matter; the only matter upon which he required explanation was the enactments of the statute De Officio Coronatoris, which he did not understand. Mr. Mellish's explanation of it was, to his mind, quite satisfactory, and he had no doubt as to the judgment that ought to be pronounced.

COCKBURN, C.J.—We did express during the argument our opinion upon the question whether a prohibition could issue. We entertain no doubt that a writ of prohibition is one that this court ought to issue, just as much to control a court of criminal jurisdiction in committing an excess of jurisdiction, as in the case of a civil action.

Rule absolute.

Tuesday, June 12.

REG. v. WHITE AND ANOTHER.

Coroner's inquest—Second inquiry—Certiorari.

*A coroner is not authorised to hold a second inquiry on the same subject-matter until after the first has been brought before the court by certiorari and quashed.*

In this case an inquest had been held at Birmingham on the body of Emily Stafford, a young woman, nineteen years of age, when a verdict was returned to the effect that she died from exhaustion brought on by disease. Something transpired, however, to lead the coroner to arrest the burial and to hold a second inquest. Accordingly a second jury was empanelled, and the investigation was proceeded with, when from evidence produced tending to show that means had been used to bring about abortion, the jury found "That the deceased had been wilfully murdered by White, and that Mrs. Fisher was an accessory before the fact." Subsequently a rule was obtained for a *certiorari*, calling on the coroner to show cause why the second inquisition should not be brought up with a view to its being quashed, on the ground that it was not competent for a coroner to hold two inquests for the same matter; that he had no jurisdiction to hold the second inquest, the first being valid and unquashed.

*Field* now showed cause.—In *Britton, Wingate's* edition, p. 4, it is said, if the coroner on the first inquiry suspect concealment of the truth, let the inquiry be made again and again. [CROMPTON, J.—He might apply to this court from time to time for a *melius inquirendo*, otherwise one does not see how proceedings could be carried on, because there might be inconsistent verdicts; if that happened so, and a committal ensued, which set of depositions would be used?] If two inquiries had been held, the last one is that upon which he would be indicted. A *melius inquirendo* usually went to the sheriff; it was to relieve against misconduct. The authorities referred to on moving for this rule, were 2 Hale's P. C. 59; Year Book, 2 Rd. 3 & 21 Edw. 4, c. 70; but on examination they will be found to be adverse to this rule. The passage in Hale which supposes that the first inquiry was not *super visum corporis*, is an error, as will appear upon turning to the Year Book. Many cases are to be found of two inquiries; but, with the exception of that mentioned in Hale, none in which the first has not been quashed. A passage in 2 Hale's P. C. p. 59, has been considered as laying down the law that a second inquest can only be held when the first inquest was not *super visum corporis*. Lord Hale says, "and therefore if the coroner take an inquisition without view of the body, he may take a second inquisition *super visum corporis*, and that second inquisition is good, for the first was wholly void;" but the cases referred to in the year-books show that the first inquest was *super visum corporis*, therefore it is not necessary that the first should be void to enable the coroner to hold a second. [COCKBURN, C.J.—The embarrassing point is the great inconvenience that would arise if a coroner *ex mero motu* were to hold several inquiries; but I think, upon looking to the construction of the language of the case in 2 Rd. 3, he may well come to the conclusion that the first inquiry was held to be bad for the insufficiency of the indictment, the words *super visum corporis* being probably omitted; and you don't find a man so accurate as Lord Hale stating that a proceeding had been set aside without sufficient authority.] (Fleta, 37, s. 3; Mirror of Justice; Umphreville, 45, were also referred to.)

COCKBURN, C.J.—We need not trouble you, Mr. Kennedy; we have the authority of Lord Hale and the universal practice. The only way in which a second inquiry can be made is by an application to set aside and quash the first. In the present case the second inquest was obviously bad; the rule will therefore be absolute.

Rule absolute.

Thursday, June 21.

REG. v. THE INHABITANTS OF BRAILSFORD.  
*Highway—Indictment for nonrepair—Road impass-*

*suble in winter—Dedication—New trial for misdirection after verdict for defendant.*

Indictment for nonrepair of a road, tried before Pollock, C.B., at the Derbyshire spring assizes, and a verdict found for the defendants.

It appeared that there was a conflict of testimony as to whether the road in question was passable in winter, and had been used during that season, and the learned judge in his summing-up expressed great doubt whether there could be a dedication of a road which was impassable in winter, and at the close of the summing-up said: "I might have stopped the case if there had not been some evidence of user during the winter, for I do not see how you can infer the dedication of a road to the public which is impassable in winter."

A rule nisi having been granted for a new trial on the ground of misdirection,

*Mellor* (Lush and S. Bristowes with him) showed cause.—As to the misdirection *Ballard v. Dyson*, 1 Taun. 279, and *The Marquis of Stafford v. Coyne*, 1 B. & C. 257, were cited. Secondly, the verdict having been found for the defendant, there is no ground for a new trial: (*R. v. Russell*, 3 E. & B. 943; *R. v. Johnson*, 29 L. J. 133, M.C.)

*Mucawlay, Hayes*, Serjt. and *Field*, in support of the rule, were not called upon.

WIGHTMAN, J.—I am of opinion that in this case there was a misdirection by the learned judge. There can be no reasonable doubt that the jury may have been, and probably were, misled by the direction of the learned judge. The evidence was not all one way [His Lordship here cited from the summing up the passage above extracted]. There are some other passages to which objection might have been taken, but they are not mentioned in the rule; e. g., he says, that "from mere user the jury could not find a verdict that it was a public way; but that there must be a dedication;" without telling the jury that user was evidence of a dedication. Then as to the other point about granting a new trial after the verdict for the defendant, whatever may have been the rule long ago, as said by Lord Campbell C. J., in *R. v. Russell*, it has since been materially modified: first, by suspending the judgment to enable the Crown to move; and afterwards directly by granting a rule for a new trial. Certainly, the direct mode is the more convenient one in cases to which it can be applied. It was said in *R. v. Russell*, and also in *R. v. Johnson*, that where the indictment charges directly a misfeasance it may be a question whether the court, in exercising its discretion, would grant a new trial; but a distinction was taken between a charge of misfeasance and one of non-feasance. This is an indictment for nonrepair of a highway, and it is in the nature of a civil proceeding to try the obligation of the parish to repair. It seems to me that there is no reason why, where the rule is moved for on the ground of misdirection, and not as against evidence, there being a conflict of testimony, we should not adopt the direct practice. The rule will therefore be absolute.

BLACKBURN, J. delivered a similar judgment.

Rule absolute for a new trial.

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAGHLEY  
WILLIAMS, Esqrs., Barristers-at-Law.

### MORTON v. BRAMNER.

*Poor-rate—Precise demand—Fraction of a farthing. If the amount of the proportion of the rate which a ratepayer was to pay comes to a certain sum and the fraction of a farthing, he is not bound to pay the fraction, and a demand by the overseer of the sum and a farthing is bad.*

On the 20th March 1860 William Bramner (the e-

Ex.]

APPLETON v. MORRAY AND ANOTHER.

[Ex.]

spondent), by his attorney Mr. C. H. Cooper, appeared at March, in the Isle of Ely, before two justices of the peace for the said Isle, pursuant to a summons previously served on the respondent, granted upon the information of George Norton the appellant, and one of the overseers of the poor of the hamlet of Wimblington, in the said Isle of Ely, requiring the respondent to show cause why he, "being a person duly rated and assessed to the relief of the poor of the said hamlet, in and by several rates made on the 8th Nov. 1859 (hereinafter called the first rate), and on the 31st Jan. 1860 (hereinafter called the second rate), in the several sums of 1s. 5d. and 1s. 9½d., had not paid the same, or any part thereof, but had refused so to do." The making, allowance and publication of each rate was duly proved. The respondent was assessed in each rate upon a rateable value of 4l. 4s. 6d. The first rate was at 4d. in the pound, and the second rate was at 5d. in the pound. Demands, of which the following are copies, were proved to have been served personally on the respondent for each rate.

As to the first rate—

"No. 11. "Wimblington Poor-rate Demand Note.

"To Wm. Brammer, of Wimblington.

"The overseer of the parish of Wimblington demands payment of the poor-rate, made the 8th Nov. 1859, due from you, with the arrears of the former rate previously due as below :—

Assessable value, 4l. 4s. 4d.; amount of	s.	d.
rate 4d. in the pound.....	1	5
Previous arrear .....	0	0
	1	5

(Signed) "JOHN THOMPSON, Collector."

As to the second rate—

"No. 11. "Wimblington Poor-rate Demand Note.

"To Wm. Brammer, of Wimblington.

"The overseer of the parish of Wimblington demands payment of the poor-rate made the 31st day of Jan. 1860, due from you, with the arrears of the former rate previously due as below :—

Assessable value 4l. 4s. 4d.; amount of	s.	d.
rate at 5d. in the pound.....	1	9½
Previous arrear .....	1	5
	3	2½

(Signed) "JOHN THOMPSON, Collector."

On the part of the respondent it was contended that both rates were altogether void, inasmuch as they were monied out wrong; that is to say, the first rate being at 4d. in the pound on 4l. 4s. 4d., amounted to 1s. 4½d. and a fraction of another farthing only, instead of 1s. 5d.; and the second, being at 5d. in the pound, amounted to 1s. 9d. and a fraction of a farthing only, instead of 1s. 9½d. And further, that the demand in each case was insufficient, as the precise sum due, and no more, should have been demanded. As an authority the decision of Gibbs, C.J., in the case of *Hurrell v. Wink*, 2 B. Moore, 417; 8 Taunt. 369, was cited; and it was submitted that it was patent from the rate that the precise sum properly due was in each case less than the amount actually demanded. No tender of any sum whatever had been made by the respondent. There were at the same petty sessions thirty-five other cases in which the same attorney appeared, and he stated that he should raise the same question in each case. The magistrates in a previous case at the same petty sessions decided against the objection, on the ground that the defence properly constituted ground of appeal, and that an error in the rate-book could not be set up as a defence to a distress, the validity of the rate not having been tested by appeal. Mr. Cooper refused to demand a case, and stated that Mr. Naylor, barrister-at-law, advised that the objections were valid, and that he would have attended to support them, but that he was engaged at Cambridge assizes. A similar case had

been heard at a previous petty sessions, when a similar question was raised by the same counsel, and overruled by the magistrates, who granted a warrant of distress, which was put in force, and Mr. Cooper thereupon issued writs for his clients against the overseers of Wimblington and their assistants acting under the said warrant of distress. The magistrates therefore deemed it expedient to decide the respondent's case in his favour, so as to allow an opportunity to the appellant of demanding this case, and obtaining the opinion of a Superior Court on the questions of law thus raised and insisted upon in an economical and summary manner. The appellant (the overseer) by his attorney Mr. W. L. Ollard, did accordingly demand a case, and entered into the usual recognisances; and this case is stated accordingly. The hearing of the other summonses was then adjourned, on the understanding that they were to abide the decision in this case. The questions for the opinion of the court were—First, whether the respondent showed sufficient cause for not paying the two rates in question, or either of them; and secondly, whether the magistrates ought or would have been justified in issuing a distress-warrant against the respondent for the recovery of one or both of the rates.

*Keane* for the appellant.—The overseers are entitled to demand this amount. It is their duty to get in the rate. Are they to be responsible for the insufficiency of the coinage? The demand is for the amount of rate at 4d. in the pound. But the amount, when carried out, gives the fraction of a farthing. Nothing was tendered. The right demand was made, though the sum total was wrongly expressed. He cited *R. v. Goodburn*, 8 Ad. & Ell. 508.

*Naylor* for the respondent.—The overseer is not entitled to collect more than is actually due. If it had been intended by the Legislature that he should collect a farthing or other coin where a fraction of a farthing or other coin only is due, it would have been so enacted, as it is in the Income-tax Act of 1842, s. 2. In the absence of such enactment the demand must be for the exact sum, and must be precise: (*Hurrell v. Wink*, 2 Moo.) [WILLES, J.—All you need say is, that the demand is intentionally larger than the overseer is entitled to.]

WILLES, J.—We consider that this case is laid before us in order that we should determine the point whether, where the amount of a rate comes to the fraction of a farthing, the ratepayer is bound to pay it. We think he is not. He is not bound to pay more than his proportion. If I pay a farthing where a fraction only is due, not only am I paying more than my fellow-parishioners, but the overseer is collecting more than he is authorised by the rate to receive. The ratepayer may say, "I am willing to pay the rate as far as it is possible to pay it, but I can't pay a fraction of a farthing."

WILLES, J.—I am of the same opinion. The case of *Bannister v. Fordham*, in Wilson, is an authority for holding that, where an amount comes to something less than any known coin, the ratepayer cannot be called upon to pay it.

KEATING, J.—I am of the same opinion. If there is any difficulty at all, it is caused by those who make the rate. *Judgment for the respondent, with costs.*

## COURT OF EXCHEQUER

Reported by F. BAILEY and JOHN DUNBAR, Esqrs., Barristers-at-Law.

Tuesday, June 19.

APPLETON v. MORRAY AND ANOTHER.

*Overseers—Recovering possession of lands—Parish property*, 59 Geo. 3, c. 12.

*Overseers, with consent of freeholders of the parish, were in the habit of letting small quantities of land. Plaintiff obtained possession of part under a written*



[Ex.]

APPLETON v. MORRAY AND ANOTHER.

[Ex.]

*agreement, not under seal, from some small portion of the freeholders, for ninety-nine years, at 5s. a year, payable to the overseers; he paid no rent at all. The overseers demanded possession, and sent a notice in compliance with the 59 Geo. 3, c. 12, requiring possession; but the notice was served upon the plaintiff's daughter, and not upon the premises. Justices directed the constable to give the overseers possession; which he did. In an action of trespass for doing so:*

*Held, personal service of the notice upon the tenant in possession, demanding possession, was not required by the 59 Geo. 3, c. 12, ss. 24, 25, and that service in this case was sufficient.*

This was an action of trespass in a coal yard, and for taking the plaintiff's van, &c. Plea—General issue by stat. 59 Geo. 3, c. 12, s. 17, and others. It appeared that the overseers of a parish had been in the habit of letting, with the consent of the freeholders in the parish, small pieces of land there. The plaintiff had applied to some twenty of these freeholders to let to him in writing (not under seal), the land in question (about twenty-nine perches), upon which this trespass was said to have been committed, for a term of ninety-nine years, at a rent of 5s. a-year, to be paid to the overseers. No rent was paid, and the overseers went before the justices in petty sessions under 59 Geo. 3, c. 12, s. 24; that section says that, "whereas difficulties having frequently arisen, and considerable expenses have sometimes been incurred by reason of the refusal of persons who have been permitted to occupy, or who have intruded themselves into parish or town houses, or other tenements or dwellings, or otherwise, belonging to such parishes, to deliver up the possession, &c. when thereto required; and it is expedient to provide a remedy for the same;" it then enacts that "if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to, or provided by, or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement, or dwelling, or into any house, tenement, or hereditament belonging to such parish, shall refuse or neglect to quit the same and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, it shall be lawful for any two of his Majesty's justices of the peace, upon complaint made to them by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement, or dwelling shall be situated, to issue their summons to the person against whom such complaint shall be made to appear before such justices at a time and place to be appointed by them, and to cause such summons to be delivered to the party against whom the complaint shall be made, in his or her absence, so to be affixed on the premises seven days at the least before the time appointed for hearing such complaint, and such justices are hereby empowered and required upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them." Sect. 25 says: "That if any person to whom any land appropriated, purchased, or taken under the authority of this Act, for the employment of the poor of any parish, or to whom any other lands belonging to

such parish, or to the churchwardens and overseers thereof, or to either of them, shall have been let for his or her own occupation, shall refuse to quit and deliver up the possession thereof to the churchwardens and overseers of the poor of such parish at the expiration of the term for which the same shall have been demised or let to him or her, or if any person or persons shall unlawfully enter upon, or take, hold, or hold possession of any such land, or any other land or hereditaments belonging to such parish, or to the churchwardens or overseers, or to either of them, it shall be lawful for such churchwardens and overseers of the poor, or any of them, after such notice and demand of possession as is by this Act directed in the case of parish houses, to exhibit a complaint against the person or persons in possession of such land before two of his Majesty's justices of the peace, who are hereby authorised and required to proceed thereon, and to hear and determine the matter thereof; and if they shall find and adjudge the same to be true, to cause possession of such land to be delivered to the churchwardens and overseers of the poor, or some of them, in such and the like course and manner as are by this Act directed with regard to parish houses."

The overseers caused the plaintiff to be served with a proper notice in writing, duly signed, and demanded possession, and afterwards obtained an order of the justices to the constable to give possession, which he did accordingly by removing a van there to a convenient distance, doing no damage. This action was brought for doing so. The cause was tried at Chester before Byles, J., when a verdict was returned for the defendants, with leave to the plaintiff to move to set it aside and enter a verdict for the plaintiff for 10*l.* if the court should think the judge at the trial ought to have told the jury that defendants were not under the circumstances justified in what they did, and a rule having been obtained,

*Welsby* and *McIntyre* showed cause.—The question here is, whether there has been a sufficient and proper service of the notice given under the Act of Parliament. The learned judge at the trial appeared to think it required a personal service; it was, in fact, served upon the plaintiff's daughter. But the defendants had a perfectly good defence at common law, for the plaintiff was no more than a tenant at will at most; he is estopped by his own agreement in writing from saying it was not parish land; and there having been a demand of possession and notice to go out, that is quite sufficient.

*Brandt*, contra, called upon to support the rule.—The service of the notice was not a sufficient compliance with the terms of the Act; it was not a personal service upon the plaintiff, but given to another person not even upon the premises at the time of the service. This is a penal statute, and should be construed strictly. If personal service could not be effected, then the other mode pointed out by the Act should have been pursued, by affixing the notice on some part of the premises. The defendants had no title at all, not so much as the plaintiff, for he had the possession; and if the defendants had brought an ejectment, they must have proved their title in order to have recovered.

*POLLOCK, C.B.*—The only question here is, whether the service of this written notice was sufficient, under the 59 Geo. 3, c. 12? It was served upon the daughter of the plaintiff, the tenant in possession; and I think the circumstances of the case show that it was sufficient, and that the rule should be discharged.

*BRAMWELL, B.*—I am also of the same opinion. There is abundant evidence of the notice having reached the plaintiff, and that seems to be sufficient to bring it within the terms of the Act of Parliament. If the Act had said there should be personal service required, that would be another matter.

*CHANNELL, B.*—I also think this rule ought to be

discharged. The plaintiff must be taken as the tenant in possession, and the only points reserved for us are, first, whether the plaintiff was in possession as tenant to the overseers; and secondly, was the notice signed by them duly served? He is prevented from denying that he held under the defendants by his own written agreement to pay them rent for it, but which he never did pay. The 24th section of the Act applies to the recovery of possession of houses, &c.; but the 25th section is for recovery of lands, and the notice required to be given by the 25th section is to be the same as that stated in the 24th, which is, that "it shall be delivered to the person in possession;" and I think the facts of this case show that, although it was not actually served personally upon the plaintiff, the 25th section has been sufficiently complied with.

WILDE, B. concurred.

*Rules discharged.*

### EXCHEQUER CHAMBER.

Reported by JOHN THOMSON, Esq., Barrister-at-Law.

#### ERROR FROM THE QUEEN'S BENCH.

Thursday, June 14.

(Before WILLIAMS, J., MARTIN, B., WILLES, J., CHANNELL, B., and BYLES, J.)

REG. on the prosecution of RINGLAND v. THE BURSLEM LOCAL BOARD OF HEALTH.

*Public Health Act 1848—Compensation for damage caused by sewerage works—Denial of liability—Mandamus—Claim of specific amount.*

*A mandamus to make compensation for damage done to houses by sewerage works, executed by a local board of health in pursuance of the Public Health Act 1848, recited that the claimant had applied to the local board to make him full compensation, and that they had denied all liability to compensate him, and the writ then commanded the local board to cause compensation to be made out of the general or special district rate. The defendants by their return alleged that they had not denied all liability, and were willing to make compensation when the same should be ascertained; that it had not been ascertained, nor had the prosecutor taken any steps towards having the same ascertained, nor given any notice of the amount thereof, or whether it exceeded 20l., nor appointed an arbitrator, as by the Act provided. The return having been traversed, the jury found that the defendants had denied their liability, but that the prosecutor had made no claim for any certain amount:*

*Held (affirming the judgment of the Court of Q. B.), that a mandamus might issue in the first instance to compel the local board to make compensation, and that it was not a condition precedent that the claimant should demand a specific sum as compensation, or inform the local board whether or not it exceeded 20l.*

*Mandamus to the Burslem local board of health, reciting that the Public Health Act 1848 (11 & 12 Vict. c. 63) had been applied to and put in force in the town of Burslem; that the local board of health had been duly constituted under the Act; that certain houses in Adelaide-street in the said town were the property of the prosecutor; and that by reason of the exercise by the defendants of the powers of the Act they caused certain shafts to be sunk near to, and certain sewers to be made under, the houses, whereby the foundations of the houses gave way, and the houses became uninhabitable; that the prosecutor had sustained damage by reason of the said acts of the defendants, and was, under the said Act, entitled to have full compensation made to him out of the general or special district rates to be levied under the Act from the defendants for the damage so sustained by reason of the exercise of the powers of the Act; that the defendants had*

[MAG. CAS.]

been applied to on behalf of the prosecutor to make him such full compensation according to the provisions of the Act; and that they then and thence hitherto had denied, and still deny, all liability to compensate the prosecutor, and had wholly refused, and still refuse, to make him compensation; and enjoining the defendants to cause compensation to be made out of the general or special rate to be levied under the Act to the prosecutor for the damage so sustained by him by reason of the exercise by them of the powers of the Act, &c.

Return. That the district of Burslem was and is an incorporate district, within the meaning of the Public Health Act 1848 mentioned in the said writ, and not a corporate district within the meaning of the said Act; and that the said local board never have denied, nor do they still deny, all liability to make the prosecutor such compensation as in the said writ was mentioned for the damage or injury therein alleged to have been sustained by him by reason of the exercise of the powers of the said Act as therein mentioned, nor had they ever neglected or refused, nor do they still neglect or refuse, to make such compensation, but on the contrary thereof, that they had been, and still were, ready and willing to make him such compensation when and as soon as the same should be duly determined and ascertained in manner and form by the said Act in that behalf provided; and that the said compensation was not and had not yet been determined or ascertained in manner and form aforesaid, or otherwise howsoever; nor hath the said prosecutor taken any step towards having the same determined or ascertained in manner or form aforesaid; nor given nor delivered to the said local board any notice in writing, or otherwise, of his claim for such compensation, or of the cause or amount thereof, nor informed them whether such compensation as claimed by him exceeded the sum of 20l., nor appointed an arbitrator, nor given notice of an intention on his part to appoint an arbitrator, to whom the matter of his claim for compensation might be referred, in manner and form by the said Act in that behalf provided, or otherwise howsoever. And for the reasons aforesaid the said Burslem local board of health have not caused, and cannot and ought not to cause, compensation to be made to him out of any general or district rate to be levied under the said Act for the said damage and injury.

Issue was joined on a general traverse of all the allegations in the return.

On the trial before Crompton, J. at the Stafford spring assizes 1859, it appeared that the prosecutor Ringland was the owner in trust of two houses in Adelaide-street, Burslem, which had been damaged by the local board in carrying out the sewerage of the town, and that damage was also done to four houses in the Waterloo-road, which belonged to a nephew of the prosecutor, a minor, and were managed by the prosecutor; and the prosecutor made a claim against the board for 165l. in respect of the damage done to the whole six houses.

The following, among other letters, were put in evidence:—

From F. C. Lees, attorney to the prosecutor, to E. Challinor, attorney to the board.

"Burslem, 23rd Feb. 1858.

"My dear Sir,—Mr. H. Ringland claims compensation from the Burslem board of health, for injury which has been caused to his property in Waterloo-road and Adelaide-street, Burslem, in consequence of the carrying out the public sewerage works. He employed a competent man to give an estimate of the amount of damage, and he being of opinion that 165l., including loss of rent, would not more than compensate him for the injury, he applied to the local board of health for that amount, but they have refused to pay it, and refer me to you as their solicitor, in case of my instituting legal proceedings. Being well satisfied of the

Y

justice of my client's claim, I ask you under the 123rd section of the 11 & 12 Vict., the Public Health Act 1848, to appoint an arbitrator on the part of the board, to whose arbitrament the matter may be referred, and if I concur in the appointment, he can solely decide it without the appointment of another arbitrator," &c.

To this Challinor wrote in reply:—

*Ringland v. Burslem Board.*

"My dear Sir,—With every wish to do the utmost justice to your client, I really cannot see that this is a case falling within the arbitration clause of the Act. I am informed that my clients repudiate any liability to yours. How can it be a matter of compensation to be measured by arbitration?"

By consent the jury were to be taken to have found that the defendants had denied their liability to make any compensation, but that the prosecutor had not claimed any specific sum, and the verdict was entered for the Crown, with leave to the defendants to move to enter the verdict and the judgment for them; the court to be at liberty to draw inferences of fact.

A rule nisi was accordingly obtained, and after argument discharged (see 28 L. J. 345, Q. B.; 33 L. T. Rep. 201); whereupon the defendants appealed.

*Gray (P. McMahon with him) for the defendants.*—First, it is submitted that the prosecutor has mistaken his remedy, and that the proper course was to have proceeded by arbitration in the first instance for the purpose of ascertaining the amount of the compensation, and then to have brought an action to enforce the liability. A denial of liability to make any compensation is a denial that any amount is due, and entitles the claimant to proceed under the arbitration clauses. Clauses 144 and 123 of the Public Health Act 1848 (11 & 12 Vict. c. 63) were then referred to. Then the amount being so determined, the question of liability is to be tried by an action, in analogy to the course pursued under sect. 68 of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 18). It is true that in *Reg. v. The Metropolitan Commissioners of Sewers*, 1 Ell. & Bl. 694, the Court of Q. B. decided that under sects. 69, 70, of the Metropolitan Sewers Act 1848 (11 & 12 Vict. c. 112), the arbitration clauses can only be resorted to where the mere amount of compensation was disputed, and not where the liability to make any compensation was denied. But in *The East and West India Docks and Birmingham Junction Railway Company v. Gatlke*, 3 Mac. & Gor. 155, a claimant was held entitled to have the amount of compensation ascertained in the first instance by a jury, and that the company were not precluded thereby from questioning the right of the claimant to any compensation whatever. Both these cases were brought to the attention of the court in *The Bradford Local Board of Health v. Hopwood*, 6 W. Rep. 818, where Wood, V. C. held, that sect. 123 of the Public Health Act 1848 could not be distinguished from the compensation clauses in the Lands Clauses Consolidation Act 1845. The cases of *Glover v. The North Staffordshire Railway Company*, 16 Q. B. 912; *The London and North-Western Railway Company v. Smith*, 1 Mac. & Gor. 216; *The South Staffordshire Railway Company v. Hall*, 1 Sim. N.S. 373; *The Sutton Harbour Improvement Company v. Hichens*, 1 De G. M. & G. 161; *Re Penny v. The South-Eastern Railway Company*, 7 Ell. & Bl. 660; *Bradby v. The Southampton Local Board of Health*, 4 Ell. & Bl. 1014, were then cited. Secondly, assuming that a *mandamus* will lie in the first instance, the prosecutor ought to have demanded a sum certain of the local board before he was entitled to the writ. [MARTIN, B.—If liability is admitted, it may be that the prosecutor should say the amount he claims, but

why should he be bound to do so when all liability is denied?] Until the amount is known, it cannot appear whether the proper course is to apply to the justices, or to proceed by arbitration. Thirdly, the *mandamus* to cause compensation to be made is in too general terms; it should have been to do some specific act, as to appoint an arbitrator or otherwise.

*Phipson*, contra, was not called upon to argue.

WILLIAMS, J.—We are all of opinion that the judgment of the Court of Q. B. ought to be affirmed. One question is, whether a party who claims to be entitled to compensation from a local board of health under the Public Health Act 1848, for damage caused to houses by sewerage works, and whose claim is met by a denial of all liability, can sue out a *mandamus* in the first instance against the local board to enforce the making of such compensation. *Prima facie*, a *mandamus* is the proper remedy to compel a public body to perform a legal duty; but here two objections have been raised to the writ. First, it is said that, looking at the provisions of the Public Health Act, and construing them by analogy to similar provisions in the Lands Clauses Consolidation Act 1845, the claimant has mistaken his proper course, and that he himself ought in the first instance to have put in motion the proceedings under sect. 144 of the statute for having the amount of his claim ascertained by arbitration, and then to have brought an action to recover the amount so ascertained wherein the liability of the local board would be determined; and in support of this view, the authority of Wood, V.C., in *The Bradford Local Board of Health v. Hopwood*, 6 W. R. 618, was referred to, where the V.C. certainly held that the Public Health Act in this respect should be construed by analogy to the Lands Clauses Consolidation Act, and that the same mode of proceeding ought to be pursued under both Acts. That decision, however, if upheld, would involve the necessity in all cases of instituting an inquiry which would serve no purpose, and might turn out entirely futile; and as there is nothing in the Public Health Act to constrain us to adopt that construction, we prefer the decision in the Court of Q.B., and think that the course pursued of obtaining a *mandamus* was proper. The next objection is, that no certain amount was claimed for compensation, and that therefore the applicant was not entitled to a *mandamus*. We think that was not necessary. The form of the writ of *mandamus* would not be affected by such a demand, or the future rights of the parties; and as therefore it could lead to no beneficial end, the omission to claim a certain sum by way of compensation is no reason why a *mandamus* should not issue. It was further said, that the Court of Q. B. considered when this case came before it on demurrer (29 L. J. 21, Q.B.), that the claim of a certain amount was a condition precedent to the issuing of the *mandamus*. When, however, that case is looked at, we think that all that was intended was, that such a claim might be necessary when the local board admits its liability, but not that it is necessary when they deny their liability. Lastly, it was said that the writ was in too general terms to enable the local board to obey it. We think there can be no difficulty on this head, if the local board are desirous of doing their duty. If the parties cannot agree, then the claimant may enforce the remedy by arbitration, as provided by the 144th section of the Public Health Act, and so get the amount ascertained.

MARTIN, B. concurred.

WILLIS, J.—Probably there were some circumstances in the case before Wood, V.C., which do not appear in the report, and which might make his decision consistent with that of the Court of Q. B.

CHANNELL, B. and BYLES, J. concurred.

*Judgment affirmed.*

Attorneys for the prosecutor, *Lewis and Sons*.

Attorneys for the defendants, *Norris and Allen*.

[Q. B.]

ILLINGWORTH v. MONTGOMERY.

[Q. B.]

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HESTLERT, Esqrs., Barristers-at-Law.

Wednesday, Nov. 16.

ILLINGWORTH (appellant) v. MONTGOMERY (respondent).

*Highway—Dedication to and use by the public—Sect. 69, 11 & 12 Vict. c. 63.*

*Where a street in a town under the operation of the Public Health Act 1848 had been set out and opened by the owners of the soil in the year 1828, and from that time to the present had been constantly used by the public, but had not since that year been subject to any repairs, and the local board having ordered the owners and occupiers of the houses to sewer, level, pave, &c., the said street, and they having neglected to do so, whereupon the said board themselves did the work and charged the amount to the said owners and occupiers pursuant to sect. 69 of the Public Health Act 1848 :*

*Held, that the facts showed a dedication to and adoption of the street by the public, and that the owners and occupiers were not liable to do the above works.*

This was a case stated for the opinion of the court as follows :—

This was a complaint made to us, the undersigned two of her Majesty's justices of the peace in and for the borough of Bradford, in the county of York, by the respondent, the said John James Montgomery, the assistant surveyor of the said borough, on behalf of the mayor, aldermen and burgesses of the said borough as the local board of health for the district of the said borough, against the appellant, the said Booth Illingworth, for that he, being the owner of certain houses in a street in the said borough called Southgate (not being a highway), and the said street on the 8th Nov. 1851 not being sewered, levelled, paved, flagged and channelled to the satisfaction of the said local board of health, was, together with the other owners or occupiers of premises fronting, adjoining, or abutting upon the said street, on or about the same date duly served with a notice requiring them respectively to sewer, level, pave, flag and channel such parts of the said street as their premises respectively fronted, adjoined, or abutted, upon or before the 8th Jan. then next. That the said notice not being complied with by the appellant, and the said other owners or occupiers aforesaid, the said local board caused the said street to be sewered, levelled, paved, flagged and channelled, and in doing so necessarily expended a large sum of money, to wit, the sum of 248*l.* 16*s.* 6*d.*; the appellant's portion of which, as settled by the surveyor of the said local board of health, amounted to the sum of 46*l.* 0*s.* 1*d.*, was afterwards duly demanded of the appellant, but he hath refused to pay, and hath not paid the same. After hearing the parties, and the evidence adduced by them, we the said undersigned justices did thereupon adjudge that the appellant should forthwith pay to the said mayor, &c., the said sum of 46*l.* 0*s.* 1*d.*, and also the sum of 8*s.* for costs in that behalf; and it was thereby ordered that if the said several sums should not be paid forthwith, the same should be levied by distress and sale of the goods and chattels of the appellant. And it was thereby adjudged that in default of sufficient distress the appellant should be imprisoned in the house of correction at Wakefield, in the West Riding of the said county, for the space of fourteen days, unless the said several sums, and all costs and charges of the said distress, and of the commitment and conveying the appellant to the said house of correction, should be sooner paid. Whereupon the following case was settled.

By the Bradford Improvement Act 1850 the provisions of the Public Health Act 1848 (11 & 12 Vict. c. 63) were duly applied to and put in force within the

borough of Bradford in the county of York, and the mayor, &c., by the council of the said borough, became and were and have ever since continued to be, the local board of health for the district of the said borough; and by the said Bradford Improvement Act, most of the sections of the Public Health Act 1848, including the 68th, 69th, 70th and 129th sections thereof, were incorporated in the said Bradford Improvement Act. Among the streets or ways in the said town and borough of Bradford is one called Southgate, which was set out and opened on or before 1828, since which time it has been used uninterruptedly by any persons who have chosen to make use of it. It was in the first instance well paved and sewered, and no act of repair has been since done to the street by either the owners or occupiers of the buildings fronting towards it. The appellant purchased the land, now his property, fronting to Southgate, in the year 1828, such purchase including one-half of the site of Southgate, so far as co-extensive with his land, and he then agreed with the owner of the remainder of the property that he would appropriate four yards and a-half in width along the whole length of his land for the purpose of forming a moiety of a certain intended public street of the width of nine yards. The portion so agreed to be appropriated had, with the remainder of the street, previously to this time been paved and flagged, and it has ever since formed a moiety of Southgate so far as it is co-extensive therewith. Beyond this agreement between vendor and purchaser, no written instrument of dedication of the street has been given in evidence to us, and no notice has been given to the surveyor of the parish since the passing of the statute 5 & 6 Will. 4, c. 50, of any intention to dedicate the said street or way to the public, nor was any certificate granted by two justices, or enrolled at the quarter sessions as directed by that Act, so as to have rendered the township and borough of Bradford in which such way is situate, thereby liable to repair the same, nor has it ever been repaired by or at the expense of the inhabitants of Bradford at large, or been declared by the said local board to be a highway, nor was it ever repaired by them as such. Southgate is open at both ends, and extends from Westgate to Brick-row, a short street in continuation of Southgate into Thornton-road. Westgate and Thornton-road are two of the principal roads and means of ingress to the town. At the date of the formation of Southgate it was intended, in connection with Brick-row, to form, and did form, a more convenient communication between Westgate and Thornton-road than existed for a distance of a quarter of a mile in either direction. The road called Westgate has, during all the time since Southgate was formed, passed through one of the most thickly populated districts of the town of Bradford; and the neighbourhood of Thornton-road has become gradually filled with manufactories and other buildings. Such being the case, the number of persons passing between the two roads and using Southgate as their nearest and most convenient route, has ever since its formation been very great. For many years previously to the passing of the stat. 5 & 6 Will. 4, c. 50, Southgate was lighted and watched by the commissioners under an old local improvement Act, which was repealed in 1850, and new powers for similar purposes were by the Bradford Improvement Act 1850 vested in the mayor, &c. of the said borough. The powers of the old commissioners under the repealed Act did not interfere with or derogate from the duties or authorities of the surveyor of highways within its limits. In 1851 Southgate not being sewered, levelled, paved, flagged, or channelled to the satisfaction of the said board of health, the said board gave notice to the respective owners and occupiers of the several houses and premises fronting, adjoining and abutting on such parts thereof as required

to be sewerred, levelled, paved, flagged or channelled, requiring them to sewer, level, pave, flag and channel the same accordingly. The appellant was then the owner of certain of such houses and premises, and such notice was duly served upon him as above mentioned, but he refused to comply with it; whereupon the said local board of health executed and caused to be executed the necessary works which were mentioned and referred to in the said notice, thereby incurring expense to a very considerable amount, the said appellant's proportion of which amount, as settled by the surveyor of the said local board, is 46*l.* 0*s.* 1*d.*, and the amount of such proportion is not a matter of dispute. The said sum of 46*l.* 0*s.* 1*d.* was duly demanded of the appellant, but he has refused to pay, and has not paid the same. The said appellant having appeared before the undersigned justices, and the facts before mentioned being duly proved, we did determine and adjudge that the appellant should forthwith pay unto the said mayor, &c., as such board of health as aforesaid, the said sum of 46*l.* 0*s.* 1*d.*; and the ground of our determination was, that the said street or way called Southgate was not (as it was contended by the said appellant to be) at the time of the giving of the notice aforesaid by the said board of health, and of the execution of the works aforesaid, a highway repairable by the inhabitants at large.

If the court shall be of opinion that the said street or way called Southgate was not at the time of giving the said notice and completion of the said works a highway repairable by the inhabitants at large, then the said determination and adjudication shall be affirmed. But if the court shall be of a contrary opinion, then the said determination and adjudication shall be quashed.

*Macle* now appeared in support of the order of justices, and argued that the facts justified the justices below, for that there was no dedication of the road to the public, and it was not therefore repairable by the public, but by the owners of the property as a private street, as provided for by sect. 69 of the Public Health Act 1848. That its not being a public highway was obvious from the fact of its never having been repaired by the public. [COCKBURN, C.J.—That may have been because it did not require repairing. BLACKBURN, J.—Is the fact that it has been repaired by the township a necessary element to make it a public highway?] It is a very strong presumption. It has never been dedicated to the public. [COCKBURN, C.J.—Before the General Highway Act the road need not have been adopted by the township at all. There was a constant stream of passengers, who went through it without let or hindrance.] It is said by Bayley, J., in *Rez v. St. Benedict* 4 B. & Ald. 447, that it is not enough that there had been a dedication of the road to the public to make the parish liable to repair; there must also be acquiescence by the public.

*Mellish*, for the appellant, was not called upon.

COCKBURN, C.J.—If there had been any doubt whether this had been a highway, these circumstances might have been urged in favour of the respondent. But here there is abundant evidence of dedication to the public, and of adoption by the public. I cannot see how the justices could have hesitated for a moment in determining that this was a public highway repairable by the public. The conviction must be quashed.

WIGHTMAN, HILL and BLACKBURN, JJ. concurred.

Conviction quashed.

Monday, June 11.

THE CHELSEA WATERWORKS COMPANY (appellants)  
v. THE PARISH OF PUTNEY (respondents).

Poor-rate—Waterworks—Rating of pipes passing  
through several parishes.

*A waterworks company, by means of reservoirs, pumping apparatus, &c., obtained water in parish A., conveyed it by aqueducts and mains through the soil of parishes B., C., D. &c., and sold it to customers in parish Z. only:*

*Held, that it is not a correct principle of rating for the purpose of one of the intermediate parishes between the parish collecting the water and the parish consuming it, to ascertain the rateable value of the whole apparatus of the company in the several parishes in which it is situate, and then divide it among the several parishes according to the land occupied by the apparatus in each parish.*

This was an appeal made by the Chelsea Waterworks Company, against a rate of the 10th Oct. 1856, for the relief of the poor of the parish of Putney, which rate was charged against the said company upon an assessment of the net value of 8000*l.*

The appeal came on to be heard before the court of quarter sessions for the county of Surrey, held on the 8th April 1857, when it was ordered by consent that the rate should be amended by reducing the said assessment to 3000*l.*, subject to the following case:—

The appellants are the company mentioned in and continued incorporated by the Chelsea Waterworks Act 1852. The company sell water to the inhabitants of a certain district, within which they are empowered to do so by virtue of the above-mentioned Act. This district is situate wholly within the county of Middlesex. The company have no power to sell, and do not sell, any water to any person or persons, or for any purpose, within the parish of Putney, or within the county of Surrey.

The water is obtained in the following manner:—A part of it is drawn off from the river Thames at Seething Wells, in the parish of Kingston, into reservoirs and filtering beds in the said parish of Kingston, and it is then, by means of pumping engines situate in the same parish, forced and conveyed through pipes which are laid down in the parish of Kingston, and other parishes in Surrey, including the parish of Putney, from the said reservoirs and filtering beds in the parish of Kingston, into certain covered reservoirs in the parish of Putney. From these last-mentioned reservoirs the water passes through other pipes which are laid down in the parish of Putney, to the banks of the river Thames, over which it is conducted by pipes, which form an aqueduct across the river, from the parish of Putney to the parish of Fulham, and thence the water is conveyed by means of other pipes into the company's district in Middlesex, where it is supplied to the company's consumers. The residue of the water is taken from the same part of the river Thames at Seething Wells. It is forced by the before-mentioned pumping engines through another set of pipes laid down in the parish of Kingston, and in other parishes in Surrey, including the parish of Putney, into an open reservoir in the parish of Putney, and the before-mentioned aqueduct across the Thames into the parish of Fulham, and thence by means of other pipes into the company's district, where it is delivered for the purpose of street watering. It is essential, for supplying the water in the company's district, either that it should be collected in and passed through the before-mentioned reservoirs in the parish of Putney, or else that some other contrivance should be resorted to for the purpose of keeping the water at a sufficient high level to admit of its flowing to the highest part of the company's district.

It is intended that the water should always be collected into and passed through the said reservoirs. The reservoirs, filtering beds and engines in the parish of Kingston; the reservoirs in the parish of Putney; and the pipes in the several parishes as used by the company, form an apparatus by which water is drawn

Q. B.]

REG. v. THE GLAMORGANSHIRE CANAL COMPANY.

[Q. B.]

from the Thames at Seething Wells, and collected, conveyed and sold and distributed as above mentioned.

The portion of the apparatus which is situate in the parish of Putney occupies nine acres of land, and consists of—

1. Certain pipes (occupying 2a. 3r. 10p. of land) by means of which the water, after being passed through the company's mains in the parish of Kingston, is conducted continuously into one or other of the said reservoirs in the parish of Putney.

2. Certain reservoirs occupying 5a. 1r. of land.

3. Certain other pipes occupying one acre of land, by means of which the water is conveyed from the said reservoirs to the banks of the Thames.

4. Certain other pipes which occupy the remainder of the said nine acres of land, and which form that portion of the said aqueduct across the Thames which lies in the parish of Putney, the remainder of the aqueduct being in the parish of Fulham.

The whole apparatus is so constructed and placed in the several parishes in which it is situate, that a part is rateable in each parish. Each and every part of the apparatus, as the same is constructed, and each and every part of the land occupied by it, is necessarily used and occupied for the purpose of supplying water to the company's customers as before mentioned, and none of the water supplied by the company to its customers can be supplied without the aid of every part of their said apparatus. The profits of the company are derived exclusively from the sale of the said water to its consumers in the said district. The rateable value, according to the Parochial Assessment Act, of the whole apparatus of the company, in the several parishes in which it is situated, is for the purposes of this case to be taken to be a certain sum, which has been agreed upon between the parties, the same being calculated at the rate of so much per acre for all the land occupied by the apparatus.

The charges and deductions which have been taken into account in making the estimate, are those which are specified in the Parochial Assessment Act, and there are no special circumstances affecting the portion of the apparatus which is in the parish of Putney.

It is to be assumed, for the purposes of this case, that the rateable value of the portion of the company's apparatus which is within the parish of Putney, has been ascertained by first taking the rateable value of the whole of the apparatus in the several parishes in which it is situate, then subdividing the amount among the said several parishes according to the quantity of land occupied by the apparatus in each parish.

If that principle be correct, the rate is by agreement to be amended, and is to stand for the sum of 2800*l.* If that principle be not correct, then the rate is by agreement to be amended, and to stand for the sum of 2000*l.*

The question for the opinion of the court is, whether the rate (when amended) ought to stand for the sum of 2800*l.*, or for the sum of 2000*l.*

The Court is to have such powers of dealing with the rate as are possessed by the court of quarter sessions. The costs are to be in the discretion of the court.

May 30.—*Bovill* (Brett with him) for the appellants.—This case is identical with and not to be distinguished from *Reg. on the prosecution of the Overseers of Hampton v. The West Middlesex Waterworks*, 28 L. J. 135, M. C., where this court held that the company was to be rated in Hampton in respect of the plant, engine houses, buildings, mains, &c., as for so much land and buildings with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as those of a water company.

*T. Jones* (Garth with him) for the respondents.—That case did not establish any rule of law; it only laid down a proposition of fact. The true principle is to be

found in *R. v. The Cambridge Gaslight Company*, 8 Ad. & Ell. 73, where it was held that the company were rateable as occupiers of the land in the different parishes by their apparatus, pipes, &c., and were properly assessed upon a sum which a tenant would pay yearly for the apparatus, pipes, &c., deducting the annual average expense of renovating the same, but not the profits of the trade, and deducting also the annual value of the apparatus and pipes lying in extra-parochial land, and that the resulting amount was to be distributed among the assessments of the several parishes in proportion not to the payments for lights in the respective parishes, but to the quantity of land so occupied in each parish. In *R. v. The Brighton Gaslight Company*, 5 B. & C. 446, the company were held assessable in respect of the land occupied by their pipes, and to the extent of the increased value of the land in consequence of its being used by them for the purpose of conveying the gas.

*Bovill* in reply.—The principle of the *Hampton* case, 28 L. J. 135, M. C., is, that a certain part of the works, mains, &c., contribute directly and immediately to produce the profit, and that other parts, though essential to the working of the whole, do not directly and immediately tend to produce the profit. The artificial value of the works to the company is not the same at every point of them. It is like the *Hammer-smith Bridge* case, 15 Q. B. 369, every part of the approaches to which, in one sense, contributed to the earning, yet it was held that the company were to be assessed in an equal sum in the two parishes upon the profits of the bridge, which was half in one parish and half in the other, although the approaches made by the company were not of equal length in the two parishes. (*The Mayor of Liverpool v. West Derby*, 6 Ell. & Bl. 704; *R. v. Mile End Old Town*, 10 Q. B. 208.)

*Cur. adv. vult.*

BLACKBURN, J.—In this case—an appeal by the Chelsea Waterworks Company against the rate made on them by the parish of Putney for the relief of the poor of the parish—the quarter sessions refer to this court only one question. If the principle stated in the sixteenth paragraph of the case is correct, the rate is to be amended and stand for 2800*l.*; if that principle is not correct the rate is to be amended and stand for 2000*l.* The general question as to the principle on which the rateable value of such property should be apportioned, is one of great difficulty and importance, which has recently been the subject of much consideration; but in this case we are not asked or authorised to say what is the correct principle, but only to determine whether this particular principle is right. Now that principle is that the rateable value of the whole apparatus of the company in all the parishes in which it is situate, is to be ascertained and then divided among the said several parishes, according to the quantity of land occupied by the apparatus in each parish. If this principle be correct every square foot of land occupied by the apparatus is to be rated at the same rate, without regard to the situation or nature of the land, whether it was originally part of a barren heath, like Putney-heath, or part of the market-gardens of Fulham, and without regard to whether it be merely land occupied by pipes under the surface of the highway, or whether it be land on which extensive buildings have been erected for the purpose of converting it into filtering beds or reservoirs. We have no difficulty in saying that this principle is not correct. We cannot sanction it, and therefore we must answer the only question put to us by saying that the rate must stand for 2000*l.*

*Rule to be amended accordingly.*

Jan. 18 and July 7.

REG. v. THE GLAMORGANSHIRE CANAL COMPANY.  
Canal—Poor-rate—Local Act—Assessing to the poor-rate.

*The Glamorganshire Canal Company—The mode and principle upon which they should be assessed to the poor-rate, under the provision of their Act, 30 Geo. 3, c. 82, s. 67, local.*

This was a case stated by the Glamorganshire sessions, upon an appeal by the Glamorganshire Canal Company against a poor-rate made for the relief of the poor of Saint Mary, Cardiff. The case stated that the appellants were at the time of making the rate the owners and occupiers of the Glamorganshire Canal, part of which was situate in the parish of Saint Mary, Cardiff. A rate or assessment for the relief of the poor of the said parish, made on the 19th Dec. 1857, was only allowed and published in respect of the defendants as occupiers of land covered by their canal and adjacent tenements and premises. The company appealed on the ground that they were overrated, but on the trial of the appeal the question was confined to the rate on the land under the canal and towing-path. The quarter sessions confirmed the rate, subject to the opinion of the Court of Queen's Bench. The Act for making the canal passed in 1790 (30 Geo. 3, c. 82): sect. 67 enacted "that the said company shall, from time to time, be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the said company in pursuance of this Act, in the same proportion as other lands and grounds lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same was the property of individuals in their natural capacity." At the time of making the canal, and previously, the lands adjacent to each side were of very much less value than at present. The land was then let at the usual rent for land in the neighbourhood of towns; but now, owing to the increase of population in Cardiff, the land adjacent has been built upon and converted into wharves and yards, and is of the value of 6d. per square yard. The average rateable value of the land nearest to the canal on the east side is about 3*l.* per acre. On the west side the lands are rated as wharves and yards at about 5*l.* per square yard. Beyond these wharves is a piece of land let as mere land, and rated at about 3*l.* per acre. The canal was, until the present rate, rated at the average annual rateable value of the land used as mere land nearest thereto. By the present rate the canal company are rated for the bed of the canal in the same proportion as the lands and grounds lying near thereto are rated in the same assessment, and in the same proportion as they would be rated in case they were the property of individuals in their natural capacity. The canal company contended that, under the 67th section of their Act, they were only liable to be assessed at the rateable value of the land lying near thereto, which at the time of the rate was used as mere land, or else at what would have been the rateable value of land adjoining, if the same had remained mere land. The court of quarter sessions found that the canal was not overrated, if the correct principle is to rate the lands and grounds in the same proportion as the lands and grounds lying near are rated as occupied at the time of making the rate, and as if the lands and grounds were the property of individuals; but that the appellants are overrated if their lands and grounds should have been assessed as the lands and grounds lying near would have been assessed if they had been continued to be used as mere land. The question for the opinion of the Court of Q. B. is, whether the principle of assessment adopted by the respondents is based upon the correct construction of the provisions of the Act regulating the rating of the company's lands. If the court shall be of that opinion, then the order of the court of quarter sessions is to stand, and the rate to remain at the full sum at which the canal and premises have been assessed by the respondents. If the

court shall be of a contrary opinion, then the rate is to be amended by reducing it to the amount of the former assessment.

*Field and Bowen* now appeared for the respondents.

*Borill, Q. C., Hughes and Giffard* for the appellants.

The following cases were cited:—*R. v. The Regent's Canal Company*, 6 B. & C. 720; *R. v. The Monmouthshire Canal Company*, 3 Ad. & Ell. 619; *Reg. v. The Grand Junction Canal Company*, 7 W. R. 597; *R. v. The Grand Junction Canal Company*, 1 B. & Ald. 289.

The facts and arguments sufficiently appear from the following judgment:—

*July 7.*—COCKBURN, C. J.—In this case the question turns upon the effect of a clause in the Canal Act, whereby the proprietors are protected against being rated in respect of the increased value of the land occupied by the canal by reason of its being so occupied, by a provision that the company shall be rated in the same proportion as other lands and grounds lying near the same are or shall be rated. A state of things has arisen which evidently is very different from that contemplated by the Legislature at the time the Act passed. The object of the enactment was to give immunity to the canal company against being rated in respect of the increased value of land, resulting from its occupation by the canal, as distinguished from its previous value as used for agricultural purposes; but in the new state of things which has arisen the adjoining land, instead of being inferior, has, by its being used as wharves and its application to building purposes, become of greater value than the soil occupied by the canal. The provision which was intended for the benefit of the canal company has thus become a means of casting an additional burden on them, and entails on them considerable hardship. Nevertheless, we are of opinion that full effect must be given to the enactment, its language being clear and precise. It is not competent to us to modify its provisions in order to meet a state of things which, if it could have been contemplated by the Legislature at the time of the passing of the Act, would probably have been provided against. Relief, in such a case, can only be sought at the hands of the Legislature, whose province we should be usurping if we were to put a construction on the Act different from what its terms warrant in order to meet the equity of the case. We have no hesitation, therefore, in rejecting the proposed construction that we are to consider not only what is the rateable value of the land immediately adjoining the canal, but that of the nearest agricultural land, no matter how far off, in order to give effect to what the Legislature had in view in passing this clause. The enactment is clear and unambiguous, that the land occupied by the company shall be rated in the same proportion as the adjoining lands. The court cannot construe the enactment differently, because the relative value of the land occupied by the canal, and of the adjoining land, have become changed. But a new difficulty presents itself, from the circumstance that the adjoining lands are no longer rateable simply as land. They have become, in many instances, covered by buildings of a valuable description, and the value of the land becomes as it were merged in that of the buildings by which it is covered. It is possible, however, to ascertain the value of the land as applicable and subservient to building purposes, as distinguished from the joint value of the land and buildings. But here a new difficulty presents itself. By the Parochial Assessment Act property is to be rated according to the rent which a tenant from year to year might be expected to give for it. Now a tenant from year to year would not give for the land in question a rent equivalent to its value for building purposes; it is only in the hands of the lessees with a long term that the land would have this larger value. For this reason this court then, consisting of my Lord

Campbell and Erie, C.J., in the case of *Reg. v. The Grand Junction Canal Company*, held that a provision similar to the present, that land occupied by a canal company was not liable to be rated otherwise than as agricultural land, notwithstanding that the adjoining land was occupied as land covered with buildings. We cannot, on consideration, bring ourselves to acquiesce in the propriety of this decision. It appears to us, then, in applying the Parochial Assessment Act to such a case as the present, the criterion is not what a tenant from year to year would give for the land to be rated, that is, the land occupied by the canal company, but what such a tenant would give for the adjoining land, according to the value at which the land in question is, by the provision of the enactment which we are called on to construe, to be rated. Now the adjoining land being built on, is worth so much to a tenant from year to year as land built upon. In the yearly rent for the buildings, a certain proportion of the rent must be taken as part in respect of the land occupied by the buildings. That proportion, larger no doubt than the value of the land, if not applied to building purposes, is capable of being ascertained. In our opinion, the rateable value of the land should be taken to be the proportion in which the lands and grounds lying near the canal in question are rated within the 6th section of this Act of Parliament, and consequently is the proportion in which the land occupied by the canal is to be rated. To rate the latter, according to what a tenant from year to year would give independently of what such a tenant would give for the adjoining land, is, at it seems to us, to rate it independently of the rating of the adjoining land; in other words, to give no effect to the provision in the section, according to which the rating is to be made. We hold, on these grounds, that the position taken by the argument of the appellants, that the whole of the land in question ought to be rated as mere land, is not tenable as relates to the adjoining land when built upon or made into wharves; but where the adjoining land has not been applied to such purposes, it must be rated as land under the Parochial Assessment Act, and cannot therefore be rated as land applicable to building purposes; at all events, beyond what a tenant from year to year would give for it for such a purpose. It appears to us that the principle on which the rate should be made is, that the land covered by buildings valued as we have already pointed out, should be brought into calculation with the land of the other description in each particular parish, and that the land occupied by the canal should be rated according to the aggregate value of the whole. This can of course be at best but a rough estimate, but it appears to us to be the only means of giving effect to the provisions of the various Acts of Parliament. The rate must therefore be amended accordingly.

*Rate to be amended.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and R. VAUGHAN WILLIAMS, Esqrs., Barristers-at-Law.

Friday, June 8.

THE LLANDAFF AND CANTON DISTRICT MARKETS COMPANY (appellants) v. LYNDON (respondent).

*Statute—Construction of—The Llandaff and Canton District Markets Act 1858, sect. 25.*

*The 25th section of the Ll. and C. District Markets Act enacts, that "every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place, or the market-house and market-places to be established under this Act, or in his own dwelling-house or in any shop attached to and being part of any dwelling-house), any article in respect of which tolls are by this Act authorised to be taken, other than eggs,*

*butter and fruit, shall forfeit and pay to the company any sum not exceeding 40s. Provided always, that nothing herein contained shall restrain or prohibit any person from crying or exposing for sale, or from selling from door to door, within the limits of this Act, any such articles as aforesaid, provided such person or persons shall have first paid for such articles the regular market tolls or duties."*

*L., a licensed auctioneer, sold horses by auction within the limits of the Act, in a private yard belonging to H.:*

*Held, that horses were "articles" within the meaning of the Act; that the yard was not L.'s dwelling-house, or a shop, within the exception, and that L. ought to have been convicted under the above section.*

This was a case stated for the opinion of the court, pursuant to stat. 20 & 21 Vict. c. 43.

CASE.

At a petty sessions for the borough of Cardiff, in the county of Glamorgan, held on the 13th Feb. 1860, the respondent appeared before us in pursuance of a summons, charging him with having on the 4th Feb. inst. unlawfully exposed horses for sale at the town of Cardiff, within the limits of the Llandaff and Canton District Markets Act 1858. By sect. 4 of the said Act (a copy of which accompanies, and is to be referred to as part of this case) the parishes of St. John the Baptist and St. Mary, comprising the borough and town of Cardiff, are included within the limits thereof. Sect. 25 of the said Act enacts as follows:—"Every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place, or the market-house or market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house), any article in respect of which tolls are by this Act authorised to be taken, other than eggs, butter and fruit, shall forfeit and pay to the company any sum not exceeding 40s."

By sect. 26, the company are required, within eighteen calendar months from the passing of the Act, to construct and open for public use, the cattle-market, by the Act authorised to be made; and from and after the opening of such market no other market and fair for the sale of live cattle shall be held.

The Markets and Fairs Clauses Act 1847, incorporated with the said Llandaff and Canton District Markets Act, by sect. 13 enacts, "that after the market-place is opened for public use, every person, other than a licensed hawk, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-house or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, shall for any such offence be liable to a penalty not exceeding 40s."

At the hearing, the opening of the markets constructed under the Act was admitted. A local newspaper was put in by complainant, hereinafter called the appellant, which contains the following advertisement:—

"Mr. Lyndon's announcements. Horses for sale.—Mr. Lyndon begs to announce that he will sell by auction, on Saturday, the 4th Feb., at Holland's Horse Repository, Working-street, a number of excellent horses, comprising several draft horses, useful and handsome hacks and others, five or six hawkers' carts, dog carts and gigs. Several sets of cart and other harness, saddles, bridles, &c. The auctioneer begs to call the attention of intending purchasers to this sale, as a large proportion of the horses and other things can be highly recommended. Sale to commence at two o'clock. Auctioneer's office, Institute-chambers, Cardiff. Jan. 27, 1860."

A witness was called by appellant, who deposed that he went on the 4th Feb. to Holland's repository in Working-street, Cardiff, and saw some horses put up for sale by public auction by the defendant Lyndon,



C. B.]

MASON v. THE BIRKENHEAD IMPROVEMENT COMMISSIONERS.

[Ex.]

and, on cross-examination, that the place where the horses were sold is a private place, entered by an archway, which leads to a yard at the side of Mr. Holland's house. A witness was called on behalf of Lyndon, who deposed that he knew Holland's repository, that it is private property, and leads nowhere, and is all in Holland's hands and within his gates. The defendant's licence as an auctioneer (a copy is hereto annexed) was put in. On this state of facts it was urged by the appellant that the place where the horses were sold was not within the exception of sect. 25; that at all events a sale of horses by auction publicly advertised in newspapers, held in a yard to which the public were admitted without restriction, is not exempted from the operation of the Act.

For the defendant it was urged that he being an auctioneer, was protected, and the licence and the 8 & 9 Vict. c. 15 were relied on in support of this view, and that the place of sale was a private place, and within the exception of the company's Act, s. 25.

We were of opinion that the place where the auction took place, being a private yard, forming part of the dwelling-house and premises of Holland, came within the exception of the 13th section of the Markets and Fairs Clauses Act 1849, and the 25th of the Llandaff and Canton Markets Act, and we thereupon dismissed the information.

The appellant being dissatisfied with our determination as being erroneous in point of law, applied to us in writing within three days after such determination, to state and sign a case for the opinion of the Court of Common Pleas, in compliance with which application we hereby state this case, and pray the opinion of the court thereon. (Signed)

*Giffard* for the appellant.—The Legislature, by sect. 25 of the special Act, creates a monopoly, and prevents the sale of live cattle within the limits of the Act in any place except those specified; and that section provides a summary remedy in lieu of an action on the case for a disturbance of the market, and for the purpose also of protecting persons selling in their own houses. Horses are clearly "articles" within the section. Then Lyndon is not selling in his own dwelling-house, but in Holland's. He cited *The Prior of Dunstable's* case, in a note to *Mooley v. Walker*, 7 B. & C. 47. He is therefore not within the exception. He is an auctioneer come to sell the horses of other persons. The fact of its being a private place makes no difference. It is not "his dwelling-house," nor is it a "shop attached to and being part of any dwelling-house."

*Coleridge* for the respondent.—An auctioneer having a licence under 8 & 9 Vict. c. 15, s. 2, would have a right to sell as the respondent did, but for the special Act. Does that Act in terms take away that right? It is submitted it does not: (*Williams v. Prichard*, 4 T. R. 2.) But what was done was within the exception in sect. 25. The shop of a horse-dealer is his yard; moreover, horses are not "articles" within the meaning of the section. He referred to sect. 15 of 10 Vict. c. 14. Horses are not cried from door to door, nor are they subject to inspection.

*ERLE, C. J.*—I am of opinion that a horse is an article within the 25th section of the special Act. The statute authorises the making of a market, and gives certain tolls to those who go to the expense of constructing and repairing it; and I think the Legislature used the word "article" so as to include all things for which tolls are to be levied. It seems to me to be intended by the Legislature that the proprietors of the market should be remunerated; and sect. 26 provides for a cattle-market, and no toll is to be taken unless accommodation is provided. Can it be said that persons may send their horses free of toll? It is said that horses do not come

within the meaning of the word "articles," because they are not cried from door to door. A person is not likely to take horses from door to door, but he may do so if he pleases. The statute says he may sell from door to door, having paid the tolls. I think the words of the Act, as to inspection, have nothing to do with this case. Then is the auctioneer within the exception that he is not to be liable if he sells in his own dwelling-house, or in any shop attached to and being part of any dwelling-house? He sells in a yard of Holland's. It is not his own. And I do not think it is a dwelling-house within the statute. I think that means a dwelling-house in the popular sense of the word, and the more so because the special Act adopts the general statute as to markets and fairs, where the exception is "except in his own dwelling-house or shop."

*WILLIAMS, J.*—I am of the same opinion. As to his being an auctioneer, it is only where the sale is lawful that his licence protects him.

*WILLES and BYLES, JJ.* concurred.

*Opinion of the court in favour of the appellant.*

## COURT OF EXCHEQUER.

Reported by F. BAILLY and JOHN DUNBAR, Esqrs., Barristers-at-Law.

June 2 and 21.

MASON v. THE BIRKENHEAD IMPROVEMENT COMMISSIONERS.

*Negligence by servants of commissioners—Notice of action requisite—Sufficiency of notice.*

*The plaintiff, by the alleged negligence of the servants of the defendants, the Birkenhead Improvement Commissioners, sustained an injury for which he brought an action. Previously to the action he sent a letter signed by himself to the defendants, which he alleged was a sufficient notice of action, if any was required:*

*Held, that under the statute for the improvement of Birkenhead by the commissioners (local and personal Act, 3 Will. 4), the alleged negligence was the negligence of the defendants' servants, and notice of action was necessary, and that the notice given in this case was insufficient.*

This was an action brought against the defendants, as the Birkenhead Improvement Commissioners, for negligence, in consequence of which alleged negligence the plaintiff, as he stated, became injured. Under the 201st section of 3 Will. 4, c. lxxviii. (the Act being local and personal), thirty days' previous notice of action is required to be given, signed by the attorney, &c., &c. It enacts that "no plaintiff shall recover in any action or suit to be commenced against the said commissioners, or any of them, or any other person for anything done, or to be done, in pursuance or under the authority of this Act, unless notice in writing, signed by the attorney for the plaintiff, and specifying the cause of such action, shall have been given to the defendants thirty days before such action shall be commenced, nor shall the plaintiff recover in any such action if tender of sufficient amends shall have been made to him, or his attorney, by or on behalf of the defendant before such action brought; and in case no such tender shall have been made, it shall be lawful for the defendant in any such action, by leave of the court after such action shall have been brought, at any time before issue joined, to pay into court such sum of money as he shall think fit, whereupon such proceeding, order and judgment shall be made and given in, and by such court as in other actions where the defendant is allowed to pay money into court."

The plaintiff, in a letter addressed to the chairman of the commissioners, said that he left his house, which was in Price-street, at six o'clock, p.m., on the 17th Jan. 1859, and "I crossed Price-street and proceeded along

[Ex.]

REG. v. EDWARD GONNE BELL.

[IRELAND.]

the flagged footway, on the right hand, towards Watson-street, and when I arrived near Mr. Smith's, 'the British Queen,' I walked precipitately into a large heap of setts or gutter stones, lying on the footway, and in endeavouring to extricate myself was propelled forward headlong on the opposite flags, and upon which these formidable stones had been left in a heap."

The attorney for the plaintiff had written and sent the following letter:—

"10, Price-street, Birkenhead, May 30, 1859.

"Gentlemen,—I am instructed by Mr. John Mason, of 144, Price-street, to apply to you for compensation for the very serious injuries he sustained in the month of January last, through the carelessness of your servants in leaving a quantity of channel stones in the street, without any protection to the same. My instructions are to commence legal proceedings if no satisfactory arrangement is made.

"Your obedient servant,

"SYDNEY OTWAY HUSBAND.

"The Commissioners of Birkenhead."

The action was commenced on the 12th Nov. 1859.

Defendants pleaded:—1. Not guilty; and 2. That no sufficient notice had been given to the defendants, in compliance with the before-mentioned Act of Parliament, before commencement of the suit.

The cause was tried at Chester before R. Gurney, Esq., when a verdict was found for the plaintiff, 150*l.* damages, leave being reserved to move to enter a verdict for the defendants, and a rule nisi having been obtained accordingly to enter the verdict for the defendants on the second issue, on the ground that the notice of action was insufficient, pursuant to leave reserved, or for a new trial on the ground that there was no evidence to go to the jury of negligence on the part of the defendants, or that the verdict was against the evidence on the question of negligence.

Bossan showed cause, and contended that under the circumstances of the case, this being an action for negligence, no notice of action at all was necessary. It was not for anything done under the Act of Parliament, but for omission on their part to do what they should have done. If notice of action should be held to be requisite, then the plaintiff's letter signed by himself was a sufficient compliance with the terms of that local Act.

Webb (Mr. Intyre with him) in support of the rule.—The sections of the local Act are to be liberally construed. The defendants have properly discharged their duties, but they have not done anything whatever beyond their duty. Notice of action was necessary in order that amends, if thought expedient, might before action have been tendered, and clearly the plaintiff's letter was an insufficient notice: (*Norris v. Smith*, 10 A. & E. 188; *Martins v. Upcher*, 3 Q.B. 662; *Breese v. Jerdein*, 4 Q.B. 585; *Jacklin v. Fytche*, 14 M. & W. 381; *Leary v. Patrick*, 15 Q.B. 226.)

The COURT intimated that the argument might be continued on a future day if required. *Adjourned.*

June 21.—BRAMWELL, B. said:—We told Mr. Webb we would let him know whether we required to hear him further upon it. We do not. One objection taken was, that there was no sufficient notice of action, and that notice of action was required. It is not necessary to go into what was suggested on the notices; it is manifest on an examination of them they were not good notices. The doubt entertained was, whether notice of action was required. That doubt existed in my own mind. The action being one for negligence, I had a doubt whether there ever was a necessity for notice of action in a case of negligence. There may be cases in which notice of action is not necessary. Under the terms of the statute, where the negligence is the negligence of servants, then I do not see any reason why, if ever notice is given, it should not be given in that case. The negligence, if any, was

[MAG. CAS.]

the negligence of the defendants' servants. We think they were entitled to the protection of notice of action being given; consequently the rule will be made absolute.

Webb.—Since arguing the case, I have discovered a case in which, under circumstances identical with the present, it was held that notice of action was necessary.

CHANNELL, B.—I agree with my brother Bramwell in thinking that notice of action was necessary; but I should say that I have had an opportunity of consulting the learned gentleman who tried the cause, and he is anything but satisfied with the verdict for the plaintiff.

Rule absolute.

Price, Abchurch-lane, attorney for plaintiff.

Eyre and Lawson, for Wain and Ball, Birkenhead, attorneys for defendants.

## Ireland.

### COURT OF QUEEN'S BENCH.

Reported by JOHN HEELEY and WILLIAM BARLOW, Esqrs., Barristers-at-Law.

Friday, June 17.

(Sittings in Banco before HAYES, J.)

REG. v. EDWARD GONNE BELL.

*Certiorari—Coroner's inquisition—Venue, change of—Jurors—Trial, impartial—Manslaughter.*

*Where it prima facie appears to this court that a fair and impartial trial cannot be had in a particular place, and such is not dispensed by a strong case in answer thereto, the court will grant a certiorari to remove the proceedings into the Queen's Bench to enable an application to be made to have such case tried in some other jurisdiction.*

This case came before the court upon a motion to make absolute, notwithstanding the cause shown, a conditional order of the 7th June 1859, whereby it was ordered that a writ of *certiorari* should issue directed to the clerk of the Crown for the county of the city of Limerick, to remove into this court all and singular inquisitions and depositions taken or made before the coroner in the said county of the city, on or about the 25th May 1859, for the purpose of having the venue changed from the county of the city of Limerick to the county of Limerick, on the grounds that the parties charged with manslaughter under the said inquisition could not have a fair and impartial trial in the county of the city of Limerick, unless cause should be shown within three days after the service of the order upon the solicitor for the next of kin of the deceased at his registered town lodgings, and upon the Crown solicitor. It appeared from the following affidavits which had been filed to ground the motion for the conditional order, from the affidavit of Edward Gonne Bell, R.M., that, at an inquest held at Limerick before the coroner, on view of the bodies of three persons, a verdict of manslaughter was, on the 25th May 1859 returned by the jury against Edward Gonne Bell and a party of police who were under his charge upon the evening of the 4th May 1859, at Broad-street, in the city of Limerick, during the election for the said city of Limerick, when very angry and bitter feelings were excited; that very many of the persons who would be likely to serve as jurors in the said city took a very warm interest in the said election on behalf of the popular candidate, and exerted themselves very much in bringing up voters; that he truly believed that it would be impossible to have a jury empanelled for his trial and said party of police who would enter upon the trial and listen to the defence with unbiassed and unprejudiced minds; that the circumstances connected with the unhappy occurrence have been repeatedly discussed among all persons

[IRELAND.]

REG. V. JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE.

[IRELAND.]

in the said city; the deaths of said men and the firing of said police were referred to in placards posted throughout said city, in which it was stated that the people were shot down by the Orange underlings of the Derby Government; that the conduct of said Bell and the police has been canvassed and commented on by several of the local newspapers, which have been widely circulated in said city, and in several numbers thereof said occurrence has been designated in the strongest language as "an awful effusion of innocent blood," "murderous outrage," "Broad-street slaughter," "hideous and revolting case," &c.; that a committee has been appointed to collect subscriptions for the families of the sufferers, and about forty gentlemen were appointed members of said committee, among whom are many who are likely to form the petty jury panel at the ensuing assizes. There were also affidavits from the county inspector of police, and from the said Edward Gonne Bell's solicitor, strongly corroborative of the above facts. There were only two affidavits filed as cause—one by the town agent of Joseph Murphy, who was the solicitor for the next of kin of the deceased; and the other by fifteen of the persons who composed the coroner's jury on the occasion of the said inquest. The former affidavit stated that the verdict on the inquisition was given on the 25th May 1859, and no motion for the *certiorari* was made until the 6th June 1859; and that the said solicitor for the next of kin was not present during the entire of the proceedings before the coroner, and was not aware of all the facts stated in the affidavits filed to ground the motion for the conditional order; and that the said solicitor was then absent from town, and that within the three days allowed for showing cause it was wholly impossible to have the necessary affidavits filed to displace the many erroneous statements which he was informed were contained in the said affidavits. The second affidavit, filed as cause by the fifteen jurors, stated they were astonished at hearing that it had been alleged that they had been intimidated into finding the said verdict; no intimidation was practised, and they would not submit to any; that they were summoned by the police in the usual way; that they found the said verdict on the evidence laid before them, totally uninfluenced by any other consideration than that of honestly discharging an invidious public duty.

*James Murphy* (with him *J. Clarke*, Q.C.), for Edward Gonne Bell, submitted that under the circumstances the conditional order for a *certiorari* should be made absolute.

*Andrew Vance*, on behalf of the Crown, appeared to say that it seemed almost a matter of right the *certiorari* should issue.

*O'Hagan*, Q.C. (with him *Charles Barry*) contra, for the next of kin of the deceased.

*Clarke*, Q.C. objects that on a motion of this nature, counsel on behalf of the next of kin should not be heard, as the matter should rest between the party charged and the Crown.

*James Murphy*.—In the *Six-mile Bridge* case it was held, that the only persons who could be heard on a motion such as this, was the Crown and the prisoners.

*Charles Barry*.—I was in that case for the next of kin and was heard; and in the case of *Reg. v. Palmer*, 5 E. & B. 1024, counsel appeared for the next of kin and were heard.

*Clarke*, Q.C.—There is a marked distinction between cases of this sort in England and in Ireland, for in the former the cases are taken up by private prosecutors, but in the latter the prosecutions are taken up and prosecuted by the Crown. [HAYES, J.—There is some difference between a coroner's inquisition and a case which has undergone a magisterial investigation; for in the former the party is not bound to prosecute at all, but in the latter the witnesses are generally bound over by the magistrates to prosecute. I am inclined, as the

learned judge who made the conditional order made it a part of the same that the solicitor for the next of kin should be served, and as the next of kin now appeared by his counsel, and as this is a matter having reference to a coroner's inquisition, and as I have heard all that one side has to say in this matter, to hear what those on behalf of the next of kin have to say why I should not make absolute this conditional order for a *certiorari*.]

*O'Hagan*, Q.C.—Three days being only allowed for showing cause against the conditional order, we could not procure affidavits in reply within that time. The object of this motion is clearly to postpone this trial from the next to the spring assizes 1860. The verdict of the coroner's jury was given on the 25th May 1859; the conditional order was not applied for until the 6th June. If now that order be made absolute, the inquisition will be returned, and no motion for a change of venue can be made until after plea pleaded in this court: (*Reg. v. Forbes*, 2 Dowl. P. C. 440.) The laches of the parties is enough here to have this motion refused. The application to have it tried by a jury from the county can be made to the judge at the trial at Limerick.

*C. Barry*.—We are here on an *ex parte* motion, for it was impossible within the time allowed we could have any affidavits in reply.

*Clarke*, Q.C. in reply.—Where a *prima facie* case, such as here, is made, that it would be unlikely that a fair trial would be had in any particular place, it is almost a matter of course to grant the *certiorari* to remove the proceedings, unless a strong case be made out on the other side. In this case there has not been an affidavit made even by the attorney of the next of kin, stating even his belief that a fair trial could be had in the city of Limerick: (*R. v. Holden*, 5 B. & Ad. 347.)

HAYES, J.—This case comes to a very narrow point, for I have nothing now to do with many of the discussions which have been raised during the progress of this motion. I have only now to deal with the question whether a *certiorari* should issue in this case or not, and this case I will deal with merely on legal grounds, and I will deal with the materials, such as they are, which I have before me. It has been said that the shortness of the time which was allowed for showing cause did not allow of affidavits being filed in answer. If that were so it would have been open to the parties to have come here with an application to extend the time for filing affidavits as cause. This was not done, and two affidavits only were filed: so I must now deal with the case as I find it, bearing in mind that this was a very serious charge, and a case occurring within a very limited jurisdiction, and bearing in mind the circumstances of this case. I do not see any reason why I should not grant this motion; and, without giving any opinion on any of the extraneous matters which have been discussed during the progress of this motion, I will only say I think this *certiorari* should go.

*Rule accordingly.*

[A similar rule was made subsequently to bring up any indictments which may be found against Mr. Bell or the police at the ensuing assizes.—REF.]

REG. ON THE PROSECUTION OF GEORGE PORTER v. THE JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE.

*Certiorari*.—Interested magistrate sitting on the bench —Declaration by interested magistrates at the sitting of the court of his intention to take no part in the proceedings—Proceedings not thereby invalidated.

G. P. was convicted at the petty sessions for wilful and malicious trespass, on the respective complaints of the Marquis of A. and of H.; H. and his father, who were justices of the peace, and joint agents of the Marquis of A., sat upon the bench during the

[IRELAND.]

REG. v. JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE.

[IRELAND.]

*hearing of the case, having made an audible and distinct declaration at the sitting of the court that they did not intend to take any part in the proceedings:*

*Held, that the presence of these magistrates on the bench did not invalidate the proceedings, and a motion for a certiorari was, therefore, refused.*

This was a motion to make absolute a conditional order obtained on the 14th of January, for a *certiorari* to be directed to the justices of the peace for the county of Tyrone, "to remove into this court all and singular the orders and convictions, for whatsoever trespasses and offences, whereof at a petty session held at Strabane on the 1st of August 1859, on the respective complaints of the Marquis of Abercorn and T. W. D. Humphreys, the said George Porter stands convicted, in order that the same may be quashed, on the grounds that the said orders were invalid on the face of them, that the jurisdiction of the justices to entertain the said complaints or make the said orders was ousted by reason of a question of title to do the acts complained of having arisen on the investigation thereof; that no offence was in fact proved against the said George Porter; and that the said T. W. D. Humphreys and John Humphreys, two of the justices who presided at the petty sessions, were interested therein, as agents of the said Marquis of Abercorn; and inasmuch as one of the said complaints was at the instance of the said T. W. D. Humphreys;" unless cause shown. The question of title alleged to be involved in this case, and on which the prosecutor grounded the present motion, arose from the following state of facts:—The father of the prosecutor became tenant from year to year, under Captain Patterson, of a farm of land containing about fifty acres, at the yearly rent of 64*l.* 1*s.* 4*d.*; and continued in occupation of the lands as such tenant until the time of his death, which occurred in the year 1840, when the prosecutor's mother Margaret Porter entered into possession. On the death of Captain Patterson, in the year 1841, the Marquis of Abercorn became the purchaser of his interest in the lands, which was an estate for lives renewable for ever. By articles entered into on the occasion of the prosecutor's marriage in the year 1849, Margaret Porter assigned over her interest in the farm to the prosecutor, and the prosecutor continued to cultivate the lands and to pay the rent, but the rent receipts were made out in the name of Margaret Porter. In the month of June 1858, two years' rent having become in arrear, a civil bill ejectment was brought for the recovery of the lands: this proceeding, however, was abandoned, as the case was not within the assistant barrister's jurisdiction, the rent exceeding 50*l.* In the month of October following an arrangement was entered into between Margaret Porter and John Humphreys, who was land agent of the Marquis of Abercorn jointly with his son T. W. D. Humphreys, that the lands should be surrendered to the Marquis of Abercorn, and that upon payment of the sum of 100*l.* Margaret Porter should be relieved from all liability with regard to the arrears of rent. This arrangement was shortly afterwards carried out, and possession of the premises given up; and on the same day an undertaking in writing was signed by George Porter to become caretaker on the farm up to the 1st Feb. 1859, and to give up peaceable possession on that day. Upon this undertaking being entered into, George Porter was permitted to resume occupation of the dwelling-house. It was alleged in the affidavit of George Porter, that the possession of the lands was so given up, and the undertaking entered into, on the belief that a decree had been obtained in the civil bill ejectment at the previous June sessions; and that that belief was founded on the statement of the bailiffs of the Marquis of Abercorn, to whom the possession had been surrendered, that such a decree

had been obtained. The bailiffs, however, in their affidavits denied having made any such statement. The lands, as appeared from the affidavit of T. W. D. Humphreys, continued from that time in the occupation of the Marquis of Abercorn, and were cultivated at his expense. The prosecutor continued in the occupation of the house until the following spring, when possession having been demanded, according to the terms of the undertaking, and refused, a civil bill ejectment was brought at the June sessions 1859, and a decree obtained for the possession of the dwelling-house. From this decree the prosecutor appealed to the ensuing assizes; and the appeal having been heard by Hughes, B. at the Omagh assizes, on the 19th July 1859, the assistant barrister's decree was affirmed. Subsequently to the affirmation of this decree, the trespasses were committed, the convictions for which were now sought to be set aside. These convictions were five in number, and were made at the petty sessions held at Strabane on the 1st of August 1859; two of these convictions were made at the complaint of the Marquis of Abercorn against Joseph Lafferty and Patrick Byrne, who were in the service of George Porter; and of the remaining three convictions, two were on the complaint of the Marquis of Abercorn against George Porter for wilful and malicious trespass; and the remaining one on the complaint of T. W. D. Humphreys against the said George Porter for wilfully and maliciously letting loose an entire horse in a field the property of the Marquis of Abercorn, in which the complainant's mare was working, by reason whereof the mare was injured, and the life of the man who was working with the mare endangered. It appeared that the summonses which were served on the said George Porter, Joseph Lafferty, and Patrick Byrne, were signed by John Humphreys, and that they were served about one o'clock on Saturday the 30th July, to appear on the following Monday. The prosecutor's affidavit stated that, when the case came on to be heard, his attorney produced him as a witness, but that the magistrates refused to permit him to be sworn; that from the short time which he had to prepare for his defence, he was unable to procure the attendance of any other witnesses; that his attorney applied for an adjournment, but that the application was refused, except upon conditions, which the prosecutor could not accede to, as being detrimental to his case. The prosecutor further stated that, at the commencement of the case, both John Humphreys and T. W. D. Humphreys were seated on the bench, and that, though remonstrated with by his attorney, they continued to sit there during the hearing of the case; and that not only did they sit on the bench, but that they took part in the proceedings; and this latter statement was corroborated by the joint affidavit of Alexander Cummins and Robert M'Connell, both of whom deposed to the same fact. On the other hand, the affidavit of John Humphreys stated "that it was wholly untrue that the deponent or his son acted magisterially in any of the cases against George Porter on the 1st Aug. 1859, or in any way whatsoever, at the said petty sessions, and they distinctly expressed that they would not act magisterially on the said day." And the affidavit of T. W. D. Humphreys was to the same effect, "that it was wholly false that deponent acted as a magistrate in his own case, or in any of the cases at the suit of Lord Abercorn against the said George Porter;" and further, "that the deponent abstained altogether from acting as a justice in any case whatsoever on the said day, and at the commencement of the proceedings he distinctly and audibly stated that he was not there as a magistrate, and would not act as such on that day, and that when the justices retired to deliberate on the cases, the deponent and his father remained in the court-house with the general public." These statements were corroborated by the

[IRELAND.]

REG. 2. JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE.

[IRELAND.]

affidavits of all the magistrates who sat on the bench on that day.

*M'Donogh, Q.C.* (with him *R. Dowse*) in support of the motion.—The 8th section of the Summary Jurisdiction Act, 14 & 15 Vict. c. 92, which provides penalties for wilful and malicious trespass, contains a proviso exempting from its operation trespasses committed under a reasonable supposition of title. There may have been a reasonable belief in the mind of the prosecutor that the delivery of possession to the bailiffs and the undertaking which was entered into on his part in Oct. 1859, did not constitute a valid surrender of the premises, as he has stated in his affidavit that he acted under the belief, grounded on the statement of the bailiffs, that a decree had been obtained in the civil ejectment. Again, these convictions ought to be set aside, as being made by an improperly constituted tribunal. It is admitted that both John Humphreys and T. W. D. Humphreys sat on the bench during the progress of the case; and the affidavit of the prosecutor, as well as that of Alexander Cummins and Robert McConnell, state that they took part in the proceedings: (*Reg. v. Justices of Surrey*, 1 Jur. N.S. 1138; *Reg. v. Sir Hugh Massey*, 7 Ir. C. L. 211.) It is not merely necessary that justice should be administered by uninterested tribunals, but that the appearance presented to the public should be such as to remove from their minds every suspicion that the source of justice is impure: (*Dimes v. The Grand Junction Canal Company*, 17 Jur. 73; *Reg. v. The Justices of Cork*, 2 Ir. Jur. N.S. 304.)

*Fitzgibbon, Serjt.* (with him *Armstrong, Q.C.*) showed cause.—All the magistrates who sat on the bench on the day when these convictions were made have sworn affidavits. In each of these affidavits there is a distinct and positive statement that neither John Humphreys nor T. W. D. Humphreys took any part in the proceedings; and the affidavits of Mr. Humphreys and his son further state that at the commencement of the case they distinctly and audibly expressed their intention of not taking any part in the proceedings. This state of facts distinguishes this case from *Sir Hugh Massey's* case, for Crampton, J. there grounded his decision on the fact, that although it appeared by Sir H. Massey's affidavit that he publicly and in the hearing of every one in the court stated that he would take no part in the proceedings, yet notwithstanding that statement he did take a part, and a very important part, by remaining with the rest of the magistrates when the public were excluded, and the magistrates proceeded to confer on the case. In the case of *Reg. v. The Justices of Cork*, Mr. French not only made no declaration of his intention not to interfere, but took part in the proceedings. And the case of *Reg. v. The Justices of Surrey* was also decided on the ground of interference by the interested magistrate.

*LEFRAY, C.J.*—This is an application for a *certiorari* to remove into this court five convictions which have been made by the justices of the peace for the county of Tyrone. Four of these convictions were made on the complaint of the Marquis of Abercorn, and the fifth on the complaint of his agent, Mr. John Humphreys. The objections to these convictions are brought before the court in the affidavit of the prosecutor, Mr. George Porter, and are as follows:—Firstly, that the court of petty sessions was improperly constituted, inasmuch as the Messrs. Humphreys took part in the proceedings, and were present on the bench with the other magistrates; secondly, that Mr. Porter raised an objection to the jurisdiction of the magistrates, on the ground that the alleged trespasses were committed by him under an impression that he had a *bona fide* claim of title to the lands upon which they took place; and thirdly, that the evidence in the court below did not establish that the acts done constituted wilful and malicious trespass, but were consistent

with his defence, that they occurred in the course of an entry made by him upon the lands with a view of asserting his title. The first objection is pointed at the constitution of the court below, and is founded on the circumstance that the Messrs. Humphreys during, at all events, part of the proceedings, sat upon the bench which is the place appropriated to the magistrates. There is no doubt that the appearance presented to the public of these gentlemen in that position would afford ground for the supposition that they took part in the proceedings; and, as it would give these gentlemen an opportunity of conferring with the rest of the magistrates, and participating in the discussion of the case, it would be *prima facie* objectionable, not only with respect to the fair and impartial decision of the case, but also because in the eyes of the public it was calculated to bring suspicion on the proceedings. Now, it has been said that the circumstance of the Messrs. Humphreys sitting on the bench raises a *prima facie* presumption that they participated in the decision; but there is a maxim, *Stabitur presumptio donec probetur in contrarium*: we must therefore inquire whether this presumption has been met satisfactorily by the evidence on the other side. Now, we have not only the denial of the Messrs. Humphreys themselves, but also the statement of the five other magistrates who sat upon the bench on the day when these convictions were made, and who were confessedly impartial, that the Messrs. Humphreys took no part in the proceedings; and we have not merely a general denial, but there is a statement in the affidavit of Mr. T. W. D. Humphreys, that when the magistrates retired into their private chamber to confer on their decision, the Messrs. Humphreys remained in the court. As regards the impression which the public might have received, we have this additional evidence. An objection was taken by Mr. Porter's attorney to these two gentlemen remaining on the bench, and in reply to his objection the chairman, whose impartiality is not questioned, stated that it was usual as a matter of courtesy to persons in a respectable position, when they came into court, to allow them to occupy that portion of the court where the Messrs. Humphreys then sat. These gentlemen then remained on the bench, and it is stated that Mr. Porter's solicitor acquiesced in their doing so, and of that acquiescence there has been no denial. But there is one additional circumstance so far as regards the view which the public might take of the matter—namely, that these gentlemen both announced, before the proceedings commenced, that they did not intend to take any part in the proceedings upon that day. In this statement one of the Messrs. Humphreys inserts the word “audibly;” that word has been omitted from the affidavit of the other; but we have the statement of the petty sessions clerk that both the Messrs. Humphreys made that announcement audibly. Now, when we compare these circumstances with the facts which existed in the cases that have been cited, we find a solid and substantial difference. In *French's* case, 2 Ir. Jur. N.S. 431, the magistrate was admitted to a share in the proceedings with respect to the adjournment. Mr. French voted on that question, and therefore there was in that case the fact that a magistrate sat on the bench and appeared to take part in the proceedings. The question in that case respected the adjustment of rentcharge in lieu of tithe, and Mr. French was a parishioner, and therefore had a pecuniary interest in the adjudication of the question. In the case of *The County of Clare Justices*, 7 Ir. C. L. 211, the magistrate whose conduct was complained of, when the other magistrates retired to consider the case, went along with them, and remained in their chamber—and therefore in that case there was a palpable participation in the proceedings. In the case of the Surrey justices, the magistrate remained on the bench, and no disclaimer was made on

[IRELAND.]

REG. &amp; JUSTICES OF THE PEACE FOR THE COUNTY OF TYRONE.

[IRELAND.]

his part. That was sufficient to impress the public with the conviction that he did act; and further, the justices did not retire to consider their decision, and the chairman announced their decision in terms general enough to embrace him: "all of us are of opinion." It occurs to me, therefore, that, with respect to the illegal constitution of the court, there is no foundation for the prosecutor's objection, and I do not feel that it is a wholesome administration of the control which this court exercises over magistrates, to raise imaginary objections, which are calculated to bring their proceedings into disrepute. I consider that justices are entitled to the greatest consideration at our hands, for they, without remuneration, discharge an onerous and often disagreeable duty, and yet, in the administration of that duty, are excluded from the protection which has been extended to the paid administrators of the law. We are now asked to inflict on these magistrates all the consequences that may arise from our granting this motion. It may be a flaw in the laws regulating the jurisdiction of the justices of the peace, that they should be exposed to consequences to which they are liable for errors committed in the discharge of their duty—a duty gratuitous on their part—and that they should not have the same exemption from liability which the paid administrators of the law enjoy. But, at the same time, the court will not countenance the slightest departure from that strict impartiality with which the law should be ever administered. The next objection to these convictions is, that the jurisdiction of the justices was ousted, by reason of the defendant raising a *bona fide* question of title. I could not but observe the tenderness with which the counsel who opened handled this part of the case, as if it would not bear much pressure. He showed his judgment in not making this the strength of his position. But, considering all the circumstances, it is clear that there was not a *scintilla* of evidence that a *bona fide* question did or could exist as to Porter's title to the land. It was a tenancy from year to year, derived from his mother, who transferred all her interest to him, but continued as the ostensible tenant; the receipts for rent were made out in her name, though the rent was paid by Porter himself. In the month of October 1858, two years' rent being due, Mrs. Porter went to the agent of Lord Abercorn, and earnestly entreated him to accept 100*l.* in full of all demand for rent, and to take the land off her hands. The possession was, therefore, actually up, and an undertaking entered into on the part of Porter to become caretaker on the lands; and from that time down to the period when these trespasses were committed, Lord Abercorn remained in possession of the lands, and his agents continued to manage them. It was argued that this operated as an estoppel, and concluded Porter from setting up a question of title to the lands; while, on the other hand, Porter denied that his signature was properly obtained, and insisted that the undertaking was entered into under a mistake. In this defence, however, he was defeated in the civil bill ejectment at the quarter sessions held at Strabane in June 1859, and the decision of the assistant barrister was afterwards affirmed at the following assizes. There was, then, evidence of record before the magistrates to show that Porter's title was invalid. But it was invalid the moment the tenant from year to year gave up possession. On looking through the authorities the impression left on my mind is, that the circumstances which have taken place put an end to the tenancy. I will only refer to the authority of *Grimman v. Legge*, 8 B. & Cr. 324; in that case, Bayley, J. says, "a parol licence to quit will not of itself operate as a surrender of the tenant's interest. But when the tenant gives up possession, in pursuance of such a licence, and the landlord accepts it, the licence, coupled with the fact of the change of possession, operates as a surrender by act and operation of law, and the landlord cannot recover

any rent which becomes due after his acceptance of the possession." From that case down to *Nickells v. Atherstone*, 10 Q. B. 944, with the exception of one case—*Lyons v. Reed*, 13 M. & W. 306—that doctrine has obtained. As to the third objection, that the alleged trespasses took place in the course of an entry made by Porter on the lands for the purpose of asserting his title, the very nature of the acts done is sufficient to remove any such presumption. I need only allude to the abominable nature of one of the acts complained of, an act which the magistrates very properly visited with seven days' imprisonment: *ex uno disce omnes*. Whatever other ground the prosecutor may have had for resting this motion upon, he has failed in establishing this objection. On the whole case, I am of opinion that this motion should be refused.

O'BRIEN, J.—During the course of the argument I had some doubts as to the validity of the surrender in point of law, and we were not referred to the authorities on that branch of the case. But, on the authority of the case of *Dodd v. Arklow*, 7 Scott's N. R. 415, it appears to me that the circumstances which have occurred in this case constitute a valid surrender by operation of law. But whatever question may have existed upon that point was set at rest by the decision of the assistant barrister, affirmed, as it was, at the subsequent assizes. It would have been much better had the Messrs. Humphreys taken their seats in the body of the court; but I do not concur in the opinion that this is a ground to disentitle them to costs.

HAYES, J.—I am of the same opinion as the other members of the court upon this case. With regard to the question of title, it appears that the prosecutor, Mr. Porter, in the year 1849, became entitled under his marriage articles to the entire interest in the lands, but that this circumstance was never communicated to the landlord, and that after his marriage the prosecutor allowed his mother to continue as the ostensible tenant; and, although the rent was paid by him, and he derived all the benefit from the farm, yet the receipts were taken out in his mother's name, and this person whom he thus put forward as tenant in the year 1859 surrendered the lands and put the landlord into possession. He can hardly now be permitted to raise a question of title, after having stood by during all these proceedings and signed an undertaking on his own part to act as caretaker on the lands. But, notwithstanding this undertaking, he refuses to give up possession of the house upon demand made by the landlord, and he puts his landlord to the trouble of an ejectment. A civil bill ejectment is brought, and a decree pronounced against him by the assistant barrister, and this decree is affirmed at the subsequent assizes. Yet, after all this, this gentleman proceeds to commit these trespasses which he says the magistrates had no right to adjudicate upon, as there was a *bona fide* question as to whether they were not committed under a fair and reasonable supposition of title on his part. If we required anything else, the very nature of the trespasses would be quite sufficient to show that no such supposition could have existed. A man would be insane who would commit acts of such a nature on his own land. As to the next objection, that the court of petty sessions was not rightly constituted, the question is, whether any of the persons who constituted the court were interested in the result. I cannot come to the conclusion that these two gentlemen formed part of the bench of magistrates upon that day. I am always most anxious to protect magistrates in cases of mistake—they should receive the greatest consideration from us; but I do not like to see a man acting as Mr. Humphreys, sen. has acted in this case. I think he would have acted with much better feeling had he abstained altogether from interfering in the matter, as he did in the first instance by issuing the summonses. These summonses were not issued until Saturday, and this

defendant was required to appear on the following Monday; this was hardly a reasonable time for a person to prepare for his defence, more especially in a case of a criminal nature, where the defendant cannot be examined himself. I think, under these circumstances, it would have been much better if the magistrates had postponed the case; and I think the Messrs. Humphreys would have acted with much better feeling had they, during the hearing of the case, retired to another part of the court. Upon the whole case, I am of opinion that the *certiorari* should not issue, and that these magistrates should not have costs.

FITZGERALD, J.—I concur in the judgment pronounced by the other members of the court; and in an ordinary case I would have contented myself with a mere expression of my concurrence. But I think it right that each member of the court should express his individual opinion in a case like the present, where this court has not only to see that the law is administered impartially, but to encourage a confidence in its impartial administration. I entirely concur in the observations that have been made, that the greatest consideration should be shown to magistrates, but I cannot express anything but condemnation on the course that has been pursued in this case. These two gentlemen were the real plaintiffs; the summonses were issued on Saturday, the 30th July, for the following Monday, and we cannot take into consideration the intervening Sunday; besides the undue haste with which the matter was thus pressed forward, when the case came on to be heard these two gentlemen took their seats on the bench. I was prepared to pronounce my judgment at the conclusion of the argument, but I considered it my duty to read over the affidavits, in order to discover if there had been any interference on the part of the Messrs. Humphreys; but after having examined the affidavits with care, I could not detect the slightest interference by them during the progress of the case. Assuming that to be so, still I cannot help saying that it is a most objectionable proceeding for a party in a case to take his seat on the bench along with the magistrates. How would it be possible for the members of this court to communicate freely if we had parties interested in the case sitting beside us, while it was at hearing? Besides, the appearance which is presented to the public, of the prosecutor sitting on the bench, is most injurious. It would be well for gentlemen in the position of the Messrs. Humphreys, if they were to remember the words of Crampton, J., in the case of *Reg. v. Massey*. "But the admission of Sir Hugh Massey that he was interested, and his continuing to sit with the other magistrates, and the important declaration of the bench, at the calling on of the case, are what this court cannot give its sanction to." With regard to the question of title, I agree that the real question is, whether Mr. Porter acted under a fair and reasonable supposition of right, and whether that appeared to the magistrates below; for although the party may have had no right to the lands, it might be that he acted under a fair and reasonable supposition that he had. But it is clear from the affidavits that he could have acted under no such supposition, and the nature of the acts was such as to show that they were the acts of a wilful trespasser, and not those of a person going upon his own ground.

June 8 and 9.

(Before the FULL COURT.)

REG. v. BUTLER. (a)

*Summary Jurisdiction Act, 14 & 15 Vict. c. 93, s. 13, fr.—Jurisdiction of a magistrate—What documents may be removed by a writ of certiorari.*

*A magistrate not sitting in petty sessions issued a warrant (which purported to be issued under the Summary Jurisdiction Act), committing P. L. to gaol, "till the next petty sessions day, or to find*

*bail to appear at said petty sessions."* The warrant recited that P. L. had disobeyed a summons to appear at the then last petty sessions day, and give evidences "in a case against two publicans." No case against two publicans was pending in court at the date of the service of the summons, or of the issuing of the warrant:

*Held, that the warrant could not be removed by writ of certiorari.*

On the 5th May 1860 the court issued a peremptory writ of *habeas corpus cum causa ad subjiciendum*, directed to the high sheriff of the county Fermanagh, and to the governor of the gaol of Enniskillen, commanding them to bring up on 8th May the body of the prisoner, Patrick Leonard, by whatever name or addition he may be called. The writ issued on the affidavit of the prisoner, who stated that on 27th April 1860 he was served with a copy of a summons to appear at the petty sessions of E., on the 30th April, as a witness in the cause therein mentioned; that he ascertained that no cause was pending or summons issued against the defendants, and therefore, believing his attendance unnecessary, proceeded to his daily work, and while so engaged was required by a police constable to accompany him to the police barrack; that he went thither, and was brought before the sub-inspector, who required him to make an information as to his knowledge of the offence stated in the summons served on him; that deponent said he would not become an informer, but would give evidence if duly summoned, and that he had already told the truth before the coroner's jury, in the presence of the sub-inspector; and deponent believes that on the same day, the sub-inspector applied to H. E., a justice of the peace who was then presiding at petty sessions, for a warrant to arrest deponent for not attending as a witness in the alleged complaint; that H. E. refused to grant the warrant, because no summons had issued or complaint laid against the defendants named in the summons served on the deponent; that deponent would have attended on 30th April to give evidence, had any cause been pending in court; that on the 3rd May deponent was arrested by two constables, who conveyed him to the constabulary barrack, and, after about two hours, brought him before A. S. Butler, resident magistrate, who committed him to gaol under a warrant signed by A. S. B., which warrant deponent believes was illegally obtained against him; and that both warrant and summons are irregular and deficient in form and substance, for not containing a statement of the title, profession, trade, or residence of the defendant, as required by stat. 14 & 15 Vict. c. 93. Deponent caused an application for his discharge to be made to A. S. B., who said he would not have interfered had he known that the matter had been entered on at petty sessions, but, as he had committed the deponent, would now admit him to bail; that deponent is still detained in prison under said warrant, and believes that neither of the persons as to whose offences he was summoned to give evidence has been summoned to answer said complaint, and that he had no intention of leaving the country, or evading service of the summons as a witness. On the 8th May the governor of the gaol returned, that he had in court the body which on 3rd May 1860 had been delivered into his custody under the following warrant:—"Petty Sessions Act (Ireland) 1851 (14 & 15 Vict. c. 93). Form E. B. Warrant to commit or detain for trial. Wm. Fletcher, constable, complainant; Patrick Leonard, defendant. Petty sessions district of Enniskillen, county of Fermanagh. Whereas a complaint was made on the 3rd May 1860, on the oath of John Meehan, sub-constable, that on the 27th April 1860 he served a copy of a summons on defendant at, &c., to appear as a witness in a case against two publicans in E., for selling spirits or other drink at prohibited hours, and said P. L. did

[IRELAND.]

REG. v. BUTLER.

[IRELAND.]

not appear when called upon, and having been ordered so to do in said summonses on 30th April 1860, and having been arrested under a warrant and ordered to give bail—This is to command you to whom this is addressed to lodge the said P. L. of E., in the gaol of E., in the county of F., there to be imprisoned by the keeper of said gaol, as follows: to Monday, the next petty sessions at E., viz., 7th May 1860, or to find bail to appear at said petty sessions; and for this, &c. —Signed, A. BUTLER, R.M., Justice of said county. 3rd May 1860. To," &c. And I do further humbly certify that said P. L. is not in my custody for any cause other than by virtue of said warrant, on which is indorsed the words, &c. "Rule of Bail—Petty Sessions district, &c. Whereas, on 3rd May 1860, P. L. was committed to the gaol of E., charged with disobeying a magistrate's summons, I hereby consent to said P. L. being bailed by recognisance," &c. So answers James Jeffers, governor of E. gaol. Upon hearing this return read, the court (Lefroy, C.J., and Fitzgerald, J., being absent,) discharged P. L., as the term specified in the warrant for his confinement had expired—whereupon, on motion of R. Dowse, of counsel for P. L., the court was pleased to grant a conditional order for a writ of *certiorari*, directed to A. S. B., to the clerk of said petty sessions district, and to the governor of the gaol of E., to remove into this court a certain warrant of commitment, and all other warrants, convictions and informations, together with all things touching the same, made before A. S. B. against P. L., whereby P. L. was committed, &c., with a view that they may be quashed, on the grounds that they are null and void on the face of them; that the said justice acted without jurisdiction, and in excess of jurisdiction, in so committing P. L., unless cause shown, &c. The affidavit of A. S. B., filed as cause, stated that on the 3rd May 1860 he was sworn in as resident magistrate, on which day sub-constable J. M. swore before deponent this information:—"Constable William Fletcher complainant; Patrick Leonard, defendant. Petty sessions, &c. The information of, &c., who saith that on 27th April 1860 I served a copy of a summons on P. L. at, &c., to appear as a witness in the case against two publicans in E., for selling spirits or other drink at prohibited hours, and P. L. did not appear, &c. Signed, John Meehan, s.c. And the said informant binds himself, &c. Taken before me this 3rd day of May, at Enniskillen.—A. S. BUTLER." That deponent then issued a warrant under which P. L. was committed; that previous to issuing said warrant he required P. L. to give bail for his appearance, at next petty sessions day, at E., and thinking that P. L. might find a difficulty in getting bail, offered to discharge him on his own recognisance to appear on said day; that P. L. refused, and was thereupon committed till 7th May, to insure his appearance; that deponent was entirely ignorant that any application had been made to any other magistrate for a warrant against P. L., and relied altogether on said information of J. M.; that deponent was then informed that the offence with which the publicans were charged was that of selling spirits before six a.m. on Sunday, 22nd April last, to a person named M. M., who was then in a state of intoxication, and who died on the same day, of the effects thereof, as was found by the verdict of a coroner's jury; and deponent was then further informed that P. L. was the companion of M. M., and drinking with him on that occasion, and had given evidence to that effect on the inquest; and deponent was anxious to procure, by all legal means, the evidence necessary to the prosecution of said offence; that on 7th May, when P. L. was brought before the petty sessions, deponent ordered him to be discharged, and caused a written order for his discharge to be delivered to the governor of the gaol; and deponent says, that in granting said warrant he acted, as he believed,

in the discharge of his duty, and without any other motive whatever, and submits, that therefore the conditional order should be discharged.

J. P. Hamilton (with him F. Macdonough, Q. C.) now showed cause.—The question is, whether a *certiorari* lies to remove a justice's warrant of commitment. The court has no jurisdiction to issue a writ of *certiorari* to quash a warrant of commitment, when the magistrate who issued that warrant has not done any judicial act. Such a warrant is returnable by a writ of *habeas corpus cum causa*, but a writ of *certiorari* lies only in a case in which the document partakes at least of the nature of a conviction. The remedy of the party aggrieved is by action, and this was a mere ministerial act on the part of the justice: (*Rez v. Lediard*, Say. 6; *Rez v. Lloyd*, Caldecott Rep. 309; *Reg. v. Churchwards of Hatfield Peverel*, 14 Q. B. 298; *Ex parte Taunton*, 1 Dowl. P. Cas. 54; *Re Allison*, 10 Ex. 661.) This warrant was plainly a mere ministerial act, for on its face it appears to have been issued not by way of conviction, but was a ministerial act done out of petty sessions, in order to further the performance of a judicial act at some future period. The Summary Jurisdiction Act (14 & 15 Vict. c. 93, s. 13, par. 2) gives to a justice power to arrest a person by warrant, and thus bring him up as a witness, if he disobeys a summons; and the fifth paragraph of that section empowers a justice to commit a witness who refuses to give evidence; but nowhere does the Act enable the justice to imprison a man for a week, to make sure that he will be forthcoming to give evidence when required. This act was an illegal act, and the warrant cannot be removed by *certiorari*. This warrant was issued when the magistrate was not sitting in petty sessions, and also when there was no such cause pending in the court; but no warrant, under sect. 13, can be issued, except by a court of summary jurisdiction. The warrant was therefore wholly illegal, and does not stand in the prosecutor's way if he desires to bring an action against the magistrate. If, then, the court refuses to grant a writ of *certiorari*, the prosecutor will not be left without remedy, for the proviso in the Justices' Protection Act, Ir. (12 Vict. c. 16, s. 2), does not apply to this particular case, as this warrant was not a legal warrant, and therefore need not be quashed in this court, before action brought, not being such a warrant as is contemplated in the Act; and further, because even if it was such a warrant, yet it has not been followed by a conviction or order.

R. Dowse, in support of the conditional order.—This document may be brought up by a writ of *certiorari*. The prosecutor did obtain a writ of *habeas corpus cum causa*, but the matter could not be debated in that proceeding, because when the body was brought into court it appeared from the return that the term of imprisonment had expired, and the party was at once discharged. This document is such an order or conviction as requires to be quashed before an action can be brought. A warrant standing alone, generally speaking, seems not to be capable of being quashed, if it be not sustainable in law. But that occurs only in the case where the justice acts merely ministerially, and is left absolutely without discretion in the matter of issuing the warrant. Moreover, the information upon which the magistrate issued this warrant was made in a cause different from that in which my client was summoned to give evidence. That appears in the very title of the information itself, which is further defective for the want of an allegation that my client could give material evidence. But even though the information did contain that allegation, yet the warrant is bad, as the statute only empowers the justice to have the party arrested and brought before him, but not to imprison the party. No cause such as that mentioned in the title was in existence at the time



when the warrant issued. The other side contend that this warrant was a nullity, at all events, and, therefore, not a subject to which the law of *certiorari* applies; but a document, even though it be a nullity, may be removed by a writ of *certiorari*: (*Haylock v. Sparke*, 1 Ell. & Bl. 471.) In that case the court assumed that the document was removable by *certiorari*, although there had not been any conviction. The warrant merely authorised the governor of the gaol to keep the party in prison. They contend, however, that this warrant is so bad that it cannot be treated even as a nullity; but the authorities prove that that circumstance does not make the document less examinable by *certiorari*, if the act was a judicial act: (*Reg. v. Aberdare Canal Company*, 14 Q. B. 854; *Reg. v. Arkwright*, 12 Q. B. 960; *Reg. v. Coles*, 8 Q. B. 75; *Grady v. Hunt*, 8 Ir. Jur. 10; *Reg. v. Justices of the West Riding of Yorkshire*, 7 Ad. & El. 583.) This, then, was not a mere ministerial act, but was a judicial act; it cannot possibly be a ministerial act, for such an act must be one done in obedience to the law, which leaves no discretion in the magistrate in that matter. Where is the common law or the statute that authorises or commands the issuing of this warrant? There is another ground on which this conditional order must be made absolute. The form of the order is, "to remove into this court a certain warrant of commitment, and all other warrants, convictions, and informations," &c. Now, Mr. Butler does not swear that this warrant is the only document in the case.

*F. Macdonough*, Q.C. in reply.—This act of the magistrate was not a judicial act. A judicial act must be done in the exercise of some jurisdiction. But the magistrate issued this warrant not in the exercise of his jurisdiction, but in excess of it. It is true that the warrant recites: "Whereas a complaint was made on the 3rd May 1860, on the oath of John Meehan, sub-constable, that on the 27th April 1860 he served a copy of a summons on the defendant, &c., to appear as a witness in a case against two publicans, &c."—and that no such case was then in existence, as now appears. That recital is therefore a misrecital, which cannot, however, alter the nature of things, and does not create a case against the magistrate himself, so as to bring him within the 13th section. In *Haylock v. Sparke* the warrant purported to be a judicial act, and the court, in delivering judgment, assumed that it was so.

The COURT stopped him, and allowed the cause shown.

### EXCHEQUER CHAMBER.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

#### ERRORS FROM THE QUEEN'S BENCH.

Tuesday, June 14.

(Before WILLIAMS, J., MARTIN, B., WILLES, J., CHANNELL, B. and BYLES, J.)

HOWELL v. THE LONDON DOCK COMPANY.

*Appeal from the Q. B.—Jurisdiction.—Action to recover rates—Consent of parties that Q. B. should deal with special case as if stated by quarter sessions—C. L. P. A. 1854, s. 42.*

*After an action had been commenced by the clerk to parish trustees to recover the amount of a rate, it was agreed by consent that a case should be stated for the opinion of the Court of Q. B. to be dealt with by the court as if granted by the quarter sessions on an appeal against the rate. The Court of Q. B. having heard the case argued, decided that the defendants were entitled to be relieved from the rate in respect to certain matters. Thereupon the plaintiff brought error in pursuance of the C. L. P. A. 1854, c. 42:*

*Held, that the parties were bound by the agreement*

*that the Court of Q. B. was to deal with the case as if granted by the quarter sessions, and that, as there could not be a review of the judgment of the Q. B. in such a case, this court had no jurisdiction in the present instance.*

This was an action of debt brought by the plaintiff as clerk to the vestry of St. George's-in-the-East, and to the trustees for putting into execution the Act of 46 Geo. 3, c. lxxvii., to recover 3063*l.* 1*s.* 8*d.*, being the amount of a rate made on the property of the defendants on the 20th Feb. 1856.

It was agreed by consent that a case should be stated for the opinion of the court, to be dealt with by the court as if granted by the quarter sessions on an appeal against the rate.

#### CASE.

By the 13th section of the above Act (local, personal and public), intituled "An Act for more effectually maintaining, regulating and employing the poor within the parish of St. George, in the county of Middlesex, and for cleansing and lighting the squares, streets and other open passages and places, and for keeping and regulating a nightly watch within such parts of the said parish as are not within the liberty of the Tower of London," certain trustees to be annually appointed under the Act were directed to settle and ascertain the respective sums of money necessary to be raised for the purpose of the Act.

By sect. 14, the rector, churchwardens, and overseers of the poor, and trustees are to make and sign two distinct rates or assessments, one of which rates shall be laid upon all persons who shall inhabit, hold, or occupy any land, house, shop, warehouse, or other building, tenement, or hereditament within the said parish, for the relief of the poor; and the other upon all persons who shall inhabit, hold, or occupy any land, house, shop, warehouse, or other building, tenement, or hereditament other than and except any docks or warehouses, which are or may be considered exempt from such rates, or some part thereof, for a limited time under any Acts relating to the London Docks within such part of the parish as is not within the liberty of the Tower of London for cleansing, lighting, and watching.

Under this statute the poor-rates have been made to the present time, and the London Dock Company have been rated thereto in respect of the same property, and on the same rateable value as in the rate now in dispute.

By the local and personal Acts, 17 Geo. 3, c. xxii. and 22 Geo. 3, c. lxxxvi. provisions were made for paving parts of the said parish and dividing the same into districts for that purpose, and powers were given to the commissioners appointed under the said Acts to make rates for defraying the expenses of paving and repairing, &c., upon all persons occupying premises within the streets, lanes and places respectively which were paved by such commissioners respectively for, adjoining to, or opening into the same.

The powers of such commissioners were altered and extended by statute 5*th* Geo. 3, c. 29, intituled "An Act for better paving, improving and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein."

By sect. 24 of that Act all paving rates are to be laid upon the persons who inhabit, hold, occupy, and are in possession of, or enjoy any messuages, tenements, lands, grounds, coach-houses, stables, cellars, vaults, houses, shops and warehouses, or other buildings or hereditaments situate or being within any of the streets or places within the said parochial or other districts.

The London Docks are situate partly in the said parish of St. George, in the county of Middlesex, and partly in the parishes of Wapping and Shadwell, the greater part being in the parish of St. George.

That portion of the docks which is situate within

the parish of St. George was, for the purpose of paving, comprised in two separate districts, and under the jurisdiction of separate commissioners appointed under the said statutes 17 Geo. 3, c. xxii. and 22 Geo. 3, c. lxxvi. viz., the St. George and Wapping Pavement Commissioners.

For that portion of their property which was included in the St. George's paving district, the London Dock Company was, previously to and at the time of the passing of the Metropolis Local Management Act, rated in point of fact at the sum of 17,000*l.*, being the estimated annual value of their property immediately abutting on the streets, lanes, and passages so paved by the St. George's Pavement Commissioners, but it is not admitted by the plaintiff that such mode or amount of rating was right in point of law.

They were also rated for other portions of their docks and premises within the said parish of St. George, for paving purposes, by the Wapping commissioners, having jurisdiction in the streets and places upon which such docks and property abutted, but to a much less amount in the whole than the rateable value of the same property as assessed to the poor-rates, but it is not admitted by the plaintiff that such mode or amount of rating was right in point of law.

By the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, s. 90, all the duties and powers of any commissioners in relation to paving in the parish, are transferred to the vestry of that parish.

Sec. 158 of that Act requires the vestry, from time to time, to order the overseers to levy the sums which the vestry may require for defraying the expenses of executing the Act.

Sec. 159 enacts that where it appears to any vestry that all or any part of the expenses, for defraying which any sum is by such vestry ordered to be levied as aforesaid, is incurred for the special benefit of any particular part of the parish or otherwise, has not been incurred for the equal benefit of the whole of their parish, such vestry may by any such order direct the sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require.

By sec. 92 expenses of paving are to be deemed expenses incurred in the execution of the Act.

By sec. 161 the general rates under that Act (which include the expenses of paving) are levied on the persons, and in respect of the property by law rateable to the relief of the poor, upon the net annual value to be ascertained by the rate for the time being for the relief of the poor.

By sec. 247 all Acts in force in any parish are repealed so far as they are inconsistent with the provisions of this Act.

The vestry of the parish of St. George, duly elected under the Metropolis Local Management Act, proceeded in pursuance thereof to make, and duly made, an order upon the trustees for putting into execution the said statute 46 Geo. 3, c. lxxvii., hereinafter called trustees of the said parish (being the officers charged with making and levying the rates for the relief of the poor), to levy and raise a sum of 6000*l.* for the purpose of defraying the general expenses of the execution of the said Act (exclusive of expenses relating to the construction of sewers, &c.), and which order is as follows:—

"To the rector, churchwardens, and overseers, and trustees of the parish of St. George-in-the-East, in the county of Middlesex,—You are hereby required to levy in the above-mentioned parish, and to pay over to C. B. S., Esq., the treasurer of this vestry, on or before the 30th June next, the sum of 6000*l.*, for defraying the expenses of the execution of the Metropolis Local Management Act, exclusive of the expenses of con-

structing, altering, maintaining and cleansing the sewers, or otherwise connected with sewerage. Sealed with the common seal of the vestry of the parish of St. George-in-the-East, this 17th day of January 1856.

"W. L. H. CLERK. (L.S.)"

The above order having been duly issued and served upon the trustees of the said parish, they in pursuance of such order, on the 20th Feb. 1856, made a rate of 10*d.* in the pound upon the persons and property rateable to the relief of the poor, which rate was duly allowed and signed by one of the police magistrates of the metropolis, and published as by law required, and to which rate the company were assessed in respect of warehouses, wharfs, docks, and quays within the walls of the London Docks, and also upon other warehouses, a jetty, and excise and custom offices, situate in different parts of the premises of the London Dock Company, the rateable value of the whole being 73,514*l.*, such sum being made up of seven separate assessments on different parts of the property.

The said company were and are the owners and occupiers of the property mentioned in the above extract from the rate, and the same was and is situate within the said parish of St. George, and rateable to the poor-rates of the said parish at the sums mentioned in the above extract; and the company were assessed for the same property at the same amount in the last poor-rate for the said parish, made previously to the 20th Feb. 1856.

The whole area of the docks of the said parish is paved at the company's own expense.

Out of the sum of 6000*l.* mentioned in the said order of vesting of the 17th Jan. 1856, about half was estimated as required for paving purposes.

Some of the principal approaches to the London Docks are by water, and a large part of the goods conveyed to and from the docks is conveyed by water carriage.

The principal land entrance to the docks is in the parish of Wapping.

One of the land entrances, and the principal water entrances to the docks, are in the parish of Shadwell, but there are five land entrances to the docks, for waggons and carts and other vehicles, in the said parish of St. George's, by some of which they have access to and from all parts of the London Docks within the said parish, and a great portion of the heavy traffic to and from the docks passes in some of these entrances and through various streets in the said parish.

The dock company having been served with notice of the said general rate, and the same having been demanded of them, applied to the vestry of the said parish that the said vestry would be pleased to make an order that the said general rate should be as to 3000*l.* part thereof (being the amount alleged by the said company to be applicable for paving purposes, be levied on such part of the said parish only as was not within the walls of the London Dock Company, and upon the warehouses and other premises of the company previously assessed to the paving rate by the said commissioners for the St. George and Wapping districts, and that as to the said sum of 3000*l.* the residue of the premises of the company should be exempt from the rate, and that with reference to subsequent orders for rates a similar principle might be acted upon.

The vestry of the said parish having met and considered the application of the dock company, resolved that no part of the said sum of 6000*l.*, directed to be raised by their said order of the 17th Jan. 1856, had been incurred for the special benefit of that part of the parish not comprised in the London Docks, but such expenses had been incurred for the equal benefit of the whole parish, and they resolved that the company were not entitled to any exemption as prayed, and that with reference to the general rate required to be levied under

EX. CH.] THE WATERFORD AND LIMERICK RAILWAY COMPANY v. THOMAS KEARNEY. [IRELAND.

the Metropolis Local Management Act, the poor-rate was their only standard of rating.

The said company having failed to pay the said rate after demand, and after fourteen days' notice left for them on the premises so rated, this action has been brought for the amount of the said rate by the plaintiff, who was at the time of making the rate, and still continues to be, the vestry clerk of the said parish, and also clerk to the trustees above mentioned.

The question for the opinion of the court was whether the trustees of the said parish were right in making the said general rate on the whole property of the dock company rated to the poor-rate of the said parish of St. George, or whether they ought to have limited the said general rate, as to so much thereof as was made for raising moneys required for paying expenses or charges, to such parts of the property of the said dock company in the parish as were formerly rated by the paving commissioners under the said Paving Acts, or to any other and what part of the property of the said dock company.

If the court should be of opinion that the said general rate was rightly made on the whole of the company's property rated to the poor-rates as aforesaid, then judgment was to be entered for the plaintiff for the sum of 3063*l.* 1*s.* 8*d.*, and costs of suit.

If the court should be of opinion that the rate ought to have been limited to part or parts only of the company's property, then it was agreed to be referred to surveyors to award and determine, according to the principles laid down by the court, the rateable value of the portion or portions of the company's property to which the court should decide the rate ought to have been confined, and to determine for what amount judgment should be entered, and it was agreed that judgment should be entered accordingly, and in that case each party was to bear his and their own costs.

The Court of Q. B. held, that it was the duty of the vestry, by the 159th section, to apportion the burden according to the benefit, and that if part of the property of the dock company had not equal benefit with the rest of the property in the parish rated to the poor from the paving expenses, in respect of that part the company was entitled to be relieved *pro tanto*; and that if inequality of benefit exists, the court would be bound to amend the rate according to the fact; and that the dock company were exempt from being rated for profits not immediately connected with the use of the paved streets, as *e.g.* those arising from the use of the basins by vessels, and from the use of bonded warehouses by imported goods afterwards exported. (The case is reported 8 E. & B. 212; 27 L. J. 177, M. C.)

*Huddleston (J. Brown with him).*—The question is, whether the parish ought to have limited the rate in question to that part of the London Dock property which was formerly assessed to the paving rate, or whether the whole of that which was assessed to the poor's rate previously, was liable to be assessed to the rate in question. The whole question turns on the construction of the Metropolis Local Management Act. [WILLIAMS, J.—There is a preliminary point to be determined. The parties in this case by consent have substituted the Court of Q. B. for the court of quarter sessions, and the Court of Q. B. have considered the case as if it had been a case reserved on an appeal to the quarter sessions. Now there could be no appeal to this court upon such a case when stated upon appeal to the quarter sessions.] This is a case stated by consent after action brought to recover the amount of the rates under the local Act 46 Geo. 3, c. lxxvii. s. 23. [WILLIAMS, J.—If this had been simply a case stated after action brought, you might have alleged error upon the judgment of the Court of Q. B., but you have put that court in the place of the court of quarter sessions.] It is submitted that this case falls within

the C. L. P. A. 1854, 17 & 18 Vict. c. 125, s. 32, which enacts that error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary. Here there is no agreement to the contrary.

CHANNELL, B.—If you had gone on with the action, the proceedings would have been as in an ordinary case. But the parties by agreement have substituted the Court of Q. B. for the quarter sessions. The court of quarter sessions have power to amend the rate, but this court has not.

WILLIAMS, J.—How can we review the principles laid down by the Court of Q. B., as those which are to guide the conduct of the arbitrator who is to ascertain the correct amount? The parties in effect have agreed that in lieu of the ordinary course of proceeding in an action a case should be stated as if granted by way of appeal from the court of quarter sessions. The judgment of the Court of Q. B. on such a case is final; and the parties could not by special agreement transfer the appeal to this court, and this court would have no jurisdiction to entertain the appeal.

BYLES, J.—If the parties could appeal to this court in this case, then it might go up to the House of Lords; and so in every rating case, where the parties consented to a course like the present. But consent cannot give jurisdiction; and I never heard that this court could review the judgment of the Court of Q. B. on a rating case reserved at the quarter sessions.

CHANNELL, B.—I think that, by the terms of the agreement, "it was agreed by consent that a case should be stated for the opinion of the court, and be dealt with by the court as if granted by the quarter sessions on an appeal against the rate," it was meant to exclude an appeal to this court.

MARTIN, B.—This is not the subject-matter of an appeal to this court at all. We decline the jurisdiction.

Sir F. Kelly (Grove with him), for the dock company, were not called upon.

WILLIAMS, J.—We are all of opinion very strongly that we have no jurisdiction. It was agreed that the Court of Q. B. was to deal with the case as if it had been granted by the quarter sessions on an appeal against the rate. As there could be no appeal against the judgment of the Court of Q. B. on a case granted by the quarter sessions on an appeal against the rate, so neither can there be an appeal in the present instance. *Case ordered to be struck out*

*Howell*, attorney for the plaintiff.

*Ellis, Parker and Co.*, attorneys for the defendants.

## IRELAND.

### COURT OF QUEEN'S BENCH.

Reported by JOHN HELETT and WILLIAM BARLOW, Esqrs.  
Barristers-at-Law.

Monday, June 18.

(Before O'BRIEN, HAYES and FITZGERALD, JJ.)  
(LEFROY, C.J. was sitting at Nisi Prius.)

THE WATERFORD AND LIMERICK RAILWAY COMPANY v. THOMAS KEARNEY.

*Appeal from the decision of the justices at petty sessions—Liability of railway companies to keep in repair the surface of a road which they had once altered—Railway Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20, ss. 46, 49, 56, 65).*

*The W. and L. Railway Company carried its railway over a bridge which spanned the public highway, the surface of which, underneath the bridge, the company lowered, so as to give the necessary head-room for the public traffic, and then put the road so lowered "into a permanently substantial condition, equally*

IRELAND.] THE WATERFORD AND LIMERICK RAILWAY COMPANY v. THOMAS KEARNEY. [IRELAND.]

convenient as the former road, or as near thereto as circumstances would allow." *The lowered part of the road afterwards became out of repair, by reason of the public traffic. On complaint to the justices at petty sessions, they ordered the railway company to put the road into repair within fourteen days.*

From this order the railway company appealed to the Court of Q. B., and (per O'Brien and Fitzgerald, J.J.), the decision of the justices was reversed (Hayes, J. dissenting).

This was a case stated by the justices of the county Limerick, for the opinion of the Court of Queen's Bench on the written requisition of the appellants, pursuant to the provisions of stat. 20 & 21 Vict. c. 43. This appeal was taken from the order of the justices in petty sessions, of which the chairman gave the following certificate:—"I certify that, upon hearing of a complaint that, notwithstanding notice to the said defendants from the said complainant (now respondent) that the roadways of the approaches to the bridges of the defendants' railway at Spittalland, Ballysimon, and Peasfield, are severally out of repair, defendants have neglected to put the same into a complete or proper state of repair; an order was made on the 23rd Feb. 1860, by the justices present, against the said Waterford and Limerick Railway Company to the following effect, viz.: The majority of the magistrates find the company have neglected to put the roads in complete and proper repair; and the magistrates are of opinion that the roads complained of ought to be put into repair by the company within fourteen days. I (the chairman) object to this decision.—D. M. MAUNSELL, J.P."

The facts proved at the hearing of the complaint on which the above order was made, were shortly these:—The complaint was made under the stat. 8 & 9 Vict. c. 20, ss. 46, 65 (the Railways Clauses Consolidation Act 1845). It appeared from the evidence of the complainant, that the W. and L. Railway Company, in constructing their railway, had built bridges, which spanned over the public roads at the three several places mentioned in the above certificate, and, for the purpose of giving under those bridges sufficient height of passage, and the proper ascent and descent, had lowered or cut away a certain portion of each of the said roads to and under each of the said bridges, and that the surfaces of the portions of each road so lowered or cut away were, at the time of hearing such complaint, and for some time had been, out of repair. The complainant contended that the W. and L. Railway Company were under sect. 46 of the 8 & 9 Vict. c. 20, bound, from time to time, to repair or metal the surface of such portions of said roads to said bridges as had been lowered or cut away by the company, according and as often as the surface was worn down or out of repair, from the public traffic passing over them, although all the said bridges, with the immediate approaches thereto, and all the works connected therewith, were then and always in proper repair; and that the part he complained of being out of repair was the surface of the road, which he termed the approaches to the bridges; and admitted that the railway company had lowered or cut away the said roads pursuant to the provisions of the Act of Parliament enabling them to do so; and that it was the public traffic on the roads which wore them down, and caused it to be necessary to repair said roads by metalling them; and that the road spanned by the said Spittal railway bridge was under the control of the trustees of the turnpike board until they ceased to exist, about a year and a half since, from which time it came under the control of the grand jury of the county Limerick, of which county complainant is one of the surveyors. From the evidence of Mr. H. Langley it appeared that the trustees of the turnpike board had repaired the road under Spittal

bridge ever since it was first put into repair by the company, on completion of their works—a period of twelve years—and that the road has not been repaired at all since that board ceased to exist. The company then contended that they were not bound to metal the surface of the said roads leading under said bridges, after they had once put them in a proper state of repair, on the completion of their works connected with them; and that the authorities, at the time being, had taken up the roads, and that the regular public traffic passed over them, after which it was the duty of the grand jury to repair them and keep them in repair. Mr. J. C. Smith, engineer of the company, proved that the bridges, approaches thereto, and all necessary works connected therewith, were in good repair; and that, so far as he knew, Limerick was the only county through which railways ran and in which it was sought to make the companies repair the surface of the roads when worn down by public traffic. He admitted, however, that until about two years since the company had been in the habit of repairing or paying for the repairs of the surface of the roads at Ballysimon and Peasfield. A majority of the justices held that, under sect. 46, the company were bound to repair or renew from time to time, for ever, the surfaces of as much of the roads as had been lowered by them. A minority of the justices held a different opinion. The points noted for argument were these two: First, that, as to each of the roads in question, same is not an approach or necessary work connected with the bridge by means of which the railway is carried over said road, within the meaning of the 46th section of the Railways Clauses Consolidation Act 1845; secondly, that the company having restored the roads in question, within the meaning of the 56th section, at the time of the formation of the railway, they are not now bound further to maintain or repair the same.

Walter Boyd (with him Fitzgerald, Serjt.), for the appellants, contended that the decision of the justices ought to be reversed. The Railway Clauses Consolidation Act was passed for the purpose of lessening the expense attendant on the construction of railways, and not to relieve counties from any portion of their liabilities. Sect. 46 (a) is not capable of receiving the construction put on it by the justices. We contend that sect. 46 does not impose on the railway company the duty of maintaining in repair a public county road, whether that road passes over the bridge or under the bridge of the railway. If, however, the court shall incline to the construction given in England to this section, and hold that the railway company is liable to repair that part of a public county road which runs along the top of a bridge constructed by the company and spanning their railway, then we still contend that in no case can the company be forced to repair that part of a public road which lies vertically under the railway-bridge. It may be contended by the respondent that, as the company altered the highway by lowering it, they are bound to keep the altered part in repair, because water will collect in the hollow and render it more expensive to keep that portion of the surface of the road in a condition fit for traffic. The 56th section disposes of that argument. For the company have caused "the substituted road to be put into

(a) Sect. 46. If the line of the railway cross any turnpike-road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width, and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense of the company. Provided always, that with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage-road, on the level.

a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow;" and having done so, the company is thenceforth exonerated from all liability in respect of that road. Such is plainly the construction of sect. 56, and if the respondent contends that the company in exercising its powers has done any damage, then his remedy is under sect. 16. The respondent, then, must rely on sect. 46, but this court cannot give to that section the construction for which he contends. Suppose that construction adopted, that argument proves too much; for the company must then keep in repair that part of the road which lies vertically under the bridge, even though it had never altered the surface of the road at all, and, although the foundation of the respondent's claim is that the company did alter the road. Moreover, sect. 46 contains no provision for keeping in repair the part of the road underneath the bridge. It provides for the repair of the immediate approaches to the bridge, and all other necessary works connected therewith. The company are bound to keep in repair the fabric of the bridge and the approaches to it, but the section does not enact that they shall also keep in repair the passages under the bridge. The company are bound also, if the embankments at either side of the bridge fall in upon the road, to remove the debris, and keep the road clear for the protection and convenience of the public. No larger construction can be given to the section, and it is quite impossible to hold that the term "approaches" comprehends the road under the bridge. The approaches to the bridge are the railway line, by which alone it is possible to get on the bridge. Sect. 46 has been the subject of two decisions in England, but the cases are not binding as authorities on this court, as no appeal from the decision is given by the statute, and the cases were decided in courts of concurrent jurisdiction: (*The North Staffordshire Railway Company, App., Thomas Dale and others, Resps.*, 8 Ell. & Bl. 836, and 27 L. J., N. S., 147, Mag. Cas.); *Leech, App., North Staffordshire Railway Company, Resps.*, 332.) Those two cases may be distinguished from this case, because in them the highway was carried over the railway, and, therefore, the part which ran along the bridge and the immediate approaches thereto never had any existence before they were constructed by the railway company. These alterations are not of the species meant by the phrase necessary works connected with the bridge, for if that were so, the company should keep in repair that part of the surface of the road which lies underneath the bridge in every case, even though the company had never touched the surface at all. The reason upon which the decisions in England were founded is, that the road and the top of the bridge, and the approaches to it, all form part of one continuous whole, which is not the case here. We therefore submit that the 46th section does not apply to this case, and that the decision of the magistrates ought to be reversed.

*James Murphy* (with him *E. Sullivan, Q.C.*)—The 46th section clearly imposes on railway companies the liability to keep in repair every road altered by them in constructing their railways, so far as the alteration extends. That is the principle laid down in the English decisions, and it is consistent with justice; for when a road is lowered in one part, the alteration must be extended to a considerable distance on each side of the bridge so as to provide the inclines specified in the Act. These alterations create a greater length of surface to be kept in repair, and therefore render those repairs more expensive. If, then, the railway companies are exempt from liability to keep the altered portion in repair, an increased liability will be imposed on the county. The company would be bound to execute the necessary repairs, even although the alteration by lowering consisted in levelling a hill, and therefore made the curved surface shorter, which would actually

relieve the county from some expense. The road has been sunk by the company for their own convenience. They have by that deepening of the road rendered the repairs more expensive, and they ought to bear the additional liability of which they have received the benefit. If the highway had passed over the railroad, as happened in the English cases, the question upon the construction of sect. 46 would be concluded by the authority of the cases which have been cited. But, in truth, ours is an *à fortiori* case, as the alterations have made it more difficult to keep the road in repair. A sunken cutting has to be made which extends to a considerable distance on each side of the bridge. That is a "necessary work connected therewith." Much argument has been employed to show that the altered portion cannot be comprehended within the words "immediate approaches." That argument might be valid if "thereto" was inserted immediately after "approaches;" but there is no specific word in sect. 46 to show that the approaches mentioned are the approaches to the bridge, and none other. On the contrary, the words are sufficiently general to comprehend also the approaches to the altered portion of the road. The manifest intention of the Legislature was that the companies should put into repair and maintain so for ever whatever works they executed for their own convenience. The meaning of sect. 46 is that a railway company which alters a road shall keep in repair the portion so altered. The decision of the magistrates ought, therefore, to be affirmed.

*Fitzgibbon, Serjt. in reply.*—The attempt made to compel the company to keep in repair the altered portions of the roads is very unjust; for the authorities—the trustees of the turnpike board—have always executed these repairs themselves for more than twelve years past, having accepted the road from the company after it had been put by them into a "permanently substantial condition" as provided by sect. 56. Now, the approaches mentioned in sect. 46 are those which enable the public to reach the bridge and pass over it. That was so in the English cases cited. The words "necessary works connected therewith" do not aid the respondent. Those words are satisfied by the construction for which we contend, and plainly comprehend the buttresses and fences and such like works. Therefore, sect. 46 refers only to the cases in which the highway is carried over the railroad. The sinking of a road is not a necessary work of the character contemplated by that section. This deepening of the road is a mere operation, but the meaning of necessary "work" is a structure. The 65th section, which enumerates the cases in which justices shall have jurisdiction to order railway companies to execute repairs, does not contain the word "road." Anything which did not pre-exist is a work executed by the company. But this road did exist before, and the magistrates' decision ought to be reversed on these grounds alone. But, further, see what inconveniences and injustice might result from affirming the decision of the justices. Admittedly, the road so altered is under the jurisdiction of the grand jury of the county—they alone have control over it. They may deal with every portion of it at their pleasure. And yet the magistrates' decision determines that the company are liable to repair a road over which they have no control or power, and although those very repairs may have been rendered necessary by acts of the grand jury which the company could not in any way prevent or control. This court cannot hold the company liable for the acts of a public body which is not responsible to them.

The court then heard the appeal taken by the Limerick and Ennis Railway Company from a like decision of the justices, and wherein the said Thomas Kearney was respondent.

*E. P. Levinge* (with him *C. R. Barry, Q.C.*) appeared for the appellants.

[IRELAND.] THE WATERFORD AND LIMERICK RAILWAY COMPANY v. THOMAS KEARNEY. [IRELAND.]

*James Murphy* appeared for the respondent.

The arguments addressed to the court were the same as those urged in the former case.

FITZGERALD, J.—We are anxious, in order to convenience the parties, to decide these cases at once, instead of deferring our judgment until Michaelmas Term. Unfortunately there is a difference of opinion among the members of the court as to the judgment which we ought to deliver, and therefore the judgment which I am about to pronounce will be my own judgment only. Having now read the authorities and heard the arguments on both sides, I own that I would not have entertained a doubt upon the case except for the adverse opinion entertained by my brother Hayes. But having heard the arguments and given the best consideration I can to the case, I adhere to my own opinion that the decision of the magistrates was wrong, and ought to be reversed. As our judgment will determine this particular case only, and will leave the parties free to raise the same question in a new case if they are so disposed, I shall express the reasons of my opinion very shortly. On looking at sect. 46 (as it relates to a particular case), I think it cannot be contended that a highway running under a railway-bridge is an approach to that bridge within the meaning of sect. 46. We still, however, must deal with the words which occur further on in that section, "and all other necessary works connected therewith." But, even supposing the surface of the road to have been deepened or altered in its character, yet such alterations are not, in my opinion, comprehended within the words used in the statute as "other necessary works connected therewith." This Act contains two classes of sections which deal with this subject. From the 46th to the 52nd sections inclusive, the Act provides for the crossing of roads by bridges, and from the 53rd to the 58th sections inclusive the statute deals with the interference with roads themselves. Now, I think that this case does not come under any section of the first class, but is included within those of the latter class, which provide for the substitution of new roads or for the alteration of old roads. My opinion is, that the present case falls under sect. 56, and that the company has provided a substituted road "equally convenient as the former road, or as near thereto as circumstances will allow," and that the company having once put the substituted road into a permanently substantial condition, lie under no further responsibility in respect thereof. On coming to any other conclusion great inconveniences would result. So far as the authorities in England are applicable to this case, they are rather in favour of this construction. The judges in those cases foresaw the serious inconveniences that would result from holding the railway company liable to repair in perpetuity the road so substituted. If the company in this case is bound to repair the road running under their bridge, at what point on the road is their liability to commence? Is it at the point at which the declination of the road begins? That point may be distant one mile or two miles from the bridge, and is it to be said that the company are bound in perpetuity to keep this extent of road on both sides of the bridge in repair although the alteration made by them may have much improved the road? Furthermore, this inconvenience would result, and is pointed out in the cases in England: supposing that this liability of the company exists, the county surveyor and the grand jury will still retain control over that part of the road, and may alter its character at their pleasure, and then a serious conflict of authority attended with grave public inconvenience would arise. If this perpetual liability exists, then in case the justices direct the county surveyor to alter the road from a metalled surface to a paved or asphalted surface, such alteration would not relieve the company from the liability to keep in repair, although the alteration imposed on them additional ex-

pense. As a doubt arises on the construction of the 46th section, the case is a proper one in which to give weight to the argument *ab inconvenienti*, and I think that great public inconvenience would result from our holding that the company are liable. The words "other necessary works connected therewith" may be satisfied without resorting to the construction adopted by the magistrates, for the words may mean embankments, fences, parapets, or such like works which are required to protect the public. This meaning will satisfy the words without resorting to the larger construction for which the respondent contends. I am, therefore, of opinion that the railway company are not liable, and, consequently, that the decision of the magistrates ought to be reversed.

HAYES, J.—I am very sorry to differ from the opinion which my learned brethren have formed; but giving my best consideration to the case and to the Act, I think that the decision of the magistrates should be affirmed; for, giving to the words in sect. 46 a plain, ordinary and reasonable construction, I think that this substituted road is a "necessary work connected therewith," and that the company has thus incurred a liability, from which they cannot easily rid themselves. I think that the cases in England are equally applicable to the case of a road which passes underneath the railway-bridge. See what an extraordinary state of things will obtain if our judgment conflicts with those pronounced in the cases which have been cited, and railway companies be held liable to keep in repair roads which pass over their railway by means of a bridge, while they are exempt from such liability whenever the railway passes over the highway. For, if railway companies act wisely there will be an end of the custom of carrying the high road across the railway. If a railway company is to be liable whenever their railway passes under a road and exempt from liability when the road passes under the railway, they will go over the road in every instance, because, having once for all put the road in repair, they will be no longer responsible. Apart, however, from this consideration, and remembering that we should give to the Act the same construction as it has received in England, it does appear to me that this is one of the "other necessary works connected therewith" which are mentioned in the 46th section, and are to be performed by the company. Therefore, upon these plain principles, and upon the authority of the cases cited, my judgment is, that the decision of the magistrates be affirmed.

O'BRIEN, J.—I agree in the judgment pronounced by my brother Fitzgerald, that this appeal should be allowed; and, apart from the strong opinion expressed by my brother Hayes, I would not have felt any doubt upon the subject. The sole question upon which we have to decide is—whether this case comes within the 46th section of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20? Considering what that section provides for, and also the provisions of the latter sections, this case plainly does not come under sect. 46 but under the later sections. The alteration of a road by raising or lowering its surface comes within sects. 56 and the two or three preceding sections, and the only obligation thereby imposed on the companies is this, they shall put the substituted road "into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow," and then when they have once obeyed the directions of that section, their obligation ceases, and they are not bound to keep the road in repair. It is said, however, that this alteration should be considered a "necessary work connected therewith" under sect. 46. Now, as to the argument that when a public road runs under a railway bridge there the company should be liable to keep the road in repair, I inquired during the argument under what section those repairs could be enforced if there was no altera-

tion by raising or lowering the road? I was answered that there is no such power to make the company liable in that case. And yet here it is sought, where the company crossed the road by a bridge, because it is necessary where the bridge is built in a different manner because this road runs under the bridge; therefore, we are to hold it necessary for the company to keep it in repair under sect. 46. I consider that that argument is unfounded. In sect. 46 the phrase "necessary works connected therewith," means works necessary to the bridge in its character as a bridge, and which the public would have a right to; or, in the words of Lord Campbell (*Dale v. North Staffordshire Railway Company*), "The work must be complete so as to be fit for the passage of carriages;" and Wightman J., says that under sect. 46 are comprised "all works necessary to make the work fit to be passed over." But where the public are not concerned with the bridge itself, I do not think that a bare alteration of the road by deepening it or by raising it is a work necessarily connected with the bridge. Necessary works are buttresses and such like. With respect to the pernicious consequences which it has been argued will flow from reversing the magistrates' decision, it must be remembered that no company can get their Act without first lodging in the proper office plans and specifications to which every person can have access, and if the company, to save themselves expense, propose to construct their railway in a manner prejudicial to the public by passing over a road when they ought to go underneath it, the Legislature will take good care of the public interests, and prevent such plans being executed. On these grounds, I think that this case is not only not affected by the English authorities, but that the grounds of those decisions are widely different. I am therefore of opinion that the decision of the magistrates must be reversed.

Thursday, April 19.

REG. at the prosecution of ROBERT HUNTER v. THE MAYOR OF THE BOROUGH OF SLIGO.

*Burgess—Premises—Description of.*

*The premises out of which A. claimed to be qualified to be enrolled as a Burgess on the Burgess-roll of the borough of S. were described in the rating books of the poor-law union of S. as "a store and coal yard."*

*Held, that this was a sufficient description within the 30th section of the Municipal Corporation Act, 3 & 4 Vict. c. 108.*

Nov. 21, 1859.—*Humphill, Q.C.*, obtained a conditional order "that a *mandamus* should issue directed to John M'Carthy, the mayor of the borough of Sligo, commanding him as such mayor to insert the name of Robert Hunter, as a Burgess, on the Burgess-roll of the western ward of the borough of Sligo, on the ground that he, the said Robert Hunter, is duly qualified to be a Burgess of the said western ward; and that, possessing the qualification, and having complied with the requirements of the statute in that behalf, by reason whereof his name had been inserted in the town clerk's list of the Burgesses of the said western ward, he should have been retained and enrolled on the said Burgess-roll, at the revision court held on the 7th and 8th days of November, inst.," unless cause shown.

It appeared that the name of Robert Hunter had been inserted on the Burgess-roll of the western ward of the borough of Sligo in the year 1858, and that in the notice of claim made by him in that year the premises out of which he claimed to be qualified were described as "a store and yard in Wine-street;" that on the 1st Sept. 1859 he claimed to be enrolled as a Burgess for the said ward, in respect of the same premises; but that inasmuch as the premises were, by a recent description in the rating book of the poor-law union of Sligo, described as "a store and coal yard,"

the said John M'Carthy, acting as mayor, in conjunction with his assessors, expunged the name of the said Robert Hunter from the Burgess-list on the ground that the said premises were not described as comprising a house, warehouse, counting-house, or shop, occupied either separately or jointly with land, as required by the 30th section of the Municipal Corporation Act, 3 & 4 Vict. 108.

Sir Colman O'Loughlin (with him John Harkin) showed cause.—This motion comes before the court under the 49th section of the Municipal Corporation Act. The words of the 30th section are, that every man of full age, who shall occupy within a borough "any house, warehouse, counting-house, or shop, which either separately or jointly with any land within such borough," occupied therewith by him as such tenant, shall be of the yearly value of not less than 10*l*, such person shall be entitled to be enrolled as a Burgess of such borough and to vote, &c. The words "house, warehouse, counting-house, or shop," are identical with the words used in the English Act, 5 & 6 Will. 4, c. 76, s. 9; and the construction put upon the section in England is, that the description must include some of those words. [HAYES, J.—May not store mean warehouse?] No doubt it may; but what we submit to the court is, that the description must follow the words of the Act. Again, there is here a supplementary qualification, namely, a coal yard; and the Act is express, that the supplementary qualification must be "land." [FITZGERALD, J.—Was there any evidence as to the nature of the premises?] No: it is not to the nature of the premises we object, but to the description.

Macdonagh, Q.C. (with him *Humphill, Q.C.*)—The objection here is to the description of the premises, and not to their nature; and what we contend for is, that the premises out of which the prosecutor claims to qualify, are of such a nature as the Act contemplates. The word store is a manifest synonyme for shop. In America store means a shop. In Todd's Johnson's Dictionary, the meaning given to the word store is "a storehouse or magazine;" and in France, magazine is the word used to express a shop. The real question here is, whether the prosecutor is in occupation of premises contemplated by the Act. It is hard that he should suffer on account of the misdescription of the premises by the poor-law valuator. With regard to the supplementary qualification, counsel cited *Robert Sweetman's* case, *Alcock's* Registry Cases, 27. [O'BRIEN, J.—It is clear that Crampton, J., in that case was of opinion that the supplementary qualification need not be described as land; that it was sufficient if it was in the nature of land. He says, "When the Legislature has used, in the same sentence, the words house, counting-house, &c., as contradistinguished from land held therewith, they must be understood to have meant such land, &c., so used as land is generally used when held conjointly with a house in a town or city—namely, as a garden, field, curtilage, yard, or other appurtenance to the principal with which it is conjoined."]

*Harkin, J.* in reply. Cause shown disallowed.

## V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's Inn, Barrister-at-Law.

Thursday, July 26.

EDMONDS v. PLEWS.

*Injunction—Bond by solicitor not to practise. Defendant, an admitted solicitor, having accepted the situation of clerk to the plaintiff, a solicitor practising at N., entered into a bond with the plaintiff which recited that the defendant had been recently appointed agent to a Mr. O., and was conditioned to be void if the defendant should obtain from*



V.C. S.]

EDMONDS v. PLEWS.

[V.C. S.]

*practising as a solicitor in N., or within thirty miles from thence, without the consent of the plaintiff; and should not act as Mr. O.'s legal adviser, except as the plaintiff's clerk; and should not accept or undertake any other agency or appointment (except such as he then held) without the plaintiff's consent; and in case the engagement should be put an end to or determined, should not continue to act as agent for Mr. O.*

*Shortly afterwards the defendant was a candidate for the office of clerk to the board of guardians; whereupon the plaintiff gave him three months' notice of putting an end to his engagement. After the expiration of the three months, defendant resigned his appointment as agent to Mr. O., but afterwards resumed the same. Defendant also obtained the situation and was performing the duties of clerk to the board of guardians, and (since the filing of the bill) obtained the situation of clerk to the Commissioners of Land Tax:*

*Perpetual injunction granted to restrain the defendant from acting as agent to Mr. O., or as clerk to the magistrates, or from otherwise violating the stipulations of the bond.*

This was a motion on behalf of the plaintiff Edmund Edmonds, of Newent, in the county of Gloucester, gentleman, for an injunction to restrain the defendant John Plevs from acting within the said town of Newent, or thirty miles from thence, as agent to Richard Foley Onslow, of Oxenhall, near Newent, Esq., or as clerk to the magistrates of the division of Newent, without the consent in writing of the plaintiff first had and obtained for that purpose, and from otherwise violating the stipulations of a bond dated the 15th Jan. 1859.

It appeared from the bill that the plaintiff Mr. Edmonds, who is a solicitor practising at Newent, in the year 1857 advertised for a clerk, and the advertisement was answered by the defendant Mr. Plevs, who was then an admitted solicitor practising in partnership with a Mr. Fisher, at Masham, in Yorkshire. Mr. Plevs finally accepted the situation, and entered upon its duties in the following month of September. In the course of the correspondence it was agreed that the defendant should execute a bond to the plaintiff binding himself not to practise without the plaintiff's consent, and a draft of such bond was prepared by the defendant, altered by the plaintiff, and as altered approved by both parties; but owing to some inadvertence it was not executed.

The bill stated that, in Dec. 1858, Mr. Onslow was desirous of engaging an agent to look after his estates and collect the rents, and manage the affairs thereof, and Mr. Plevs, being still a clerk in Mr. Edmonds' office, proposed to take that situation, and also applied to the plaintiff for his consent thereto. The plaintiff being ready to promote the wishes of the defendant, so far as the same were not inconsistent with his duties as clerk to the plaintiff, consented, after some consideration, to the proposed arrangement, but he required and insisted that the bond which had been previously agreed to should now be executed. The bond was accordingly altered to meet the circumstances, and was executed by the defendant on the 15th Jan. 1859.

The bond was in the sum of 2000*l.*, and contained the following clause:—"Whereas it was lately agreed by and between the said John Plevs and Edmund Edmonds, that the said John Plevs should become and he has already entered upon the duties of managing clerk to the said Edmund Edmonds, at such salary (the same not being less than after the rate of 120*l.* per annum) as should from time to time be agreed upon, for the term of one year, to be computed from the 29th Dec. last, and so on from year to year, until either the said John Plevs or the said Edmund Edmonds should put an end to the said agreement, by giving to the other

of them three calendar months' notice in writing of his intention of putting an end thereto. And whereas the said John Plevs hath, with the consent of the said Edmund Edmonds, been appointed agent to and for Richard Foley Onslow, of, &c., the same agency not comprehending or extending to the giving of any legal advice, or the transaction of any legal business whatsoever, and upon the stipulation for such appointment it was agreed by and between the said John Plevs and Edmund Edmonds, that the said appointment should not take precedence of his duties as such managing clerk as aforesaid; and should the said engagement of managing clerk be put an end to and determined as hereinbefore mentioned, that then and in such case, and at the expiration of such notice as aforesaid, the said John Plevs should resign the said appointment as agent to the said R. F. Onslow, and cease to hold the same, unless the said Edmund Edmonds agree in writing to the said John Plevs continuing to hold the same. And whereas it was further stipulated and agreed upon, by and between the said John Plevs and Edmund Edmonds, that the said John Plevs should enter into and give to the said Edmund Edmonds a bond, conditioned that he the said John Plevs would not at any time or times hereafter, directly or indirectly, practise as an attorney, solicitor, or conveyancer on his own account, or in partnership with any other person or persons, or act as agent for any attorney, solicitor, or otherwise, or accept or undertake any other agency or appointment of any nature or kind soever, except such as he now holds, during the continuance of his re-engagement as such managing clerk as aforesaid, within the town of Newent aforesaid, or within the distance of thirty miles from thence, without the leave, licence and consent in writing of the said Edmund Edmonds, or hold the said appointment of agent to the said Richard Foley Onslow, after his said engagement with the said Edmund Edmonds shall be put an end to or determined by notice as hereinbefore mentioned. Now therefore the condition of the above-written obligation is such, that if the above bounden John Plevs shall and do at all times hereafter abstain from directly or indirectly practising as an attorney, solicitor, or conveyancer on his own account or in partnership with any other person or persons, or as agent for any attorney, solicitor, or otherwise within the town of Newent aforesaid, or within the distance of thirty miles from thence, without the leave, licence, or consent in writing of the said Edmund Edmonds, his executors, administrators, or assigns, in that behalf first had and obtained; and if the said John Plevs shall never act within the town of Newent as aforesaid, or the distance of thirty miles from thence as the legal adviser of the said Richard Foley Onslow, either in the way of giving or offering professional advice (except as managing clerk to the said Edmund Edmonds); and if the said John Plevs shall not at any time or times hereafter, during the continuance of his said engagement as such managing clerk to the said Edmund Edmonds as aforesaid, accept or undertake any other agency or appointment of any nature or kind whatsoever (except such as he now holds) without the leave, licence and consent in writing of the said Edmund Edmonds for that purpose first had and obtained, and in case the same engagement shall at any time be put an end to or determined by notice as hereinbefore mentioned, if he the said John Plevs shall not thereafter continue to hold, accept, or undertake any agency or appointment of agent to the said Richard Foley Onslow, or any other person whatever, within the town of Newent aforesaid, or within the distance of thirty miles from thence, without such leave in writing as hereinbefore mentioned, then the above-written obligation shall be void, but otherwise shall be and remain in full force and virtue."

Upon this bond being executed, and with the con-



sent of the plaintiff, the agency of Mr. Onslow was accepted by Mr. Plews.

The bill then alleged that the defendant, having obtained leave to hold this situation simultaneously with and without prejudice to his position as clerk to the plaintiff, had taken advantage of the opportunities which such situation afforded him to extend his own connection as a solicitor and agent, independently of and in opposition to the interest of the plaintiff, and the terms and stipulations of the bond.

On the 23rd June 1859 the clerkship of the Newent Union fell vacant, and the plaintiff Mr. Edmonds became a candidate for that office. The defendant, however, was proposed by Mr. Onslow, who was chairman of the board of guardians, so that Mr. Edmonds found his own clerk in rivalry with him as candidate for this office. The plaintiff and Mr. Onslow had, up to this time, been on friendly terms with each other, and the plaintiff warmly expostulated with him on the subject of this proceeding; and in consequence of his remonstrance the proceeding was dropped. Mr. Edmonds thereupon, finding it impossible to retain Mr. Plews as his clerk, wrote to him a letter dated 27th July 1859, giving him a three months' notice, under the bond for putting an end to his engagement with the plaintiff. The defendant accepted the notice, and expressed his readiness to leave at once. The plaintiff replied that he was quite willing; but that the defendant's engagement with Mr. Onslow must at the same time terminate. The defendant thereupon said he would see Mr. Onslow on the subject. A correspondence followed between Mr. Onslow and the plaintiff, and the result was that, in consequence of the determination expressed by the plaintiff to enforce the bond, the defendant relinquished the idea of leaving the plaintiff's service at once.

On the 3rd Oct. 1859, the plaintiff, who had for many years held the appointment of clerk to the magistrates for the division, received a notice of dismissal. No reasons were assigned for this step.

A correspondence then ensued between Mr. Fisher, the former partner of Mr. Plews, and the plaintiff, in the course of which Mr. Fisher informed the plaintiff that the defendant was advised he could accept and hold certain appointments without violation of the bond, namely, the clerkship to the magistrates for the division of Newent, which had been that day offered him, and the continuance as agent to Mr. Onslow. The plaintiff said he should not give his consent to the defendant's holding these appointments.

The bill alleged that from and after the 27th Oct. 1859, the defendant ceased to attend at the plaintiff's office, and his engagement terminated, and the defendant thereupon resigned his appointment as agent to Mr. Onslow. Subsequently, however, in violation of the stipulations contained in the bond, the defendant resumed his appointment as agent for Mr. Onslow, and also succeeded in obtaining the appointment of clerk to the magistrates, and he was now carrying on and performing the duties of both these situations in the town of Newent; and prayed for an injunction in the terms above mentioned.

Mr. Plews, by his answer, admitted that he did resign, and that he had resumed and was now carrying on his occupation of steward to Mr. Onslow; that he was acting as clerk to the magistrates; and further, that he had since obtained another appointment, usually held by a solicitor, viz., clerk to the commissioners of land-tax. He further said that Mr. Onslow had formerly employed as his agent the late Mr. Cannon, a solicitor, who died in June 1858. At that time the defendant was appointed Mr. Onslow's agent. Defendant was informed and believed that the plaintiff—who had frequently adverted to and complained of Mr. Cannon's appointment to him—on the occasion of Mr. Cannon's death applied to Mr. Onslow for the

agency, and Mr. Onslow refused to appoint him. Defendant said the plaintiff told him (the defendant) that as he, the plaintiff, could not obtain the agency himself, he had no objection to the defendant's accepting it; but that he would take time to consider the terms upon which he would allow defendant to accept it.

*Malins*, Q. C. and *B. B. Rogers* supported the motion.

*Bacon*, Q. C. and *Faber* appeared for the defendant.—They said, that although the defendant had entered into the contract, he did so upon the express understanding of the plaintiff that no unfair use should be made of it. There was no affidavit filed in support of the plaintiff's case. [*Malins*.—I have read his own admission from the answer of the three facts. He admits them.]

The VICE-CHANCELLOR.—Is it not better to treat this as a motion for decree? Would it not be better that the motion should be either refused or granted on this application, if there is no other question in the cause?

*Bacon*.—The only reason why I do not accede to that instantly is, that I am persuaded, if the matter stood over until November, it might be arranged.

The VICE-CHANCELLOR.—I have been looking through your answer, and there seems to me to be a confession of the whole case; and an undertaking and injunction will be the same thing. I really do not see what can be done for this gentleman. He may say he expected that the instrument would not be enforced, or some other use made of it; but there seems as flagrant a violation of it as there could possibly be. I should regret if there is any exasperation of feeling in the matter, the case being very clear. I think you cannot show any reason why there should not be an order for an injunction. It is only an interim injunction. You can move to dissolve it or come to any terms that may be desirable. Your undertaking would be no more than an injunction.

After some further discussion, it was arranged that the defendant consenting to allow the motion to be treated as a motion for decree, a perpetual injunction should be granted; but that the injunction should not come into operation for one month from the date of the order; and, by consent of the plaintiff, no costs. Liberty to apply.

Solicitors for the plaintiff *Cree* and *Lust*; for the defendant, *John Fisher*, jun.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMSON, T. W. SAUNDERS, and C. J. B. HEMBLEY, Esqrs., Barristers-at-Law.

*April 24, May 4, and July 7.*

HODGSON AND OTHERS v. HOOPER AND OTHERS.

*Real property—Statute of Limitations—3 & 4 Will. 4, c. 27, ss. 2, 7, 8, 15, 34.*

*In 1781, the lady of a manor, with the consent of the tenants, granted to certain persons licences to inclose certain waste land, that they and their heirs, and all persons claiming under them, should and might lawfully hold the same so inclosed in trust, for the purpose of erecting and building a workhouse for the poor of the parish of Mitcham, and for a garden, &c., rendering to the lady and all other lords or ladies the yearly rent of 5s. for the same in every year for ever. Two of the grantees were the churchwardens and overseers of the parish; they entered into possession of the land, and a workhouse was duly erected thereon, which was used as such until 1838. Previously to 1817, all the grantees had died; and in 1835, proclamations having been made, and the heir of the surviving grantee not coming in to be admitted, the vestry of the parish in order to save the forfeiture of the land, nominated seven persons, who were duly admitted on payment*

[Q. B.]

HODGSON AND OTHERS v. HOOPER AND OTHERS.

[Q. B.]

*of a fine, to hold to them, and the survivor and survivors, and the heirs and assigns of such survivor of the lord of the manor, by the rod, and by copy of court-roll, at the will of the lord, according to the custom of the manor, upon the same trust, and subject to the same rent as contained in the grant of 1781, and certain heriots and fines therein specifically named. In 1840, a resolution of the vestry was passed for surrendering the piece of ground and the workhouse to the lord of the manor, and in pursuance thereof the then trustees and the churchwardens and overseers surrendered the same by the rod to the lord, who thereupon entered into and took possession of the same. The yearly rent of 5s. was paid from 1781 to 1791, and from 1825 to 1836.*

*In 1859 the then overseers and churchwardens of the parish brought an action to recover the premises from the then lord of the manor :*

*Held, that there was no adverse holding by the overseers and churchwardens in 1833, when the 3 & 4 Will. 4, c. 27, passed, and that the lord had five years from that time during which he might have entered and resumed possession; that before the expiration of that time a fresh tenancy at will was created, which was put an end to in 1840; that there was no creation of a freehold, but that the plaintiffs were tenants at will, or at most tenants from year to year, and were not entitled to the possession of the premises at the time they brought the action.*

This was an action brought (16th Feb. 1859) by the plaintiffs, the churchwardens and overseers of Mitcham, Surrey, against the defendants, for the recovery of a piece of land, containing four acres and ten perches or thereabouts, in the said parish, on the north side of Mitcham-common, together with the messuage or tenement and the out-offices and buildings thereon lately erected as a workhouse for the poor of the said parish of Mitcham, and for a garden or orchard for the further accommodation of the said poor, and such other buildings as are now standing thereon, and which premises are now used as an india-rubber manufactory, with the appurtenances.

Case stated by consent.

There are, either appendant to, or forming part of or included in, the manor of Biggin and Tamworth, in the county of Surrey, large commons or commonable waste lands, of which the premises sought to be recovered, prior to 1781, formed part.

On the 21st Aug. 1781 the lady of the manor of Biggin and Tamworth, by the consent in writing of eighteen persons, tenants of the manor, "granted unto Foster Reynolds, John Swain, John Chesterman, Joseph Sibley and James Galpin, licence to inclose a piece of land, parcel of the common or waste belonging to the said manor, called Mitcham-common, containing three acres and two roods (being part of the land sought to be recovered), as the same were then staked out, and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same so inclosed, in trust, for the purpose of erecting and building a workhouse for the poor of the said parish of Mitcham, and for a garden and orchard for the further accommodation and benefit of the said poor, rendering to the lady of the said manor, and all other lords or ladies, lord or lady of the said manor, the yearly rent of five shillings for the same in every year for ever." The consent and grant are entered on the court-rolls of the manor, but the grant was not according to any custom of the manor, and there never was any custom of the manor for the lord or lady of the manor to grant alien, or convey any part of the common or waste lands of or belonging to the manor in the manner in which the waste land comprised in the

[MAG. CAS.]

grant of the 21st Aug. 1781 was or purported to be granted or conveyed.

John Chesterman and Joseph Sibley were the then churchwardens and overseers of the parish.

The churchwardens and overseers of the parish from 1781 entered into possession of the land and premises, and a poorhouse or workhouse was duly erected at the expense of the parish upon the piece of land, and the workhouse and land was thenceforth used and possession thereof had by the churchwardens and overseers of the parish, for the accommodation and benefit of the poor thereof, until 1838.

Up to and including the year 1836 the workhouse was used by the churchwardens and overseers of the parish of Mitcham. Subsequently to the year 1836, and by virtue of the Poor Law Acts, the parish of Mitcham was included, with other parishes, in the Croydon Union, and the workhouse was from time to time used by the guardians of the Croydon Union constituted under the said Acts, for the reception of the poor of the parish of Mitcham, until Midsummer 1838. The guardians of the poor of the said union paid to the churchwardens and overseers of Mitcham the annual rent of 105l. in respect of such workhouse up to Midsummer 1838, and up to that time the churchwardens and overseers kept the workhouse in repair and disposed of the fruit or produce of the garden and orchard, and annually accounted to the vestry of the parish in respect of the rent and produce. In the year 1838 the use of the workhouse as a workhouse was abandoned, but the churchwardens and overseers of the said parish retained possession of the land and premises, sold the produce of the land, and accounted for the sums realized by such sale in their accounts as such churchwardens and overseers until Feb. 1840.

In the year 1817 the churchwardens and overseers of the said parish took possession of 2 roods 10 perches of land, parcel of the said Mitcham-common (the remaining part of the land sought to be recovered), and inclosed the same, and held possession of and used and enjoyed the same, with the residue, for the benefit of the poor, until 1838, and from thence till Feb. 1840 they sold the produce thereof, and applied the proceeds in manner mentioned with respect to the residue of the land.

Previously to the 6th Aug. 1817 all the persons originally nominated trustees of the said piece of ground and premises, containing three acres and two roods, had died, and it appears on the rolls of the manor that the homage presented to a court baron, holden on the 21st May 1834, the deaths of the said trustees, and it was not known who was the survivor or the heir of the survivor, and there is also an entry on the court-rolls, and the fact is that thereupon three several proclamations were made, according to the custom of the manor, for the heir of the surviving trustee, or any other person claiming title to the said premises, to come in and be admitted, and that the last of such proclamations was made on the 27th Oct. 1835, and that default having been made, the bailiff of the manor was ordered to seize the land as forfeited to the lord. Such proclamations and default were duly enrolled.

On the 10th Oct. 1835 the steward of the manor wrote and sent the following letter to the churchwardens of Mitcham :—

"6, Harper-street, Red Lion-square,

"10th Oct. 1835.

"Gentlemen,—I beg to inform you that a general court baron for the manor of Biggin and Tamworth will be held at the Swan Inn, Mitcham, on Tuesday, the 27th instant, at twelve o'clock at noon, and as all the gentlemen who were admitted tenants of the manor for the land upon which the workhouse is erected are dead, it is necessary that the parish should

Q. B.]

HODGSON AND OTHERS v. HOOPER AND OTHERS.

[Q. B.]

nominate others in their stead, in order that they may be admitted at the next court to save a forfeiture of the estate. I shall therefore be obliged by hearing from you upon the subject at your earliest convenience. "I am, &c.,

"J. E. PENFOLD, Steward.

"To the churchwardens, Mitcham, Surrey."

In the parish books of Mitcham there is an entry dated 22nd Oct. 1835, to the following effect:—"At a vestry held this day, pursuant to public notice given in the church on Sunday last, for taking into consideration a notice received by the churchwardens from the steward of the manor of Biggin and Tamworth, to nominate tenants for the land on which the workhouse is erected in the stead of those who are deceased, and other business: Resolved, that the following eight gentlemen being nominated, be requested to take upon themselves the execution of the trust, with the understanding that the expenses consequent thereon should be paid by the overseers of the poor of this parish."

The overseers of the parish paid to the then lord of the manor, or his steward, the sum of 79*l.* 17*s.* 6*d.* as and by way of fine in respect of the admission of seven of the above named eight persons (the vicar not being admitted), and there is on the rolls of the manor an entry that at a special court baron, holden on the 27th Oct. 1835, after reciting the grant of the 21st Oct. 1781, and that the said Foster Reynolds and the four other persons inclosed the piece of land whereon the churchwardens and overseers erected the workhouse, and converted the remainder into a garden and orchard as aforesaid, and after reciting the proclamations and forfeiture, and that the lord had remitted the escheats and forfeiture, the lord granted to the said seven persons the said piece of land and premises, to hold unto them and the survivor or survivors of them, and the heirs and assigns of such survivors of the lord of the manor, by the rod and by copy of court-roll, at the will of the lord, according to the custom of the manor, in trust for the inhabitants of the parish of Mitcham, and to be surrendered and disposed of as they should from time to time, in public vestry assembled, or otherwise, legally direct or appoint, so as the aforesaid customary hereditaments and premises should be for ever thereafter used as a workhouse for the poor of the parish of Mitcham, and for no other purpose, yielding and paying the rent of 5*s.* a-year, and a heriot on the death of every tenant of 2*l.* 2*s.*, and a fine at will on the death or alienation of a tenant, and doing fealty, suit of court, and performing such other services as the customary tenants of the manor do or ought to perform. And such seven persons were then admitted tenants in manner and form aforesaid, and the fine for their admission was set at 79*l.* 17*s.* 6*d.*, and their fealty was respited.

It appears from the accounts of a deceased steward of the manor, that the yearly rent of 5*s.* reserved by the grant of the 21st Aug. 1781 was paid to the lord from 1781 to 1791, and from the books of the churchwardens and overseers of the parish that it was paid to the lord from the year 1825 to the 25th March 1836.

The guardians of the poor of the Croydon Union, on the 8th May 1838, sent to the churchwardens and overseers of Mitcham a notice in writing under their common seal of their intention to deliver up to them on the 24th June next possession of the workhouse and gardens, land and appurtenances thereto belonging, which they then held of them. The workhouse was at the same time abandoned by the guardians, and possession thereof was delivered up to the churchwardens and overseers of Mitcham.

At a meeting of the vestry of the parish of Mitcham, held on the 23rd Jan. 1840, a resolution was

passed for surrendering the said piece of ground and the workhouse and premises which had been erected thereon by the parish, into the hands of the then lord of the manor, which resolution was to the following tenor and effect:—"At a vestry assembled under public notice, given as the law requires for that purpose, to take into consideration the expediency of surrendering and disposing of the premises on Mitcham-common, lately used as and for the workhouse of this parish, and to give directions to the churchwardens and overseers of the poor, and the trustees and all other persons in whom such premises are now vested, to surrender and dispose of the same accordingly, Edward Walsley, Esq., churchwarden, in the chair, present Messrs. James Bridger, churchwarden (who is now lord of the manor, and one of the now defendants), John Glover and John Searle, overseers, John Holden and Charles Aspery, guardians, and nineteen other vestrymen: Whereas, it appearing to this vestry that the guardians of the Croydon Union have ever since Midsummer 1838 formally abandoned and delivered up possession to the churchwardens and overseers of the poor of this parish, the premises on Mitcham-common, which had been for many years and up to that period used as a workhouse for the poor of this parish, and that such premises are now no longer used or required as such workhouse, and it appearing also to this vestry that the parish has ever since sustained a considerable annual expense by keeping a proper person to protect the premises, and it further appearing to this vestry that the purpose and object for which the premises were granted to certain trustees for the benefit of the parish by the lord of the manor, of whom such premises are holden, have now ceased, and that such trustees are liable to pay to the lord of the manor a yearly quit-rent, and to keep the premises in repair; it is unanimously resolved and agreed that it is expedient and for the benefit of this parish that the hereditaments and premises heretofore used as a workhouse for the poor of this parish be surrendered to the lord of the manor of whom the same are holden by the churchwardens and overseers of the poor, and by the trustees of the same, and by all such other persons as may be considered necessary to effect a legal surrender of the said premises. And this vestry do hereby accordingly authorise and empower, direct and appoint the churchwardens and overseers of the poor of this parish, the five persons (naming them) to whom the premises were granted in trust for the inhabitants of this parish, and to be surrendered and disposed of as they should from time to time in public vestry assembled, or otherwise legally direct and appoint, so as the said premises should be for ever after used for a workhouse for the poor of this parish, and for no other purpose, to surrender the same premises into the hands of the lord of the manor in such way as may be considered necessary in order to relieve this parish and the trustees from all further expense and liability."

A copy of this resolution was forwarded to James Moore, Esq., the then lord of the manor, with a letter expressing the readiness of the parish officers to execute it.

It appears by an entry on the court-roll, that in pursuance of the resolution, the then trustees of the piece of land, workhouse and premises, and the churchwardens and overseers of the parish, surrendered the same into the hands of the lord, according to the custom of the manor, and by a surrender note under seal, taken out of court by the steward of the manor on the 16th Feb. 1840, and signed by the trustees, therein described as customary tenants of the manor, and by the overseers and churchwardens of the parish, described as such, those parties, in pursuance of the direction of the vestry meeting of the inhabitants of the parish of Mitcham, contained in the above resolution, surrendered by the rod into the hands of the lord, accord-

[Q. B.]

HODGSON AND OTHERS v. HOOPER AND OTHERS.

[Q. B.]

ing to the custom of the manor, the said piece or parcel of customary land, containing 3a. 2r., together with the messuage or premises, for many years, and until then lately used as a workhouse, &c., to which said customary hereditaments the said trustees were admitted tenants at the said special court baron holden on the 27th Oct. 1835, to the intent that the lord might do therewith his will.

The poor-law board for the time being were no parties to the surrenders, or either of them. According to the course of business of the poor-law board, if any application for their consent to or with respect to such surrenders had been made to them, such application, and the consent thereto, if any, would have been entered on the register for the time being of their correspondence, which register is now in existence. On searching such register it is found that no such application or consent is contained therein, nor is there any trace among the documents of the poor-law board of such application having been made or consent given.

Immediately after the aforesaid surrender of the 3a. 2r. had been made, and on the same 18th Feb. 1840, one churchwarden and one overseer of the poor of the parish accompanied the bailiff of the manor on the said 2r. 10p., and delivered the possession thereof to the bailiff. One churchwarden and one overseer were appointed and delegated by the two churchwardens and three overseers of the poor of the said parish to deliver up possession as aforesaid as their joint act, and on their behalf, and such possession was so delivered up accordingly.

James Moore, as the landlord of the said manor, thereupon entered into and took possession of all the lands and premises containing 4a. Or. 10p. James Moore was, and continued to be, from the year 1803 up to the time of his death (which happened in the month of Feb. 1851), the lord of the manor, and the defendant James Bridger became the lord of the manor in 1857.

The defendants claim all and every the said lands beyond the said James Moore.

The licence of the 21st Aug. 1781, and the grant of the 27th Oct. 1835, were neither of them executed in the presence of two or more credible witnesses, or enrolled in the High Court of Chancery within six calendar months next after the execution thereof, and the licence was not made for a full and valuable consideration, actually paid at or before the making of such licence. The said 2 roods 10 perches of waste land was not, nor has any part thereof, assured by deed executed in the presence of two or more credible witnesses, and enrolled in the High Court of Chancery.

The questions for the opinion of the court, were first—whether, at the time of the surrender in Feb. 1840, the churchwardens and overseers of Mitcham had any, and what, estate or interest in the premises, or any part thereof? secondly—whether at the commencement of this action, the churchwardens and overseers were entitled to the possession of the land and premises, or any part thereof, on behalf of the parish? If the answer to the two questions were in the affirmative, in respect of any part thereof, then judgment was to be entered for the plaintiffs for so much. If in the negative, then judgment was to be entered for the defendants.

The court was to be at liberty to draw such inferences from the facts stated as a jury might have drawn.

*Lush, Q.C., T. H. Terrell* (Chancery bar) and *Holl* for the plaintiffs.—At the time of the passing of 3 & 4 Will. 4, c. 27, there had been an adverse possession for twenty years, and a freehold was acquired which has never been divested: (1 Coke, 142 b.) It was the intention of the parties, not that the grant should be a

copyhold grant, but a grant in fee-simple for ever, subject to a nominal rent, and it was the intention that beyond that rent the lord should have no interest. The twenty years' adverse possession gave a title; the rent was not paid as a rent service, but as a rent seek, and not as any acknowledgment of a tenure. A title was gained at the passing of the Act, subject to be divested if an action was brought within five years of that time; that not having been done, nothing has occurred which can divest the plaintiffs: (Litt. ss. 215-217; *Nepean v. Doe*, 1 Smith's L. C. 535, 4th Edit.; *Reading v. Royston*, 2 Salk. 423; Co. Litt. 277; *Taylor v. Horde*, 1 Burr. 60; 1 Wms. Saund. 319, note k; *Doe d. Dayman v. Moore*, 9 Q. B. 555, were also referred to.)

*Bovill, Q.C., W. H. Terrell* (Chancery bar) and *Robinson*, contra.—This action was brought in 1859, and we must look to what took place during the twenty years preceding that time. From 1836 the lord exercised the rights of an owner in fee, and the plaintiffs were only in possession as tenants till 1840, when the surrender was made; then there is no adverse act by the plaintiffs till 1859, when the writ was issued. There has, therefore, been a twenty years' possession by the lord. The reservation of a rent shows the intention to preserve the lord's rights; the tenancy was at will, or, at most, from year to year. In 1833, therefore, the holding was not adverse. The Act gave the lord five years before his title was put an end to, and before that there was a new tenancy: (*Doe dem. Lansdale v. Gower*, 17 Q.B. 589; *Doe v. Gregory*, 2 Ad. & El. 14, were also cited.)

*Lush, Q.C.* in reply. *cur. adv. vult.*

June 14.—*COCKBURN, C.J.*—This was an action brought by the churchwardens and overseers of the parish of Mitcham, to recover certain lands and premises of which the defendants are in possession, deriving title from Jas. Moore, lord of the manor of Biggin and Tamworth, in the county of Surrey. The property in dispute was formerly part of the wastes of the manor in question, and, as such, part of the lord's freehold. It appears from the case that on the 21st Aug. 1781 the then lady of the manor, by consent of the tenants of the manor, granted to five persons named, licence to inclose three acres and two roods, part of the waste, and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same so inclosed, in trust for the purpose of erecting and building a workhouse for the poor of the said parish of Mitcham, and for a garden and orchard for the further accommodation and benefit of the said poor, rendering to the lady of the said manor, and all other lords or ladies, lord or lady of the said manor, the yearly rent of 5s. for the same in every year for ever. The churchwardens and overseers in the year 1781 entered into possession, and at the expense of the parish erected a workhouse, and used and occupied it, up to and including the year 1836, as the workhouse of the parish. It appears from the accounts of a deceased steward of the manor, that the yearly rent of 5s. reserved by the grant was paid to the lord of the manor from the year 1781 to the year 1791; and it appears from the books of the churchwardens and overseers of the parish that this rent was further paid from the year 1825 to the 25th March 1836. We think ourselves warranted to infer that it was paid during the interval between 1791 and 1825. On the 10th Oct. 1835, the five persons to whom the licence had been granted in 1781 being then dead, notice was given to the officers of the parish by the steward of the manor to nominate other persons for the purpose of admission to save a forfeiture. Seven persons were accordingly nominated and admitted, the parish paying a sum of 79l. 17s. 6d. as a fine on their admission. In this proceeding the estate was treated by all parties (but beyond all question erroneously) as a copyhold

Q. B.]

HODGSON AND OTHERS v. HOOPER AND OTHERS.

[Q. B.]

tenement, In 1840 the parish officers, in conformity with a resolution of the parish in vestry assembled, surrendered and gave up the premises to the lord of the manor, and the latter then entered and took possession and afterwards conveyed the premises to the defendants. The plaintiffs claim to recover possession on the ground that the parish having had adverse possession of the premises for more than twenty years at the time of the passing of the 3 & 4 Will. 4, c. 27, the right of the lord was barred, and an indefeasible freehold interest acquired by the parish, which freehold interest was not afterwards divested by what took place in the admission in 1835 or the surrender to the lord in 1840. The defendants on the other hand contend, that the possession of the parish up to the passing of the 3 & 4 Will. 4, c. 27, was that of tenants at will, and that consequently the lord had a period of five years from the passing of the Act before his right of entry expired; that within such five years a new tenancy at will was created by what took place in 1835, and consequently a further period of twenty-one years accrued to the lord within which the estate at will might be determined; and that within such twenty-one years, namely in 1840, the estate at will was put an end to by the entry and possession of the lord. If the defendants are right in the position that the parish officers were possessed as tenants at will at the time of the passing of the 3 & 4 Will. 4, c. 27, the defendants must prevail, as we are clearly of opinion that if the first tenancy was a tenancy at will, the admission in 1835 operated to create a fresh tenancy of the same kind. If before the right of entry upon a tenant at will is gone, the tenancy is put an end to, and a new tenancy at will created by fresh agreement, express or implied between the parties, then, according to the decision in *Doe dem Bennett v. Turner*, 7 M. & W. 226 (with which we concur), a fresh right of entry accrues, and an additional period of twenty years must run before the entry would be barred. Whether such a fresh tenancy was created or not is a question of fact. It is true that the admission in 1835 took place under an erroneous belief that the property was copyhold; but this mistake does not prevent the transaction from operating as what we find it really was, namely, a determination of the first tenancy at will and the creation of a new one, inasmuch as the admission being inoperative to convey a copyhold estate, the possession under it amounted in point of law to no more than a tenancy at will. The right of entry of the lord after this would not be barred by efflux of time till 1855. But in 1840, long before it was barred, the lord of the manor, Mr. Moore, actually entered, and from that time he, and those who claim under him, had both possession and title to the premises. This being so, we are brought back to the question whether the holding of the plaintiffs up to the 3 & 4 Will. 4, c. 27, was as tenants at will, or whether their possession had been adverse. It was contended on the part of the plaintiffs, that the intention of the parties was that a freehold interest should be created (the grant of the licence being to the licencees and their heirs for ever), and that the rent was received as a quit-rent, after the manner of the rents received in ancient times on the grants of freehold by lords of manors, and that although such a grant could not operate in law as a conveyance of the freehold, yet the parties having intended to create a freehold estate, possession under the grant would be of a character incompatible with the notion of a freehold title in the grantor, and would therefore be an adverse possession. The proposition of the plaintiffs—that where there is an intention to convey a freehold estate, and possession is given accordingly, but owing to some defect in the conveyance in point of law an estate at will only is created, possession under such circumstances will amount to an adverse possession—if true in point of law

(a matter which it is not necessary to determine) must at all events be taken with this qualification, namely, that the intention that the holding should be in the character of a freehold must clearly appear. The incompatibility of the possession with the notion of the freehold remaining in the former owner must be fully established, or the presumption that that which in law is an estate at will was only intended to be such must prevail. But, in our opinion, the plaintiffs fail to establish that there was in the present case an intention to create a freehold estate. The so-called grant does not purport to convey the fee in the ordinary way. It merely purports to grant a licence to inclose the land and to hold it in trust, paying a yearly rent for the same. The argument as to intention, arising from the fact of the grant being made to the grantees and their heirs for ever, is met by the reservation of a yearly rent; more especially as this rent could not be effectually reserved unless the grantor reserved to herself the freehold; and we can see no reason why we should not give effect to this reservation. It seems to us that the terms of the licence as strongly manifested that the lady of the manor should for ever have the lordship of the land, as that the licencees should hold the land for ever. Moreover, the fact of the parish having submitted in 1835 to the demand of the lord to nominate fresh trustees for admission, at a time when, from the effect of the recent statute, had their possession been adverse, they would have acquired an indefeasible title against the lord, is inconsistent with the notion of their having held as freeholders. On the contrary, such a proceeding is evidence of an acknowledgment that the freehold was in the lord: (see *Doe v. Wilkinson*, 3 B. & C. 413; *Doe v. Clark*, 8 B. & C. 717.) Besides this, the payment of the annual rent, even if he did not turn the holding from a tenancy at will into a tenancy from year to year, which would exclude all question as to adverse possession—a question which, in the view we take of the case, it is unnecessary to consider—at all events affords strong evidence that the holding continued permissive, and as the lord of the manor could, before the statute had run, have turned the licencees out of possession, and probably would have done so if at any time they had refused to pay the 5s., which they had stipulated to pay, “for that holding,” we cannot but draw the inference that each successive payment of 5s. was a fresh acknowledgment that the land was held by the permission of the lord of the manor. It is enough for the decision of this case, that we think that on these facts the plaintiffs have not established that the holdings, which originally had been permissive, had before 1835 become adverse. The onus lies on them to do so, and we do not think they have succeeded. If this be so, the possession was not adverse when the 3 & 4 Will. 4, c. 27, received the royal assent. The then lord of the manor had five years more during which his right was preserved, and he might at any time before 1838 have entered and resumed possession of the premises. We have hitherto spoken only of the part of the premises which were comprised in the licence of 1781. Besides this, the parish officers in 1817 took possession of 3 roods 10 perches of land, parcel of the waste, and inclosed the same, and held possession of it and enjoyed it with the residue. The lord's right of entry to this portion of the land could not, in any view of the case, be barred before 1837, and as this portion of the premises was included in the surrender and readmittance in 1835, before the right of entry was barred, and was also taken possession of in 1840, the defendants are equally entitled to this portion as to the other. We therefore answer the questions put to us, by saying that in 1840 the churchwardens and overseers of the poor had no greater interest in the premises than that of tenants at will, or at most tenants from year to year; and secondly, that they were not entitled to the posses-

C. B.]

MERSEY DOCKS AND HARBOUR COMPANY v. JONES.

[C. B.]

sion of the premises at the time they brought the action. The result is, that there must be judgment for the defendant.

*Judgment for defendant.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs.,  
Barristers-at-Law.

June 4 and 5.

MERSEY DOCKS AND HARBOUR COMPANY v. JONES.

*Poor-rate—Exemption—Docks—Occupation beneficial or non-beneficial.*

*The Mersey Docks and Harbour Company are not rateable for the relief of the poor in respect of their wet docks, basins, cranes, sheds and wharves, graving docks, &c., transit sheds and offices, tramways, railroad and sidings, dock offices and depots, &c.; no person having a beneficial occupation thereof. Following Rex v. The Inhabitants of the Parish of Liverpool, 7 B. & C. 61, where the same question in effect, and the same statutes, were the subject of adjudication.*

*Per Byles, J.: there is not, as regards the question of exemption from rating, any difference in principle between the case of a public harbour where any man may enter with his ship, and pay a compensation towards the sustentation of the harbour, and the case of a public road which any one may use with his vehicle, and pay his contribution towards the repair of the road.*

This is an action of replevin brought by the plaintiffs against the defendant for the taking and detaining certain goods and chattels of the plaintiffs, and by consent of the parties, and by the order of the Hon. Keating, J., dated the 11th Jan. 1860, according to the C. L. P. A. 1852, the following case was stated for the opinion of the court:—

By a rate made for the relief of the poor of the parish of Liverpool, on the 2nd June 1853, the plaintiffs were assessed in the sum of 20,580l. 18s. 8d. in respect of the annual value of the dock estates within the said parish vested in the said board. The following is a copy of the assessment:—

Wet docks and basins, cranes, sheds, and wharfs connected therewith, within the parish, viz. Wellington, Bramley Moore, Nelson Stanley, Collingwood, Salisbury, Clarence, Trafalgar, Victoria, Waterloo, Princes, Canning, Albert, Salt-house, Wapping, King's and Queen's Docks .....	£	s.	d.
18,900	0	0	0
Graving docks and graving blocks, engines and sheds connected therewith at the Clarence, Princes, Canning, King's and Queen's Docks .....	746	13	4
Transit sheds and offices, Princes Dock .....	375	13	4
Tramway, railroad and sidings, and high level railway along the side of the docks within the parish .....	233	6	8
Dock offices, comprising general offices, treasurer's offices, solicitor's offices, secretary's offices, marine surveyor's offices, board-room and store-room .....	116	13	4
Depôt for wrecked goods, Waterloo Dock .....	52	10	0
Depôt for wrecked goods, Princes Dock .....	32	13	4
Transit shed, west side of Nelson Dock .....	23	6	8
Transit shed, west side of Nelson Dock .....	23	6	8
Transit shed, west side of Nelson Dock .....	23	6	8

Transit shed west side of dock entrance to Waterloo Dock .....	£	s.	d.
20	8	4	
Weighing machine, George's Dock passage .....	14	0	0
Weighing machine, Prince's Dock ...	11	13	4
Telegraph office, Town-buildings ...	7	7	0

The plaintiffs did not appeal against the said rate.

The distress in question was levied in consequence of the nonpayment of the rate. The plaintiffs entered into the usual replevin bond, and brought the present action. The dock estates within the parish of Liverpool became vested originally in the mayor, aldermen, bailiffs and common council of the borough of Liverpool, as trustees of the docks and harbour of Liverpool, by virtue of several Acts of Parliament; part of those estates was granted voluntarily by that corporation, part was sold by that body to the trustees for a pecuniary consideration, and other parts were purchased by the trustees from private individuals, according to the powers given to them by the said Act before-mentioned and other Acts, being altogether twenty-two in number, and forming a series extending from the first year of Queen Anne to the twenty-first year of her present Majesty, both inclusive, all of which may be referred to as part of this case. Before the construction of many of the present works part of the land was shore both above and below high-water mark, but the greater part consisted of land and buildings in the occupation of individuals rated to the relief of the poor of the said parish. The dock estates at present consist of docks, basins, piers, jetties, graving docks, griddons, wharfs, quays, sheds, offices, buildings, landing stages, slips, stairs, river walls, dams, embankments, locks, gates, bridges, weirs, sluices, tunnel cuts, channels, roads, railways, tramroads, cranes, engines, machinery and other matters and conveniences requisite to form complete docks, and the trustees are authorised to receive large sums of money under the name of dock rates and duties for the accommodation of vessels in the said docks by virtue of the said Acts of Parliament.

Under and by virtue of the 6 Geo. 4, c. 187, and the 14 & 15 Vict. c. 64 (being two of the Acts comprised in the said series), a committee was appointed in the manner directed by the Acts, called the Committee for the Affairs of the Estate of the Trustees of the Liverpool Docks, and all the powers and authorities of the said trustees of the Liverpool docks were vested in such committee. By stat. 20 & 21 Vict. c. 162 (local and personal), and which also may be referred to as part of this case, entitled "An Act for consolidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust, and for other purposes," sect. 26, all the docks, lands, buildings and other property, real and personal, situate at Liverpool that were held by or in trust for the trustees of the Liverpool Docks, became vested in the plaintiffs under the style of the Mersey Docks and Harbour Board, but subject to all charges and liabilities affecting the same. By sect. 49 of the said last-mentioned Act, it is enacted that, subject to the provisions of this Act, the board shall stand possessed of all the property, powers, rights and privileges hereby transferred to them upon the trusts and for the purposes upon and for which such property, powers, rights and privileges were holden previously to the commencement of this Act. The 56th section of the same enacts as follows:—The following rules shall be observed by the board with respect to the moneys received by them under this Act; (that is to say), (1.) The conservancy expenditure shall be defrayed out of the conservancy receipts. (2.) The pilotage expenditure shall be defrayed out of the pilotage receipts. (3.) No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure. (4.) No sums shall be payable in respect

of docks by any vessel that does not use the same. (5.) Save as by this Act is provided, no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes. The 59th section of the same Act is as follows:—"The board shall render to Parliament, as soon as may be after the 24th day of June in every year, an account of its receipts during the preceding year, ending the 24th June, and the manner in which the same have been applied."

The board manages the dock estates by its servants and agents, who receive and account for to the board the dues and other moneys arising from the management of the said estates, and no part of the estates and premises comprised in the above assessment or schedule is let off to other persons, nor are any rents paid to the board for any part thereof. With regard to the application of the moneys received as dock duties, the stat. 8 Anne, c. 12, s. 9, under which the first dock was built, enacts as follows:—"That all and every such sum and sums of money that shall be raised and received by the duties aforesaid, and recovered for any the forfeitures in this Act appointed, other than so much thereof as shall be laid out and allowed to the collector, or other necessary officer, for the collecting and managing the said duty, for charges of recovering the same, shall, by the said mayor, aldermen, bailiffs and common council for the time being, be applied and disposed of to the building and repairing the said new dock or basin and other works, and for the securing, preserving, amending and maintaining the said dock or basin and harbour of Liverpool, and to no other use or purpose whatsoever."

By sections in the subsequent Acts all the Acts in the series, including this of 8 Anne, are directed to be read and construed as one Act.

All the dock rates payable by the former Acts of Parliament were repealed by the 51 Geo. 3, c. 143, one of the above-mentioned series, by which new rates were substituted. The 27th section of that statute is as follows:—"And be it further enacted, that all the moneys which shall be collected, received, levied, borrowed and raised by and under this Act shall be applied in paying and defraying the expenses and charges attending the obtaining and passing this present Act, and to the paying the expenses and charges attending the levying and collecting the said rates and duties, and after the paying and appropriating one-third part of the said money, to and for the purpose of making and completing the southernmost portion of the said North Docks as hereinafter is mentioned, then to the paying off and discharging the present bond-debt of 14,705*l.* 19*s.* 4*d.*, and the debt of 67,406*l.* 18*s.* 7*d.*, owing by the said trustees to the corporation of Liverpool, for the purchase of land and strand intended for the site of the southernmost of the said two northern docks, and any future bond-debt, and the interest on the same, and to the paying and discharging the interest on all other moneys which may be hereafter borrowed and taken up at interest under the provisions of this Act upon the credit of the said dock rates and duties as aforesaid, and to the carrying into execution the purposes of this Act and the said recited Acts, in the making, erecting, building, finishing and maintaining such docks, basins, piers and other works and buildings in the port of Liverpool, under the said Acts and this Act, and to the paying, defraying and satisfying all other charges and expenses already incurred, or hereafter to be incurred, in the carrying into execution or under or in consequence of any of the said former Acts or this present Act, and the residue or surplus of all moneys arising from such rates or duties which shall remain

after such application thereof as aforesaid, shall from time to time be applied in or towards the repayment of the principal moneys which shall have been borrowed under this Act, until all such principal moneys shall be repaid, and all assignments of or mortgages upon the rates and duties are paid off, satisfied, discharged and redeemed; and when by the means last mentioned all the principal moneys which shall have been borrowed shall be repaid, and all assignments and mortgages upon the said rates are satisfied and redeemed, then, and in such case, it shall be lawful for the said trustees, and they are hereby required, to lower and reduce the rates and duties hereby granted and made payable, as far as the same can be done in the then state of the docks, basins, buildings and other works and buildings of the said port, and leaving sufficient for all charges of management and collection of rates and other concerns of the said docks, basins, piers, works and other buildings, and improving, repairing and maintaining the same, and for the carrying into execution the provisions of the said former Acts and this Act."

By the Act 6 Geo. 4, c. 187 (another of the said series), power is given by the 105th section to the said trustees to levy certain fresh rates; and by the 106th section, to lower all rates, and to raise the same again; and by the 130th section it is enacted as follows:—"And be it further enacted, that all the moneys which shall be collected, levied, borrowed and raised under this Act, or the said recited Act, shall be applied in any order, with respect to priority of such application, as to the said trustees shall seem expedient and proper (except as by this Act provided as to the time of payment of assignments of the said rates and duties granted by virtue of the said recited Act) in paying and defraying the charges and expenses of obtaining this Act, and in paying the expenses and charges of collecting the rates and duties, and all interest due and to grow due from time to time on moneys borrowed or taken up at interest by the said trustees, and any principal moneys that may be called in from time to time, and in the general management and conducting of the said trust-estate in the construction of the works by this and the said former Acts authorised to be erected, established and maintained, in supporting, maintaining and repairing the same, and every part thereof, and in carrying into execution all the provisions of the said several recited Acts and this Act, and in paying off and discharging the whole or any part of the present bond or other debt, and any future bond or other debt, and all interest due and to grow due thereon, and also in the defraying, paying and satisfying all the charges and expenses already incurred or hereafter to be incurred in carrying into execution the several purposes of or under or in consequence of any of the clauses, provisions, powers or authorities contained in the said former Acts or this Act."

By the Act 4 Vict. c. 30 (another of the said series), power is given to the trustees to erect transit sheds, to make a wet dock, to construct other works, and to raise a further sum of money, and to levy certain additional rates; and by the 124th section it is enacted as follows:—"And be it enacted, that all the moneys which shall be collected, levied, borrowed, or raised under or by virtue of the said recited Acts and this Act, shall be applied in any order, with respect to priority of such application, as to the said trustees shall seem expedient, in and towards the completion of the several docks, transit sheds, warehouses and other works, by the said recited Acts and this Act authorised to be made, framed, erected and built, and for and towards the several objects and purposes in the said recited Acts and in this Act mentioned, in the general management and conducting the said trust-estate and carrying into execution all the provisions of the said several recited Acts and this Act, and for the

C. B.]

MERSEY DOCKS AND HARBOUR COMPANY v. JONES.

[C. B.]

general improvement and reparation of the docks, basins and works of the said trustees."

By the Act 7 & 8 Vict. c. 80 (another of the said series), power is given to the said trustees to construct additional docks and raise further sums of money; and by the 127th section it is enacted as follows:—"And be it enacted, that all the moneys which shall be collected, levied, borrowed, or raised under and by virtue of the said recited Acts and this Act, shall be applied first in and towards the payment of all the expenses of and attending the passing of this Act, and then in and towards the completion of the several docks and other works by the said recited Acts and this Act authorised to be made and constructed, and for and towards the several objects and purposes of the said recited Acts and this Act mentioned, and in the general management and conducting of the said trust-estate, and carrying into execution the provisions of the said recited Acts and this Act, and for the general improvement and reparation of said several docks and other works of the said trustees."

By the Act 9 & 10 Vict. c. 119 (another of the said series), power is given to the said trustees to construct additional wet docks and other works, and to raise a further sum of money; and by the 47th section it is enacted as follows:—"And be it enacted, that all the moneys which shall be collected, levied, borrowed, or raised under and by virtue of the said recited Acts and this Act shall be applied first in and towards the payment of all expenses of and attending the passing of this Act, and then in and towards the completion of the several docks and other works by the said recited Acts and this Act authorised to be made and constructed, and for and towards the several objects and purposes of the said recited Acts and this Act mentioned, and in the general management and conducting of the said trust-estate, and carrying into execution the provisions of the said recited Acts and this Act, and for the general improvement and reparation of the several docks and other works of the trustees."

By the Act 11 Vict. c. 10 (another of the said series), power is given to the said trustees to construct additional docks and other work; and by the 40th section it is enacted as follows:—"And be it enacted, that all moneys which shall be collected, levied, borrowed, or raised under and by virtue of this and the said recited Acts shall be applied in and towards the payment of all expenses of and attending the passing of this Act, and in and towards the construction and completion of the several docks, warehouses and other works by the said recited Acts and this Act authorised to be made and constructed, and for and towards the several objects and purposes in the said recited Acts and this Act mentioned, and in the general management and conducting of the said trust-estate, and carrying into execution the provisions of the said recited Acts and this Act, and for the general improvement and reparation of the several docks and other works of the trustees."

The board are bound to apply the present dock rates and dues, and all other moneys received by them out of the dock estate, according to the directions of the several Acts of Parliament, and no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock estates. All the docks, sheds, tramways, railroads, offices and other things mentioned in the above assessment were erected and provided under and in pursuance of the said several Acts of Parliament, or some of them, solely for the purposes of the dock business, and are not used for any other purpose whatever, and all revenues of any kind derived by the board from any part of the property is carried to the general dock estate, and is appropriated and applied in manner

shown by the accompanying accounts for the year 1858, which are to form part of this case.

By the 4 Vict. c. 30, s. 52, the trustees were empowered to build warehouses on the quays of one of the docks, and by the 11 Vict. c. 30, s. 3, such power to build warehouses was extended to all the dock quays; and by sect. 71 of the first-mentioned, and by sect. 4 of the second-mentioned Act, such warehouses were expressly made subject to all parochial and other rates. None of the warehouses built in pursuance of the said Acts are included in the above assessment.

The questions for the opinion of the court were, whether the Mersey Docks and Harbour Board is rateable to the relief of the poor in respect of the property enumerated in the above schedule or any part of it? If the court should be of opinion in the affirmative, then judgment is to be entered for the defendants, for such sum as the court think they were entitled to distrain for, and costs. If the court should be of a contrary opinion, the judgment is to be entered for the plaintiffs for their costs of suit.

JUNE 4.—Sir Fitzroy Kelly, Q.C. (with whom was Quain) for the plaintiffs.—The very point now before the court was decided in favour of the plaintiffs by the Court of Q. B. in *Rez v. The Inhabitants of the Parish of Liverpool*, 7 B. & C. 61. My friend must say that that decision was wrong. He contends for three propositions: first, that this dock property is occupied by some class of persons entitled to usufruct; secondly, that the dues taken under the Acts of Parliament are not applicable to public purposes; thirdly, that this case comes within the Parochial Assessment Act. He must show that a tenant would give for this property a sum of money upon which this rate might be legally imposed. During the last 150 years the Legislature, finding the port of Liverpool useful for ships of war as well as merchantmen, passed these Acts, granting to a body of merchants power to purchase lands, &c., and carry out the objects of the Acts. It was intended that the usufruct should be applied to specific purposes, and in the manner pointed out in the Acts, and the usufruct being made applicable to those purposes by the Legislature, the property is not rateable. But the Legislature has treated this property as not rateable. 4 Vict. c. 30, s. 71, enacts expressly that the additional warehouses by that Act authorised to be erected shall be subject to the payment of all parochial rates in like manner as the same are or would be payable in respect of warehouses the occupancy of which is not beneficial." There is a similar enactment also in 11 Vict. c. 10. He cited *Reg. v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, n. (c); *Reg. v. The Mayor of Liverpool*, 9 Ad. & Ell. 435; *Reg. v. Wallingford*, 10 Ad. & Ell. 259; *Crease v. Sawle*, 2 Q. B. 862.

Bovill, Q.C. (with whom was Mellish) for the defendants.—Since the passing of the Acts authorising the erection of additional warehouses, the docks are in this position: a portion is liable to be rated, and a portion by the decision of the Court of Q. B. is not liable. In 1859 the same question arose in respect of the Newcastle Docks, also with respect to the Clyde Docks; and in the case of the Birkenhead Docks the Court of Q. B. decided that the docks were rateable, and that case cannot be distinguished from this. In addition to the cases cited on the other side, he referred to *R. v. Kenmore*, 17 Q. B. 859; *R. v. Temple*, 2 Ell. & Bl. 169; *Mayor of Liverpool v. Wetherby*, 6 Ell. & Bl. 704-713; *R. v. Churton*, 28 L. J. 131, M.C.; *R. v. Trustees of River Lea*, 19 J. P. 310.

JUNE 5.—ERLE, C.J.—I am of opinion that the judgment of this court should be given in accordance with the decision in *Rez v. Liverpool*, where the same questions in effect on the same statutes were the subject of adjudication. At the same time I beg to reserve to myself the right of reconsidering the point in case I



C. B.]

MERSEY DOCKS AND HARBOUR COMPANY v. JONES.

[C. B.]

should hereafter form a part of a court of error between these parties. My learned brethren in the Q. B. had my full concurrence in the cases cited for the defendants. In these cases the questions seem to me to be, first, does the statute prohibit payment of poor-rates where it makes the property subject to the payment of all charges thereon? If not, then, is the party rated a trustee occupying merely for the public benefit? In all these cases the question which was mooted in *Ree v. Badcock*, what is the public's, is the governing consideration. Property held on behalf of the Government of the country, for the purposes of administration, is clearly held for the public benefit. Beyond this no clear definition of holding for the public interest has been given that I have found. In each of the series of cases relied on for the defendants, the effect of the decision was, that the claim of exemption on the ground of public interest was not sustained. Thus the millers benefited by the Kentmere reservoir; the inhabitants of Huddersfield, or of Harrogate, or of Manchester, benefited by waterworks; and the capitalists investing capital in merchandise and shipping, resorting to the port of Birkenhead and the port of Tynemouth, were not the public. If the question here is narrowed to the point, whether the capitalists thus resorting to the port of Liverpool for commerce are the public, the analogy to the cases cited is strong. If the exemption continues these capitalists benefit. If the liability is established, these capitalists will probably sustain the burden, as they would have to pay increased charges for the use of the port; the main distinction between the cases decided and the Liverpool case thus being the comparative wealth and importance of the town of Liverpool. I have wished to say thus much, that I may not appear to have deserted an opinion which I repeatedly expressed in concurring with my brethren, with whom I had the satisfaction to act in another court. But, as a court here of co-ordinate jurisdiction with the Court of Q. B., I give judgment upon the express decision upon the point decided in the case in *Barnewall and Cresswell*, reserving to myself the right hereafter as above expressed.

WILLIAMS, J.—I am entirely of the same opinion. I think we are bound by the decision in 7 B. & Cr. of *Ree v. The Liverpool Docks*. Mr. Bovill has certainly called our attention to several recent decisions in the Court of Q. B., which I admit are inconsistent with the principle upon which that case was decided, particularly the *Birkenhead* case the *River Lea* case, and *Ree v. Churton*. In those recent decisions the *ratio decidendi* of *Ree v. The Liverpool Docks* is regarded as founded on a supposed statutory prohibition to apply any part of the surplus of the dock receipts to the poor-rates, because such surplus is entirely devoted to certain other prescribed purposes. The authority, therefore, is sought to be confined to cases where there is such a statutory exemption. On looking at the report of the case in 7 B. & Cr., the ground on which that case was decided manifestly is, that there was no person who had a beneficial occupation of the docks. That is plain, not only from Lord Tentarden's language to that effect, but also from his referring to the case of *Ree v. Woodward*, as an analogous case, where it was held that a Quakers' meeting-house, if the pews were not let, is not rateable. So, in the case decided at the same time, the case of *Ree v. Weaver*, Bayley, J. says it virtually has been decided by the conclusion to which they have just arrived in *Ree v. The Liverpool Docks*; and says, the principle of that decision is applicable to the case of *Ree v. The Trustees of the River Weaver Navigation*, the case that the court then had in hand. There the surplus remaining over and above the expense of supporting the navigation was to be applied to maintaining and repairing the bridges and highways. Those were public purposes, and as no part of the moneys could be applied to private pur-

poses, those moneys were not rateable in the hands of the trustees. I own I cannot see how any doubt can be entertained. It was upon that ground that the Court of Q. B. decided the case of *Ree v. The Liverpool Docks*. A long series of cases has recognised *Ree v. The Liverpool Docks* as decided on the ground which I have just mentioned, especially the case of *Ree v. Badcock*, which was cited during the argument, and also another case, which I think was not cited, of *Ree v. St. George's, Southwark*, 10 Q. B. Rep. There Lord Denman, in giving the considered judgment of the court, says: "It has been settled by several cases that the possessors or occupiers as trustees of property otherwise rateable, the profits of which they were bound by Act of Parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property." And then Lord Denman goes on to cite the case of *Ree v. The Salters' Load Sluice*, *Ree v. Liverpool*, and *Ree v. The Weaver Navigation*. This recognition was continued down as late as the case of *Ree v. Harrogate*, where Lord Campbell and the Q. B. go into the distinction which they consider was established by the case of *Ree v. The Liverpool Docks*, between a beneficial occupation and a non-beneficial one, by reason of its being for public purposes. Down to as late as Lord Campbell's time, therefore, we find that distinction was recognised, and that distinction was investigated, treating the case of *Ree v. Liverpool* as good law, and as founded on that distinction. As far as I understand the Acts of Parliament, not only has this decision been recognised as settling the law by this long line of cases, but the Legislature itself appears to me to have clearly recognised the law as settled by *Ree v. Liverpool Docks*, and as settled on the ground that the occupation of the trustees is not a beneficial one. Because the statute of the 4 Vict. c. 30, after providing that additional warehouses may be erected, goes on to enact in the 71st section: "That the occupancy by the said trustees of all or any of the warehouses to be erected under the provisions of this Act, shall be subject to the payment of all parochial and all other local rates now levied and hereafter to be levied in the said parish of Liverpool, in like manner as the same are or would be payable in respect of warehouses the occupancy of which is beneficial." There is a similar enactment in the 11 Vict. c. 10, and, as I caught it, the statute not being before us, in another Act which has passed since this rate was made, the 20 & 21 Vict. c. 152. Then what is the legitimate inference to derive from these enactments in these three Acts of Parliament? Surely they assume that but for the passing of these enactments, and but for the exception there created with respect to a particular portion of the property occupied by the trustees, the occupancy would not be beneficial. In other words, these enactments treat the law, as laid down in *Ree v. The Liverpool Docks*, as the settled law, and assume that, by reason of the law being so settled, the occupation by the trustees is not beneficial, and therefore that it is not the subject of a rate; and they proceed to say that in respect of this particular portion of the property, it shall be considered as if it was beneficial, therefore, plainly assuming that it was not in truth beneficial, but should be treated as such for the purpose of being rated, by reason of the special enactment. How, then, can we, sitting here as a court of concurrent jurisdiction, refuse to recognise a case which for many years was regarded both by the court and the bar as the leading case on the subject, and which no one has ever ventured to say ought to be overruled, and which, in fact, the Legislature has adopted as the basis of enactments in three Acts of Parliament. It seems to me, therefore, that we are bound to recognise it; and being so bound, our judgment must be for the plaintiffs.

BYLES, J.—I also am of opinion that our judgment

C. B.]

EDDLESTON v. FRANCIS]

[C. B.]

must be for the plaintiffs. I found my opinion upon the applicability of *Rex v. Liverpool Docks*; indeed, applicability is hardly a proper word to use. This very question, with the Acts of Parliament, exactly as Mr. Bovill now contends that they are, presented itself to the mind of the Court of Q. B. in 1825, and they decided that the property was not rateable. I say "exactly as they are," because, although it has been pointed out, it is as well to recall attention to the fact, that supposing Mr. Bovill is right in his contention that the statute of the 8 Anne, c. 12, s. 9, is no longer in existence, Lord Tenterden, for some reason or other which is not very apparent, construed these Acts of Parliament without reference to that Act, the statute of Anne, for he says that the statutes which he was considering did not contain the words "to the purposes of the Act, and to and for no other use or purpose whatsoever." The statutes therefore presented themselves, that is, the earlier statutes, to the mind of the Q. B. in 1827 precisely as Mr. Bovill now says they are. That is a decision on the very point and between the very parties now before the court, that these docks are not rateable. I admit that Mr. Bovill has been more successful in contending that the case of the *Birkenhead Docks*, followed, as it has been, by the two cases of the *Newcastle Docks* and the *River Lea*, is with difficulty distinguishable from the case of *Rex v. The Liverpool Docks*. But the court in giving judgment in the case of the *Birkenhead Docks*, expressly refrained from overruling that prior case. On the contrary, they treat it as a subsisting authority. How is it possible for us, therefore, with the respect which should be always due from one court of co-ordinate jurisdiction to another, to refuse to recognise the existing authority of *Rex v. The Liverpool Docks*, which the Court of Q. B. did at the time when they were deciding the *Birkenhead Dock* case, which the learned counsel for the defendant says is irreconcilable with that prior case. But, although it is more easy to point out slight differences than to distinguish these cases by any solid and substantial ground of distinction, it must not be assumed that the Acts of Parliament are the same. It is impossible to read the Acts of Parliament to which my brother Williams has called attention, without seeing clearly that it was a matter of bargain between the parishes and the docks that the rateability of the warehouses should be created, but that the absence of rateability on the rest of the property should be preserved. Their bargain, it is true, can make no difference in the law; but then that bargain is incorporated in three Acts of Parliament, which seem to me to imply, almost as clearly as if they had expressed it, that the rule laid down in the case of *Rex v. The Liverpool Docks*, whether applicable to other cases or not, shall at all events govern the rateability of those docks. If, therefore, we were at liberty to do what the Q. B. did not venture to do, it seems to me that we are entirely precluded by the subsequent Acts of Parliament. I do not wish to preclude myself from forming any other opinion, if, upon further consideration in another place, I should be called upon to give it; but at present it seems to me that the Acts of Parliament are not the same, but that they differ, and differ in a way unfavourable to the defendants. I cannot help, however, saying—and I think I am bound to say—that I think the case of *Rex v. The Liverpool Docks* was rightly decided, and that when the case comes to be discussed in a court of error, it is possible that that decision may be arrived at. Now all these decisions proceed on the statute of the 43 Eliz. What does the 43 Eliz. do? It delegates to the new overseers of the poor, then first created, a power of taxation. Now whom are they to tax? They are to tax the inhabitants and the occupiers in the parish according to their ability. Such are the words of the statute, "according to ability." Did the Legislature intend to

[MAG. CAS.]

delegate to them the privilege of Parliament to tax the public? I say nothing of the exemption of Crown lands from taxation, or even of the exemption of those lands which are temporarily severed from the Crown and under the administration of the Woods and Forests; it may be that they stand on another footing; they are Crown property. The Crown is not bound in a statute unless it is named. But public land, public buildings, the extensive lands of the Bedford Level, lands or buildings which are for the benefit of a borough, have been held exempt from rateability. In this case, as in a thousand others, it may be very easy to say property of this nature is clearly not liable to taxation, property of another nature is liable to taxation, but difficult to lay down a precise rule as to those cases which fall near the dividing line. On the one hand, if there are a plurality of individuals, even members of a neighbouring parish, they are individuals, and if trustees hold for them they are rateable in the name of their trustees. On the other hand, it seems to me that if the occupier is agent or trustee for a body who are the general public, then, according to the decisions and upon the true construction of the statute of Eliz., the property is not rateable, and that is consistent with the first and leading case on the subject; I mean the case of the *Salter's Load Sluice*, and all the cases down to the case of *Rex v. Birkenhead*, as far as I am aware of. Then that brings the question to the narrow point, is this a public purpose? Mr. Bovill says, no, it is not, because it is only a portion of the public who use it, the capitalists who invest in ships. It might equally be said of a public highway for carriages, that that is for the use of that branch of the public who invest their property in carts and waggons: in one case as well as the other, all have a right to use it. And if a great public harbour like this, open for all the public, is to be rated, I do not see how we can stop, unless we go on and say that the occupier of the soil over which there is the easement of a public highway is also rateable for the value of the benefit which the public receive. The distinction between the two is this—but it is no distinction in principle—the frequenters of this great public harbour pay a compensation for the use of it. Put the case of a turnpike-road; there the public pay a toll for the use of the road. There is, indeed, now an Act of Parliament specially exempting the toll of a turnpike-road; but that was intended to meet the case of mortgagees in possession. It had been decided long before, that the soil of a public turnpike-road is not rateable, on the ground that it belongs to the public. Now, I cannot conceive any difference in principle, I must admit, between the case of a public harbour where any man may enter with his ship and pay a compensation towards the sustentation of the harbour, and the case of a public road where any man may enter with his vehicle and pay his contribution towards the repair of the road. Upon these grounds I am bound to say that it seems to me that the case of *Rex v. The Liverpool Docks* was rightly decided. At the same time I place my judgment, as I said before, on the incompetency of this court to review a solemn decision of the Q. B., recognised by them when they had all the opposite considerations before their eyes; especially when I see several Acts of Parliament which in this particular case have treated that as being law, whatever it may do in other cases, which is to conclude all questions arising between the parishes of Liverpool and the docks in that borough.

*Judgment for the plaintiffs.*

*Wednesday, Jan. 18.*

EDDLESTON (appellant) v. FRANCIS (respondent).  
*Local board of health—Improvements—Recovery of expenses—11 & 12 Vict. c. 43, s. 11—When matter of complaint arises.*

*In the year 1854 certain permanent improvements*

2 C

C. B.]

EDDLESTON v. FRANCIS.

[C. B.]

were completed by the local board of health upon premises at Nantwich. F. was receiver of the rent of the premises, appointed by the Court of Ch. In 1853 and 1854 F. and the local board agreed that the expenses should be raised by mortgage, and notice of the sum was given to F., who paid 30*l.* in part payment. He afterwards ceased to be receiver, and refused to pay the balance. A demand of payment was made upon him in 1857, and in December of that year he finally refused to pay. A complaint was made by the local board before justices, upon the 19th Jan. 1858:

*Held, that the matter of complaint arose when notice of the amount to be raised by mortgage was given to F., and that the information ought to have been laid within six months from that time, under 11 & 12 Vict. c. 43, s. 11:*

*Held, also, that the local board, in agreeing to the mortgage, had exercised their option, and could not afterwards proceed to recover the expenses by summary proceedings, under 11 & 12 Vict. c. 63, s. 129.*

This was an appeal by the Nantwich Local Board of Health (by R. C. Eddleston, their clerk), against the dismissal of a complaint made before justices of the county of Chester, by the local board, under sect. 51 of the Public Health Act 1848, against Francis, for the nonpayment of 14*l.* 16*s.* 6*d.*

Case.—On the 19th Jan. 1858 an information and complaint was made and preferred by the appellant before the Rev. Thomas Brooke, against the respondent, for 14*l.* 6*s.* 6*d.*, being a balance due for certain works of private improvements done in the month of October 1853, to houses at Nantwich, under sect. 51 of the Public Health Act 1848, which case was fixed for hearing at the special sessions, Nantwich, on 26th Jan. last, when Mr. Charles Stuart Brooke appeared for the respondent, and objected to the magistrates' jurisdiction: first, on the ground that the said complaint was not made within the time limited by law, and by sect. 11 of 11 & 12 Vict. c. 43, which enacts that, "in all cases where no time is already or shall hereinafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose," nor in accordance with the decision of the judges in the case of *Reg. v. The Leeds and Bradford Railway Company*, 21 L. J., N. S., 193, M. C.; secondly, that the said Frederick Francis is not, nor was he for more than six calendar months before the said complaint was made, the owner or occupier of the premises mentioned in the said complaint, as required by the Public Health Act 1848; and, thirdly, for other good and sufficient reasons. On which the case was adjourned until the 23rd Feb. last, when the appellant applied for a further adjournment until the 23rd March last, which adjournment was granted. The magistrates present on that day were of opinion that the information should be dismissed, but at the request of the appellant, who stated he wished it heard before a larger bench of magistrates, it was again adjourned to the 6th April last. On which day the respondent's attorney was unable to attend in consequence of illness; but to save the expense of witnesses being under the necessity of attending again, the appellant called his clerk to prove the posting of two notices to a Mr. Joseph Woolf, of Haslingdon-hall, in Cheshire, who acted as agent for the respondent, which said notices were dated respectively the 23rd April 1853, requiring works to be done by the respondent. On Mr. Woolf being called, the notices were shown to him, and he proved that he received copies of them from the appellant, and wrote to the respondent on the 4th May 1853 as to the same; and that he also saw

the respondent at the Rising Sun at Wistaston, on the 19th of the same May 1853, when he handed the notices over to him. The case was then again adjourned until the 4th May instant, when it came on for hearing before us. The respondent's attorney handed in a written notice of the foregoing objections to our jurisdiction to hear the case, and after hearing the arguments on behalf of the appellant and the respondent, we were unanimously of opinion that the information should be dismissed, and therefore we dismissed it, on the ground that it appeared to me the undersigned Thomas Fletcher Twenlow, that so far back as 1833 certain permanent improvements were done by the direction and under the superintendence of the local board of health, at a cost of 44*l.* 16*s.* 6*d.*, upon houses in Nantwich belonging to a property over which the respondent had been appointed receiver by the Court of Ch., and that for the raising the sum required, a mortgage had been agreed upon and prepared between the local board of health and the receiver, which mortgage was never executed. For some time there was an account current kept between the builder and the board of health, and 30*l.* was paid by the receiver to the builder, but the receiver having retired from the office, after various applications, finally by letter, dated Dec. 1857, declined to pay the sum of 14*l.* 16*s.* 6*d.* Then it was objected by the respondent's attorney that the complaint was laid too late, under the 11 & 12 Vict. c. 43, s. 11, but I, the said Thomas Fletcher Twenlow, was of opinion that this objection should be overruled. On referring to the Public Health Act 1848 (11 & 12 Vict. c. 43, s. 11), I thought that the money should have been raised under sect. 90; but as it appeared that another mode of raising the money had been adopted in a way not pointed out, as I thought, by the statute, I doubted whether the balance of the account came under the provisions of sect. 129, which provides for the recovery in a summary way of damages and costs; and therefore I agreed with the other justices in dismissing the said complaint. And we the undersigned, Samuel Cross Starkey and William Baker, Esquires, being of opinion that the said complaint was not laid within the time limited by the 11 & 12 Vict. c. 43, s. 11, also dismissed the said complaint, when the appellant being dissatisfied with our determination as being erroneous in point of law, on the 6th day of May instant gave notice of appeal against the same, under the 20 & 21 Vict. c. 43, s. 2.

*Welsby* for the appellant.—The first question is, whether the application was in time under the statute 11 & 12 Vict. c. 43, s. 11, which enacts "that in all cases where no time is already or shall hereafter be specially limited for making any such complaint (i. e. a complaint before justices) in the Act or Acts of Parliament relating to each particular case, such complaint shall be made within six calendar months from the time when the matter of such complaint arose." By 11 & 12 Vict. c. 63, s. 129, the amount of any damages, costs, or expenses by that Act directed to be ascertained or recovered in a summary manner, may be ascertained by and recovered before two justices. The matter of complaint here arose on the demand: (*Labouchere* (appellant) v. *Addison* (respondent), 23 L. J. 25, M. C.) The matter of complaint is the refusal to pay. And the time must be reckoned from the notice of demand. Secondly, Francis being only a receiver under the Court of Ch., was the owner chargeable within the Act. Such a receiver is an agent and a trustee, having a fiduciary character under which he would be answerable to the parties interested.

*Huddleston*, Q.C. for the respondent.—The mortgage was prepared in May 1854, and 30*l.* was paid on the understanding that it would be carried out. It was then brought to the knowledge of the respondent how much the amount was, and the matter of complaint

[Ex.]

WILLETT v. BOOTE AND ANOTHER.

[Ex.]

arose then, and the application should have been made within six months of that time.

ERLE, C.J.—I am of opinion that this appeal ought to have been dismissed. It ought to have been made within six months after the matter of complaint arose. The matter of complaint is the nonpayment of the expenses of works completed in 1854. The proceedings which we are now adjudicating upon were commenced in Jan. 1858. The appellant relies on the fact of the demand of payment in 1858, and he says there was no matter of complaint until a demand and a refusal. I am clearly of opinion that in such cases the matter of complaint does not arise until the person liable has notice of the amount. Now it appears that Francis in 1853 and 1854 objected to be answerable, having only a temporary interest, and he and the local board of health came to an agreement that he should not be looked to, and that an improvement rate should be made. A mortgage was prepared, and notice of the sum was given to Francis, and he paid in part 30*l*. Now it is in my mind clear that that must either be taken to be notice to Francis of the amount due, or to be an agreement that it should be raised by an improvement rate. And then I think they had exercised their option, and cannot now, especially when Francis has long ceased to be receiver, come and recover it by a summary proceeding from him. They must be taken to have exercised their option.

WILLIAMS, J.—As to the first question, it appears to me that the local board, having selected to throw the expenses on the occupier by rate, cannot now proceed under the 90th section.

WILLES, J.—I am of the same opinion. If the proceeding to charge the premises was operative, it prevents the proceeding under the 90th section. If it was not operative, the board could have at once proceeded under that section.

KEATINGE, J.—I concur; especially on the ground taken by the Lord Chief Justice, that what was equivalent to notice to Mr. Francis was done.

*Judgment for the respondent.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and S. McCULLOCH, Esqrs., Barristers-at-Law.

May 28 and June 26.

WILLETT (appellant) v. BOOTE AND ANOTHER (respondents).

*Appeal from justices—Master and servant—Servant absenting himself—4 Geo. 4, c. 34, s. 3—Payment by foreman.*

*Where the respondents, being master potters, contracted with the appellant to serve them at a certain weekly wage, and by a subsequent agreement contracted with other parties to pay them a certain sum for every dozen score put into the oven, the said parties undertaking to pay thereout the wage of the said appellant:*

*Held, that the relation of master and servant arising between the respondents and the appellant under the first agreement, was not terminated by the subsequent agreement.*

#### CASE.

The complainants are manufacturers of earthenware at Burslem. The defendant is a journeyman ovenman. The complaint came on for hearing before Thomas Bailey Rose, Esq., on Tuesday, the 20th March, and afterwards by adjournment on the 27th March 1860, and the following facts were proved:

By an agreement, bearing date the 15th Nov. 1859, the defendant agreed to serve the complainants as a biscuit oven placer, from the 11th Nov. 1859 to 11th Nov. 1860, on the terms therein stated, namely, to be paid four shillings a day for each day's work done.

By an agreement, also bearing date the 15th Nov. 1859, Thomas Robinson and John Bowers entered into the service and employment of the complainants as biscuit oven firemen, and they were to be paid by the complainants one shilling per score for placing and firing twenty dozen of ware, to be delivered into the biscuit warehouse, and a further sum of twenty shillings per oven for odd work, it being understood that, out of the price of one shilling per score of twenty dozen, and the extra charge for odd work, Robinson and Bowers should pay to the defendant Willett and the other nine workmen, parties to the first agreement, the wages payable to them by virtue of such agreement, Willett and others being employed in placing the ware in the ovens to be fired by Robinson and Bowers.

The entry of the work done, and the wages paid for the same work, is made in the book kept by Messrs. Boote for that purpose in the following manner:

“Bowers and Company.

“6050 dozen, at one shilling per score  
dozen—Odd work for four ovens,  
twenty shillings per score ..... £19 2 6”

It was proved in evidence that the above sum of 19*l*. 2*s*. 6*d*. included the wages payable to the defendant and the other workmen, and it was proved that the complainants were in the habit of paying several workmen under one name, and so entering it in their wages book, but no specific sum was reckoned in that as payable to Willett.

On Saturday, the 25th Feb. last, the defendant, with nine other workmen, parties to the first agreement, refused to carry out the dishes from the dish makers' place to the oven, which they had always heretofore done, alleging as a reason that, since their hiring, extra work had been put on them, namely, sanding the saucers. About the middle of the day of the 25th Feb. last, the defendant absented himself from work without the permission of the complainants, and did not return to his work, although required by the complainants to do so, but he returned on the 27th Feb. and continued to work as heretofore, except carrying out the dishes, which he refused to do. The defendant and the other workmen had offered to leave the question in dispute to arbitration, which Messrs. Boote refused. Sometime after November Robinson gave Willett a month's notice to leave, but at the expiration of the month he (Robinson) agreed that he (Willett) should continue to work, which he did. On the examination of Robinson on the part of the defendant he admitted that there had not been any express contract of hiring of the defendant Willett by Robinson and Bowers, but he stated that Willett had performed part of the work comprised under the agreements. It was objected on behalf of the defendant that the relation of master and servant did not subsist between the complainants and the defendant, notwithstanding the first agreement, and it was alleged on his behalf that he had worked under Robinson and Bowers, who had paid him the wages he was entitled to out of the money received under their agreement with Messrs. Boote.

It was further urged that the agreement was vague and indefinite, as the rules and regulations were not specified, and that any dispute about work could be referred to arbitration.

The magistrates convicted the defendant and sentenced him to one month's imprisonment in the House of Correction; but on the application of the defendant I consented to grant a case for the opinion of the Court of Exchequer, and in pursuance thereof I have stated the foregoing circumstances. And whereas the said William Willett has given me notice in writing and required me to state and sign a case for the opinion of the Court of Ex. setting forth the facts and grounds of the said conviction, and entered into recognisances pursuant to the statute in such case made and provided. Whether under the circum-

[Ex.]

LEARY v. LLOYD.

[Q. B.]

stances stated, the relation of master and servant did subsist between the complainants and the defendant, and whether there was an absenting from the service within the meaning of the Act. Whether the agreement was vague and indefinite, and therefore void. Whether the dispute ought not to have been referred to arbitration; and whether my said conviction was correct in point of law.

(Signed) THOS. B. ROSE (L.S.)

Scotland appeared for the appellant.

J. E. Davis appeared for the respondents.

*Curr. adv. vult.*

June 26.—BRAMWELL, B. now delivered the judgment of the court.—We are of opinion this conviction should be confirmed. The first question is, did the relation of master and servant exist between the respondents and appellant. The facts are, that the respondents are master potters, that they hired the appellant and several other men for a considerable period, by a written agreement, at the wages of 4s. a day. On the same day that this agreement of hiring was made, the respondents engaged with two other men for their services, and undertook that they would pay them 1s. for every dozen score put into the oven, and this meant that a sum arrived at by taking 1s. for every dozen score of the total quantity put into the oven was to be given to these latter men, but that out of the sum so given to them they were to pay the other men for daily wages. The appellant and the other men who signed the first-mentioned agreement were no parties to this; but in fact they were paid their wages by the hands of the two men named in the second agreement. It is said this established the relation of master and servant between the men in the second and those in the first agreement, and destroyed it between the respondent and the appellant. But this is not so; that would be to suppose that the appellant and respondents entered into an agreement for no purpose, but at once to cast it away. The matter is very intelligible; the appellant desired to have, and the respondents desired to pay, a fixed daily wages for the appellant's labour, but the respondents desired to have that benefit which is got from careful supervision and the partial application of the principle of piecework. They therefore hired the appellant at daily wages, and they agreed with the two men in the second agreement that the appellant should work under them as under foremen, and that they the foremen should be paid thus: an account should be taken at one penny for every dozen score of all articles put in the oven. That is, the sum which exceeds the wages of the men employed should be paid to them (the foremen) to keep for their own benefit; and that for the convenience of all parties the residue of that sum should be given to them for them to be the hands who pay the men. It is clear that if the foremen had not paid the men, either because their earnings would not allow them, or for any other reason, the respondents would be liable. It was asked whose would the loss be if one of the workmen did not work? but the question is not intelligible—nobody's but his own. If he did not work he would not be paid. If the question means if he worked idly or ill, why the loss would be the foreman's. But so it would be if the respondents had agreed in terms with the foreman, as we say they have in substance, with this difference, that they themselves would pay the men, and deduct their wages from the sum arrived at by taking one shilling for every dozen score. The very object of the arrangement is to give the foreman an interest in getting the greatest possible quantity of work out of the appellant and his fellows. The other objection to the conviction arose thus: in the agreement of hiring there is a clause of arbitration; the appellant made a claim on the respondents, which the respondents refused to accede to and refused to refer to arbitration; the appellant then deserted the service of the respondents. Now it was

urged that if he thought he had a right to do so because his master would not refer this dispute to arbitration, his doing so would not be a wilful desertion of the service so as to subject him to a penalty. Probably that is so; but there really is no ground in the case stated for saying, that he left the service for such a reason. There is nothing to indicate it on the case; and though we have offered to remit it to the justice, the offer has been declined by the appellant. The point is not open to the appellant, and it must be taken that he left the service as a means of compelling his master either to comply with his requisition, or to refer the matter, or for some other cause, knowing he was thereby breaking his agreement. That being so, the appeal must be dismissed.

*Judgment for the respondents.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTSFORD, Esqrs., Barristers at-Law.

May 26 and July 7.

LEARY (appellant) v. LLOYD (respondent).

*Merchant Shipping Act 1854, 17 & 18 Vict. c. 104, ss. 19, 107, 109, 244, 257—Harbouring deserters—Evidence of being a British ship—Proof of registry.*

*In order to convict a person under the above Act of harbouring a seaman who has deserted from his ship, it is necessary to prove that the ship is a British ship, which proof must be given by evidence of its being duly registered.*

This was a case stated under the provisions of the 20 & 21 Vict. c. 43, by which it appeared that on the 25th Jan. last George Lloyd, the respondent, who is the police officer employed by the Newport Dock Company for the protection of the shipping frequenting the Newport Docks, and to prevent seamen from deserting their vessels, laid an information before one of the justices for the borough against the appellant Dennis Leary, who keeps a sailor's lodging-house and beer-house at Newport, for having wilfully harboured certain seamen who had deserted their vessel.

The information was laid under sect. 237 of the 17 & 18 Vict. c. 104 (the Merchant Shipping Act 1854), and a summons was issued and served upon the appellant, who appeared at the town-hall on Friday, the 27th Jan., before two justices to answer the charge. The summons recited that information, "That you, Dennis Leary, did on the 22nd Jan. 1860, at the borough of Newport, then and there wilfully harbour Peter Smith, Allen M'Intyre, Ferdinand Pamin and John Brown, seamen, who had deserted from the British ship *Sultana*, knowing or having reason to believe such seamen to have deserted."

It was proved by Samuel Brewster that he was the master of the British ship *Sultana*, of Liverpool, then lying in the Newport Docks, within the said borough, where she had arrived a week previously from Antwerp; that eleven seamen, who were on the ship's articles of agreement (which were produced), and who had arrived at the port of Newport with him in the vessel, had all deserted the ship; that Peter Smith, Allen M'Intyre, Ferdinand Pamin, and John Brown, named in the summons, were four of the eleven seamen who had so deserted; that the men signed the articles at Antwerp to come to the port of Newport, and from thence to proceed to a port in the United States and back to a port of discharge in the United Kingdom; that the men only having just commenced their voyage, and having no right to leave the ship, deserted either on the night of the 21st or 23rd Jan., and took away all their clothes and effects with them.

The official log-book of the ship was not produced, but it was proved that Smith, M'Intyre, Pamin and Brown had severally been duly convicted on the 23th

Q. B.]

FOX v. WILLIAMS.

[Q. B.]

Jan. at Newport, for having deserted from the said vessel, the *Sultana*, and had been each of them sentenced to three weeks' hard labour.

The appellant's attorney objected that there was no evidence that the *Sultana* was a British ship; that the evidence of the master that she was such, and the production of the articles of agreement signed by the deserting seamen, which were in the form required by the Merchant Shipping Act 1854, was not sufficient proof of the ship being a British vessel in the absence of the certificate of registry, which he contended ought to be produced. He further contended that, in the absence of the official log-book, no legal evidence was before the justices in proof of the men named in the summons being deserters.

The justices were satisfied, on the evidence before them, that the ship was a British vessel, and that the seamen named in the summons had deserted from the vessel. Sect. 244 of the Merchant Shipping Act 1854 was referred to in reply to the appellant's objection.

Michael Miles proved that he was the watchman employed on board the *Sultana*, "to watch the ship and see nothing went out of her; that he was going on board the ship at twenty minutes to six on Sunday night, Jan. 22nd; that the *Sultana* was lying second ship off the dock wall, a Bremen ship being moored next to her; that he then and there saw the appellant Leary standing on the dock wall, and saw a bag of clothes thrown down upon the wall, and one of Leary's men take away the bag. Miles, concluding that seamen were deserting, seized the bag of clothes and took it from the man who was carrying it away, when another man, a sailor, ran up and said, 'This is my bag,' and pulled it away from the watchman. Leary stood by and said to the witness, "Mike, go on board your ship." Miles replied, "No, Leary; you are carrying on a pretty game here to-night, and I will report you for it."

To this accusation Leary made no reply. The watchman then proceeded on board his ship, the *Sultana*, and in order to reach her he had to pass over the Bremen ship lying next the quay wall. On the deck of the Bremen ship he saw beds and other seamen's effects wrapped up, and some seamen standing by. He called the mate of the Bremen ship and asked him if the beds, &c., belonged to the vessel? and the master replied, in the hearing of Leary, who was then standing under the Bremen ship's bow, that they belonged to the *Sultana*.

It was then proved by Lloyd, the respondent, that in consequence of the information he had received from Captain Brewster and the watchman Miles, he went with the other police officers to the house of the appellant on the 23rd Jan., and in his house they found four of the eleven men who had deserted, namely, Smith, M'Intyre, Pamin and Brown, named in the summons. They were in the taproom openly; a fifth man, on seeing the officers, ran away. The seamen were taken to the police station, and on the following day were duly convicted before two justices and were severally committed to prison for deserting the said ship.

It was not proved that Leary was present or in his house at the time the deserters were so taken out of it; but George Bath, one of the police officers, who went with the respondent and apprehended the seamen, proved that he saw Leary in the street in the evening of the day on which the four seamen were taken into custody, and told him (Leary) that four sailors had been apprehended in his house for deserting from the *Sultana*. Leary replied, "Is that all?" The witness said, "Yes." Leary said, "There are some more there; I don't want them; they came to me; the captain can have them if he likes; they shall pay me for their board before they get their clothes."

The appellant's attorney having contended that there was no evidence to show that the bag of clothes thrown from, or the effects found upon, the Bremen ship, were part of the effects of the deserting seamen from the *Sultana*, and that the appellant did not know the men were deserters; the justices, looking at all the circumstances proved in evidence, deemed the offence proved, and convicted the appellant of wilfully harbouring Peter Smith, knowing or having reason to believe he had deserted his ship, in the penalty of 5*l*., including costs.

The question for the consideration of the court was, whether the conviction was right or wrong?

*Dowdswell* appeared for the appellant, and contended that there was no legal evidence that the *Sultana* was a registered British ship, which proof was necessary to support the conviction: (ss. 19, 109, 107, 244, 257 of the 17 & 18 Vict. c. 104, Merchant Shipping Act 1854.)

No one appeared for the respondent.

*Cur. adv. vult.*

July 7.—BLACKBURN, J.—This was an appeal against a conviction on an information under the 257th section of the Merchant Shipping Act 1854, for harbouring a deserter from the British ship *Sultana*. On the hearing before the magistrates no certificate of the registry of the ship having been produced, an objection was taken that there was no proof that the ship in question, which was alleged to be a British ship, had been registered pursuant to the requirements of the Act in question, and that the information could therefore not be sustained. The magistrates having overruled this objection, the same point was taken before us upon the hearing of the appeal, and we are of opinion that the objection is well founded and must prevail. After a careful consideration of the Act, we are of opinion that the sections coming under the head of discipline, of which the section in question is one, have reference to British ships alone; but by the 19th section no ship required to be registered shall, unless registered, be recognised as a British ship. It follows that in a proceeding in which it becomes necessary to show that a ship is a British ship, proof of the ship having been registered becomes essential to invest the ship with the character of a British ship. Such proof was in the present case wanting, and the absence of it ought, in our opinion, to have prevented a conviction from taking place. We therefore hold that the conviction was wrong, and must be reversed.

Conviction quashed.

Wednesday, Nov. 7.

FOX v. WILLIAMS.

*Clerk to borough justices—Partner with clerk of the peace of the county—Interest in prosecutions—5 & 6 Will. 4, c. 76, s. 102.*

*A. and B. were in partnership as attorneys A. was clerk to the borough magistrates of N., and B. was clerk of the peace for the county of M., to the quarter sessions of which the borough justices of N. committed their prisoners for trial.*

*By indenture B. released all interest in A.'s fees as clerk to the borough justices, and B. released all interest in A.'s fees as clerk of the peace for the county:*

*Held, that this arrangement exempted A. from the operation and penalties of sect. 102 of 5 & 6 Will. 4, c. 76.*

This was an action for a libel published in the *Star of Gwent* newspaper of Feb. 18, 1860, of which the defendant is the proprietor.

The first count of the declaration was for publishing the report of a meeting of ratepayers of the borough of Newport, at which some strong observations were made by some of the speakers, on the plaintiff. The second count was for a libel contained in an article in

Q. B.]

FOX v. WILLIAMS.

[Q. B.]

the same paper, commenting on the subject. Among other pleas, the defendant pleaded a justification as to part of the libel.

The trial took place before Byles, J., at the Hereford assizes, and a verdict was found for the plaintiff, damages 200*l*.

It appeared that the plaintiff and a Mr. Prothero were in partnership as solicitors, at Newport, Monmouthshire, and had been so for some time prior to Jan. 1857, and that Mr. Prothero was clerk of the peace for the county of Monmouth, and Mr. Fox clerk to the justices of the borough of Newport, that prisoners and others were committed for trial by the borough justices to the quarter sessions at Usk, and the assizes for the county, that Mr. Prothero as clerk of the peace received fees on the arraignment and trial of such prisoners, &c.; that Mr. Prothero and Mr. Fox, as such partners, brought their fees, &c., prior to Jan. 1857, into one common account. In consequence of this arrangement much litigation took place, and ultimately the Court of Error decided that Mr. Fox was acting contrary to the 5 & 6 Will. 4, c. 76, s. 102 (*see Reg. v. Fox*, 1 L. T. Rep. N. S. 216), and liable to an indictment, and having been found guilty upon such an indictment a fine of 1*s*. was imposed upon him. During the progress of the litigation, and before the decision of the Court of Error, Mr. Fox, and Mr. Prothero by the advice of counsel, executed the following indenture to avoid the effect of the 102nd section of the above statute.

"This indenture, made the 11th March 1858, between Charles Prothero, of Newport, in the county of Monmouth, gentleman, of the one part, and Charles Burton Fox, of Newport aforesaid, gentleman, of the other part. Whereas prior to and since the 1st Jan. 1857, the said C. P. and C. B. F. have carried on business together as attorneys and solicitors at Newport aforesaid, in copartnership, by verbal arrangement only, and not under any deed or articles of copartnership. And whereas no rest or division of profits of the said copartnership hath ever yet been made or taken place. And whereas doubts have been entertained as to the legality or advisability of the said C. P., who is clerk of the peace for the county of Monmouth, being interested or taking any share in the fees or moneys received of the said C. B. F. as clerk to the justices of the borough of Newport, in respect of prisoners committed for trial at the general or quarter sessions, or any adjourned sessions of the peace for the county of Monmouth, and of the said C. B. F. being interested in or taking any share in the fees or other moneys received by the said C. P. as clerk of the peace for the county of Monmouth, in respect of prisoners committed for trial by the justices of the borough of Newport aforesaid, to or of whom the said C. B. F. is the clerk, and the said parties hereto have accordingly agreed to enter into these presents for the purpose of removing such doubts and all questions relating thereto. Now this indenture witnesseth, and it is hereby mutually declared and agreed by and between the said parties hereto, and each of them the said C. P. and C. B. F. doth hereby for himself, &c., covenant, agree and declare to and with the other of them, his heirs, &c., that as and from the 1st Jan. 1857, and henceforth during the continuance of the partnership between the said C. P. and C. B. F., upon any and every rest and division of profits by and between the said partners, or their or either of their executors or administrators, the said C. P., his executors or administrators, shall not take or receive, or share or have any claim or interest whatsoever in all or any of the fees or moneys received or receivable by or payable to the said C. B. F. as clerk to the justices of the borough of Newport, for or in respect of all and every, or any prisoner or prisoners, or other person or persons whomsoever, heretofore committed, or hereafter to be committed for trial by the justices of

the borough of Newport aforesaid, or any one or more of them, at any court of gaol delivery, or general or quarter sessions, or any adjourned sessions of the peace for the county of Monmouth, or any part or parts of such last-mentioned fees or moneys respectively. And the said C. P. doth hereby, for himself, &c., relinquish, release and quit claim to all and every such last-mentioned fees and moneys, and every part and parts thereof respectively, and all share, claim and interest whatsoever, either at law or in equity, or otherwise howsoever, of him the said C. P. therein or thereto, and doth hereby declare that the said C. B. F., his executors and administrators, shall have, take and receive, or have credit for, in and upon any and every rest or division of profits by and between the said partners and their or either of their executors or administrators, the whole and every part of the fees or moneys received by or payable to him the said C. B. F. as clerk of the justices of the borough of Newport aforesaid, for or in respect of all and every, or any prisoner or prisoners, or other person or persons whomsoever heretofore committed or hereafter to be committed for trial by the justices of the borough of Newport aforesaid, or any one or more of them, at any court of gaol delivery or general or quarter sessions, or any adjourned sessions of the peace for the county of Monmouth, as and for the sole proper fees and moneys of him the said C. B. F., his executors and administrators, and for his and their own absolute use and benefit. And further, that as and from the 1st Jan. 1857, and henceforth during the continuance of the said copartnership, upon any and every rest and division of profits by and between the said parties hereto, or their, or either of their executors or administrators, the said C. B. F., his executors or administrators, shall not receive or take or share, or have any claim or interest whatsoever in all or any of the fees or moneys received or receivable by or payable to the said C. P. as clerk of the peace of or for the county of Monmouth or otherwise howsoever, for or in respect of the indictment, arraignment, prosecution, conviction, trial, sentence, judgment, or acquittal, or other proceeding whatsoever, at or before or by any court of gaol delivery or general or quarter sessions, or any adjourned sessions of the peace for the county of Monmouth, of all and every, or any prisoner or prisoners, or other person or persons whomsoever, heretofore committed or hereafter to be committed for trial by the justices of the borough of Newport aforesaid, or any one or more of them, at any court of gaol delivery, or general or quarter sessions, or any adjourned sessions of the peace for the county of Monmouth, or any part or parts of such last-mentioned fees or moneys respectively. And the said C. B. F. doth hereby for himself, &c., relinquish, release, and quit claim to all and every such last-mentioned fees and moneys, and every part and parts thereof respectively, and all share, claim and interest whatsoever, either at law or in equity, or otherwise howsoever of him the said C. B. F., therein or thereto. And doth hereby declare that the said C. P., his executors and administrators, shall have, take and receive, or have credit for, in and upon any and every rest and division of profits by and between the said partners and their or either of their executors or administrators, the whole and every part of the fees or moneys received by or payable to him the said C. P., as clerk of the peace for the county of M., or otherwise howsoever, for or in respect of the indictment, arraignment, prosecution, conviction, trial, sentence, judgment and acquittal, or other proceeding whatsoever at or before, or by any court of gaol delivery, or general or quarter sessions, or adjourned sessions of the peace for the county of M., of all and every, or any prisoner or prisoners, or other person or persons whomsoever, heretofore committed or hereafter to be committed for trial by the justices of the



Q. B.]

Ex parte THE MAYOR OF BIRMINGHAM.

[Q. B.]

borough of N. aforesaid, or any one or more of them, to or at any court of gaol delivery, or general or quarter sessions, or adjourned sessions of the peace for the county of M., as and for the sole proper fees and moneys of him the said C. P., his executors and administrators, and for his and their own absolute use and benefit. In witness, &c."

The justices having taken advice as to the effect of the deed, resolved to continue Mr. Fox in his office as clerk to them. Afterwards, however, at a meeting of ratepayers of the borough of Newport, a Mr. Brown and a Mr. Geo. Williams made speeches containing libellous matter upon Mr. Fox, the report of which speeches, with some unjustifiable comments, constituted the libel complained of. At the trial Byles, J. ruled that the operation of the deed of March 1856, so far as the prospective part of the deed was concerned, was to make the subsequent acting of Mr. Fox legal; but reserved leave to the defendant to move for a new trial for the purpose of questioning that ruling.

Huddleston now moved accordingly, and also for a new trial on the ground that the damages were excessive. It is submitted that the ruling of Byles, J. was a misdirection; and that the execution of the deed of March 1858 has not avoided the effect of sect. 102 of the 5 & 6 Will. 4, c. 76. By sect. 102 of the 5 & 6 Will. 4, c. 76, after giving the borough justices a power to appoint a clerk, it is provided "that it shall not be lawful for the said justices to appoint or continue as such clerk to the justices any alderman or councillor of such borough, or clerk of the peace of such borough, or the partner of such clerk of the peace, or any clerk or person in the employ of such clerk of the peace, provided also that it shall not be lawful for the said clerk to the justices, by himself or his partner, to be directly or indirectly interested or employed in the prosecution of any offender committed for trial by the justices of whom he shall be such clerk as aforesaid, or any of them, at any court of gaol delivery or general or quarter sessions. And any person being an alderman or councillor, or clerk of the peace of any borough, or the partner or clerk, or in the employ of such clerk of the peace, who shall act as clerk to the justices of such borough, or shall otherwise offend in the premises, shall for every such offence forfeit and pay the sum of 100*l.*, one moiety thereof, to the treasurer of such borough to be paid," &c. If the plaintiff is in any way interested by himself or his partner in the prosecution, sect. 102 is contravened. Although the deed deprives the one of any pecuniary interest he derived through the fees of the other, still there is an indirect interest in promoting the number of prosecutions, and it may be that the clerks' and office expenses requisite for the purpose of conducting them are shared in common.

Hill, J. left the court to consult with Byles, J.

COCKBURN, C. J.—We have been informed that Byles, J. is not dissatisfied with the amount of damages, and, considering that the libel is admittedly such as cannot be justified on the ground of fair comment, and charges that the arrangement between Mr. Fox and Mr. Prothero is not a *bona fide* one, but merely colourable and fictitious, the verdict ought not to be disturbed on the ground of the amount of damages. As to the point of misdirection, I also think that there is no ground for a rule. The plaintiff has now no such interest as the statute contemplates. He has no pecuniary interest as an individual, himself or by his partner, in the office. The only interest he can have is such as a man has in the advancement of the pecuniary profits of a brother or a friend. Whether such an arrangement is to be commended, and may not be open to some observation, we have not to determine.

WIGHTMAN, J.—I also think that this was a case for substantial damages, and that a rule ought not to be granted on this ground. If there had been any evi-

dence that the plaintiff was directly or indirectly interested in the profits of the office by his partner, it might have been different, but there was no such evidence.

HILL, J.—The libel went far beyond a *bona fide* comment, and made a grave imputation on the professional character of Mr. Fox. It was therefore a case for substantial damages. After the execution of the deed I am of opinion that Mr. Fox did not by himself or his partner directly or indirectly become interested in the profits of the office within the meaning of the statute?

BLACKBURN, J. concurred.

Rule refused.

Thursday, Nov. 8.

Ex parte THE MAYOR OF BIRMINGHAM.

Status of mayor—Right to preside as chairman—Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 57.

The mayor of a borough is not entitled as of right, under the 57th section of 5 & 6 Will. 4, c. 76, to take the chair at the gaol sessions and other meetings of the justices; the words in that section only refer to his social rank, and not to his magisterial authority.

The Solicitor-General (Tomlinson with him), on the part of the mayor of Birmingham, moved for a rule calling upon the justices of the borough to show cause why a *mandamus* should not issue commanding them to allow the mayor of the said borough to take precedence and to preside as chairman at all meetings of the justices at which he should be present and where a chairman should be required.

By the affidavit it appeared that the present mayor, Thomas Lloyd, was elected to the office in 1859, the borough being a corporation under 5 & 6 Will. 4, c. 76. In 1859 a separate commission of the peace had been granted to the borough. In 1859 disputes having arisen between the borough justices and Sir John Ratcliffe, the then mayor, as to his right to take the chair and preside over the gaol and other sessions and meetings as of right, by virtue of his office, certain of the other justices of the borough insisted that he had no such right, and they then elected another of their number to perform the duties of chairman.

On the 9th Jan. last, at a gaol session, there were present thirteen justices, including the mayor. When the business was about to commence the mayor took the chair and invited the other justices present to proceed with the business, whereupon a discussion arose as to the right to act as chairman, and a motion was made, seconded and carried, that Mr. Wart should take the chair. The mayor thereupon left the chair and the council chamber, after protesting against the proceedings, and the justices proceeded with the business. The mayor now stated in his affidavit that he had made inquiries as to the practice of other principal boroughs and cities, and found that it was the general and unchallenged practice of the mayor to take the chair as of right and by virtue of his office. In the present case the mayor has applied to the Home Secretary, who took the opinion of the law officers of the Crown, who were of opinion that the mayor was entitled as of right under the Municipal Corporation Act. After the mayor had returned from the meeting, the justices sent him a memorandum, stating that he had no right to preside; that the justices were independent of the town council; that all justices were in the eye of the law equal and that, in fact, they could carry on the business without appointing a chairman, or elect whom they thought proper; that they had taken the opinion of counsel, and that they determined to insist on their right to appoint their own chairman until they should be commanded by this court to do otherwise.

It was now argued that the Municipal Corporation Act, 6 & 7 Will. 4, c. 76, s. 57, gives the mayor for the time being of every borough, during the time of



Q. B.]

BOSANQUET v. HEATH. HEATH v. BOSANQUET.

[Q. B.]

his mayoralty, precedence in all places within the borough; and that the present was the proper and only way to insist on such right. [WIGHTMAN, J.—Are all justices of the peace equal in the eye of the law? I don't find words that the mayor is to have precedence as a justice of the peace. BLACKBURN, J.—It merely means precedence in point of dignity.]

COCKBURN, C.J.—It is a proper mark of respect to place the mayor in the chair, but there can be no compulsion. The words in the statute plainly refer to the mayor's social rank, and not to his magisterial authority.

*Rule refused.*

Friday, Nov. 9.

BOSANQUET v. HEATH.

HEATH v. BOSANQUET.

*Ecclesiastical law—Chapel—Proprietary—Rights.*

*A churchwarden of a parish, as such, has no rights over a proprietary chapel in the parish devoted to the performance of divine service according to the rites of the Established Church.*

*The proprietor of an unconsecrated chapel, though open for the performance of divine service according to the rites of the Established Church, has a right to request any one therein to depart, and, if he refuses, to remove him by ordinary legal measures.*

*Bosanquet v. Heath.*

Declaration for an assault and false imprisonment.

Pleas:—That the defendant was possessed of a chapel wherein the plaintiff was trespassing and doing damage; that the defendant requested the plaintiff to leave the chapel, which the plaintiff refused to do, whereupon the defendant gently laid his hands upon the plaintiff to remove him, doing no more than was necessary for that purpose, which is the alleged assault complained of, and thereupon the plaintiff being still in the said house resisted and assaulted the defendant, who thereupon necessarily committed the other trespasses in his own defence, and in defence of the said chapel of the defendant.

Replication.—That the plaintiff being vicar and incumbent of the parish of Enfield, had dedicated and devoted the said chapel, the same being situate in the said parish, and within the diocese and jurisdiction of the Bishop of London, to the worship of God according to the rites and ceremonies of the Church of England as by law established, for the celebration of which said worship in the said chapel the said bishop had duly granted his licence according to law, and which said licence was at the said time when, &c. in full force. That the plaintiff was at the said time when, &c. one of the churchwardens of the said parish, and an inhabitant and parishioner of the same, and that at the said time when, &c. the same being Sunday, the said chapel being then open, with the defendant's consent, for the purpose of celebrating divine service there, and such service being about to commence, the plaintiff went into and was in the said chapel for the purpose of joining in the celebration of divine worship therein, according to the rites and ceremonies aforesaid, and of worshipping God therein according to the same, and was desirous of remaining therein for the purposes aforesaid.

Demurrer thereto and joinder.

*Heath v. Bosanquet.*

Trespass for breaking and entering a messuage, chapel and premises of the plaintiff at Clay-hill, in the parish of Enfield, Middlesex, and breaking open a box and taking away plate, velvet and furniture.

Pleas:—1. That the said chapel was within the diocese and jurisdiction of the Bishop of London, and was dedicated by the plaintiff, then being the vicar and incumbent of the parish of Enfield, to the worship of

God according to the rites and ceremonies of the Church of England as by law established, for the celebration of which said worship in the said chapel the bishop had duly granted his licence according to the statutes in that behalf. That defendant was one of the churchwardens of the said parish, and an inhabitant and parishioner, there then being no chapelwarden of the said chapel, and that at the said time when, &c., the same being Sunday, and being one of the usual days for the celebration of divine service and of the Lord's Supper in the said chapel, the said chapel being then with the plaintiff's assent open for the celebrating divine service therein, and for the administration of the sacrament of the Lord's Supper, the defendant went into and was and remained in the said chapel for the purpose of joining in the celebration of divine worship therein according to the rights and ceremonies aforesaid, &c. 2. Justifying breaking open the box and taking the plate for the purpose of collecting the alms at the offertory as churchwarden as aforesaid. 3 and 4. Justifying the trespasses as to the velvet and furniture, as churchwarden as aforesaid, for the purpose of arranging the communion-table and walls adjacent, according to the rites of the Established Church.

Demurrers to the pleas and joinder therein.

*M. Smith (Coleridge with him) for the vicar.*—What is called a chapel in the pleadings is a mere secular building in point of law, and the defendant, as churchwarden of the parish, had no right in the chapel. It does not appear that the chapel has been consecrated to the service of the Church of England, and the public have no right to the use of it: (3 Inst. 203.) The licence to the clerk to perform divine service in the building is only a personal licence. [COCKBURN, C.J.—What is there to prevent the proprietor charging one shilling admission to each person?] Nothing: (*Mogey v. Hilcoate*, 2 Hag. 30; *Farnworth v. Bishop of Chester*, 4 B. & C. 553.)

*Field (Bovill with him) for Captain Bosanquet, the churchwarden.*—The vicar in his plea calls the building a chapel, and, as against him, that must be taken to mean a legal chapel. It is quite consistent with the pleadings that this is a chapel of ease. The defendant Bosanquet could not be turned out according to the 52 Geo. 3, c. 159, s. 11. [COCKBURN, C.J.—The chapel being open for service, the plaintiff might not be a trespasser for entering; but the proprietor has a right to determine the licence to enter at any moment.]

COCKBURN, C.J.—This case is free from any doubt. We have not to determine the intrinsic merits of the case, but what is the law. The pleadings disclose only that this was a chapel, and we are bound to construe it as merely a private proprietary chapel, dedicated by the owner to the performance of divine service, according to the rites of the Church of England, retaining over it his rights of property, and never intending to divest his right of property over it, or to dedicate it to the parish at large. The owner therefore has a right to prescribe what persons shall or shall not remain in it; and where a person, as here, claims a right to be there, he may call on him to depart, and if he will not, he may remove him in a legal way. Our judgment ought therefore to be for the vicar.

HILL, J.—I am of the same opinion. The facts in the case are these: This is a private chapel, not consecrated for the use of the parish, and therefore the owner retained his rights of property over it, and though open, it must be considered as open for the purpose of private worship.

BLACKBURN, J.—I am of the same opinion. Mr. Heath is on these pleadings the proprietor of the chapel. It was contended that he was bound to admit Captain Bosanquet, because the chapel was open for divine service, but there is no authority for that.

*Judgment for the vicar.*

Q. B.]

REG. on the Prosecution of THE GUARDIANS OF THE STRAND UNION, &amp;c.

[Q. B.]

Saturday, Nov. 10.

REG. on the prosecution of THE GUARDIANS OF THE POOR OF THE STRAND UNION (respondents) AND THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF ST. GILES-IN-THE-FIELDS (appellants).

*Order of removal—Lunatic pauper—Unemancipated child—Status of irremovability of father—Order of maintenance.*

*The unemancipated child of a person who has acquired the status of irremovability becomes thereby himself irremovable, so that an order of maintenance made with reference to himself as a lunatic pauper should not be made upon his parish of settlement, but upon the parish where he has obtained his status of irremovability.*

*The parish of settlement of A. was St. Giles-in-the-Fields, but he obtained the status of irremovability by residence in St. Anne's, Westminster. B, his unemancipated child, being a lunatic pauper, was removed to an asylum, and an order of maintenance was made upon St. Giles-in-the-Fields:*

*It is, that upon a proper construction of the 9 & 10 Vict. c. 66, s. 1, 11 & 12 Vict. c. 111, s. 1, and the 16 & 17 Vict. c. 97, s. 102, the order should have been made upon St. Anne's, Westminster, and was therefore bad.*

This was a case stated for the opinion of this court under the provisions of the 12 & 13 Vict. c. 45, s. 11.

It was stated that on the 17th Oct. 1854 James Randall, who was then eighteen years of age, was living unemancipated with his father Thomas Randall (who is still alive), in the parish of St. Anne, Westminster, in the Strand Union, Middlesex, and on that day the said James Randall having become insane, was removed to the county lunatic asylum, and has been maintained therein ever since, and ever since and during this period has been and still is there as a pauper lunatic. He never gained a settlement in his own right. At the time of his removal to the asylum his father was legally settled in the parish of St. Giles-in-the-Fields, Middlesex, by reason of having gained a settlement in such parish by renting a tenement, and which settlement the said Thomas Randall still retains. The said Thomas Randall and his said son James Randall the lunatic, who lived with him as part of his family, had each resided for five years and upwards in the said parish of St. Anne, Westminster, next before the 17th Oct. 1854, when such lunatic was removed to the said asylum. After his son's removal to the asylum, Thomas Randall continued to reside in the said parish of St. Anne, Westminster, until three years ago, when he left the parish without any intention of returning thereto, and he has, in fact, never since returned thereto. After the lunatic had been sent to the asylum, and down to the 15th Sept. 1859, his maintenance and support therein were charged to the common fund of the Strand Union, but after the last-mentioned day, being that on which it was discovered that his father had left such parish in the manner hereinbefore mentioned, the cost of such maintenance and support were as to the twelve months immediately preceding the said 15th Sept., transferred and for the future charged to the account of the said parish of St. Anne with the said union. On the 11th Oct. 1859 the order now appealed against was made, under the 16 & 17 Vict. c. 97, s. 97, adjudging the settlement of the said lunatic to be in the parish of St. Giles-in-the-Fields, and the guardians of the poor of such parish were ordered to pay the expenses incurred and paid in supporting the lunatic in the asylum within the preceding twelve months to the guardians of the poor of the Strand Union, and were also ordered to pay for the support of the said lunatic. The part of such expenses paid or incurred since the said 15th Sept. to the 11th Oct. 1859 amounts to 2*l.* and no more. It is contended, on the part of the ap-

pellants, that the lunatic was, at the time of his being conveyed to the asylum, exempt from removal to the parish of his settlement, by reason of a provision in the 9 & 10 Vict. c. 66; that under the 16 & 17 Vict. c. 97, s. 102, the order ought not to have been made, and that such lunatic ought to continue to be maintained in the said asylum out of the common fund of the Strand Union. The appellants also contend that if any such order may be made, it ought not to direct the payment of expenses incurred before the date thereof; or, at all events, ought not to direct the payment of expenses incurred before the said 15th Sept. 1859. It was contended on the part of the respondents, that if the said lunatic was exempt from removal, as alleged by the appellants, such lunatic being, as the respondents contend, unemancipated when his father left the parish of St. Anne as before mentioned, and having, as the respondents contend, no other settlement than that of his father, ceased to be exempt from removal by reason of any provision in the 9 & 10 Vict. c. 66, and that the order was properly made in its terms on the parish where the lunatic was settled.

The questions for the opinion of the court were—

First, whether any order can lawfully be made on the said parish of St. Giles for payment by the said parish of expenses for the lodging, medicine, clothing, and care of the said lunatic in the said asylum?

Secondly, whether, assuming that any such order may be made, the payment of past expenses may, by such order, be ordered to be made?

Thirdly, whether, if the payment of past expenses may be so ordered, all the expenses incurred during the twelve months next before the order, or such part only as may have been incurred since the said 15th Sept. 1859, may and ought to be directed to be made by such order?

If the first question ought to be answered in the affirmative, the order is to be confirmed; but if in the negative, the order is to be quashed.

The second and third questions were given up by the appellants upon the argument.

By the 9 & 10 Vict. c. 66, s. 1, it is enacted that "no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant."

Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable."

This last proviso was repealed by the 11 & 12 Vict. c. 111, s. 1, and the following enacted in its stead: "That the said last proviso be repealed, and that instead thereof the following be enacted: Provided always that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

By the 16 & 17 Vict. c. 97, s. 102, it is enacted: "That all the expenses incurred since the 29th day of September 1853, or hereafter to be incurred in and about the examination, bringing before a justice or justices, removal, lodging, maintenance, medicine, clothing and care of a pauper lunatic heretofore or hereafter removed to an asylum, registered hospital, or licensed house under the authority of this or any other Act, who would at the time of his being conveyed to such asylum, hospital, or house have been exempt from removal to the parish of his settlement or the country

Q. B.]

Ex parte GREEN, re RAND AND ANOTHER v. GREEN AND ANOTHER.

[Q. B.]

of his birth by reason of some provision in the Act of the session holden in the ninth and tenth years of her Majesty, chapter sixty-six, shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption if such parish be subject to a separate board of guardians, or by the overseers of such parish where the same is not subject to such separate board," &c.

Poland now appeared on behalf of the respondents, and contended that the order was valid, for that the lunatic had not himself acquired such a status of irremovability as is contemplated by the 102nd section of the 16 & 17 Vict. c. 97, that section only referring to the irremovability mentioned in the 9 & 10 Vict. c. 66, and not to the irremovability of a child as referred to in the 11 & 12 Vict. c. 111, s. 1; and that at all events, as the irremovability of the child continued only so long as the parent continued irremovable, its own irremovability ceased when its father lost his irremovability by quitting the parish of St. Anne three years ago: (*Reg. v. Cudham*, 28 L. J. 105, M. C.; *R. v. St. Ann's, Blackfriars*, 2 Ell. & Bl. 440.)

Keane, for the appellants, argued that the order was bad, for that the child having at the time of the order acquired through its father the status of irremovability, came within the provision of sect. 102 of the 16 & 17 Vict. c. 97: (*Reg. v. Elvet*, 29 L. J. 17, M. C.) (He was stopped by the court.)

COCKBURN, C.J.—The whole force of Mr. Poland's argument rests upon the contention that the proviso in the 11 & 12 Vict. c. 111, is not to be considered as a part of the 9 & 10 Vict. c. 66. If it is to be considered as a part of it, then the case comes within the express provision of the 16 & 17 Vict. c. 97, s. 102. Now it is clear to my mind that the proviso of the 11 & 12 Vict. c. 111, was intended to be a substitution of the proviso in the 9 & 10 Vict. c. 66, and that the meaning of the Legislature was to incorporate the provision of the subsequent Act into the former one, and with reference therefore to the 16 & 17 Vict. c. 97, s. 102, that the second Act should be considered as a part of the first Act.

BLACKBURN, J.—I think so too. The words of the 102nd section of the 16 & 17 Vict. c. 97, are that all expenses incurred with reference to a lunatic pauper removed under the authority of the Act, "who would at the time of his being conveyed to such asylum, hospital, or licensed house under the authority of this or any other Act, have been exempt from removal to the parish of his settlement or the country of his birth, by reason of some provision in the Act of the session holden in the ninth and tenth years of her Majesty, chapter sixty-six, shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption." The first question is, whether the lunatic, when he was conveyed to the asylum, had acquired an exemption from removal under the 9 & 10 Vict. c. 66? Now in that statute the first provision is that a person who has resided for five years in a parish should not be removed from it, and then there is a proviso which was afterwards opened by the 11 & 12 Vict. c. 111, and another substituted for it, and the effect of that subsequent proviso is, that it becomes a portion of the former Act. If with the assistance of the two statutes the lunatic was irremovable at the time the order was made, then comes the next question, whether in this case the lunatic pauper was exempt from removal? The language used in the case of *Reg. v. Elvet* is very strong upon this point, showing that a child obtains irremovability, though only through its parent. It may be that the effect of this is, that a lunatic pauper may be a burden to the parish, even after the parent has ceased to be irremovable, but the Legislature may have intended that, irrespective of such questions, it was de-

sirable to settle the question of liability at once. The order was therefore not properly made, and there must be judgment for the appellants.

*Judgment for the appellants without costs.*(a)

Monday, Nov. 12.

Ex parte GREEN, re RAND AND ANOTHER v. GREEN AND ANOTHER.

*Prohibition to Arches Court—Church-rate—Notice of meeting.*

"Notice is hereby given, the churchwardens and overseers, and other principal inhabitants of this parish, are requested to meet in the vestry on the 14th July, &c., to examine the churchwardens' accounts, and to grant a rate."

Held, a sufficient notice; this court refusing a writ of prohibition to the Ecclesiastical Court to stop a suit for subtraction of church-rates, the defendant having neglected his right of appeal.

Philbrick moved for a rule calling on the plaintiff and the judge of the Arches Court to show cause why a writ of prohibition should not issue to prevent the judge from further proceeding in a suit of subtraction of church-rates. The libel had been opposed, but was admitted by the court, and the defendant ordered to bring in his defensive allegation. The first article of the libel alleged that the parish church of Hadleigh, in the county of Suffolk, was out of repair, and that there were no funds out of which the expense could be defrayed; that on the 14th July 1858 the churchwardens and other ratepayers met in the vestry-room to make a rate, when certain proceedings took place, and on a poll being demanded by the churchwardens, a church-rate was carried. The second article referred to certain paper writings, one of which was the following notice of the said vestry meeting, which notice it was contended was insufficient. It was as follows:—"Notice is hereby given, the churchwardens, overseers and other principal inhabitants of this parish, are requested to meet in the vestry on Wednesday, the 14th July instant, at half-past nine o'clock in the forenoon, to examine the churchwardens' accounts and to grant them a rate. Given under our hands this 3rd day of July 1858. Joseph Rand, William Grimwade, Churchwardens." It was contended in the Arches Court that the above notice was defective, but the judge (Dr. Lushington) overruled the objection, and desired the defendant to bring in his defensive allegations. It was now contended that such decision of the judge was an error in point of law. At the present time vestry meetings are regulated by Sturges Bourne's Act, 58 Geo. 3, c. 69, which enacts that "no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and time of holding the same, and of the special purpose thereof, three days at the least before the day to be appointed for holding such vestry." This notice is informal and incorrect; first, it is not addressed to all who had a right to attend, but only to the churchwardens, overseers, and other principal inhabitants; secondly, no parish is named; thirdly, it is not stated what rate it is proposed to make. [HILL, J. referred to the case of *Griffin v. Ellis*, 11 A. & E. 743, as showing that the mere admission of a pleading by an ecclesiastical court proving a rate void at common law, was not sufficient to enable this court to grant a prohibition.] *Blunt v. Harwood*, 8 A. & E. 610; *Gough v. Gapper*, 5 East, 345; *Gore v. Gapper*, 3 East, 472, are in defendants' favour, and have never been overruled. [HILL, J.—Yes, but the case of *Griffin v. Ellis* was decided on demurrer, and might have been appealed against.] It does not overrule the case referred to. He also referred to *Richetta v. Bodenham*, 4 A. &

(a) Wightman, J. was in the Court of Probate, and Hill, J. in the Court for Crown Cases Reserved.

Q. B.]

*Ex parte* WILLIAM THOMPSON—SOMERVILLE v. MIREHOUSE.

[Q. B.]

E. 433. The judge has decided that this notice is sufficient. Defendant says he ought to have rejected the libel altogether, and that he was wrong in his construction of the statute. [COCKBURN, C.J.—All the inhabitants of the parish are entitled to be present, but only those who are rated are entitled to vote. You cannot contend that the notice would be bad if the word "principal" had been left out. Was this objection taken in the Ecclesiastical Court? Yes, and it was overruled by the judge. [COCKBURN, C.J.—It does not seem to me that this form of notice would prevent any one from attending and exercising their rights; the request to meet in the vestry is the same as if the notice had said the vestry of the parish on the church-door of which this notice is stuck. The defendant might have appealed to the Privy Council.] No doubt blame attaches to the defendant for allowing the time to appeal to go by. A similar application to the present had been made to the C. P. and refused. The Act requires that notice should be given to all the parishioners, not alone to the principal parishioners, and this notice might well include lodgers; it ought to have been addressed to the occupiers and ratepayers. [COCKBURN, C.J.—How could the insertion of the word "principal" have misled any one? BLACKBURN, C.J.—We say "worthy and independent electors," but that does not exclude the unworthy and corrupt.] *Clutton v. Cherry*, 2 Phil. 373; *Smith v. Deighton*, 8 Moore P. C. 179; *Bacon's Abr. tit. "Churchwardens," C.; Round and another v. Green and another*, 6 Jur. N.S. 303, were also cited.

COCKBURN, C.J.—We do not think there is anything in these objections, as no practical inconvenience or mischief can arise. We think we ought not to interfere, especially as defendant might have appealed.

HILL and BLACKBURN, J.J. concurred.

#### *Rule refused.*

*Ex parte* WILLIAM THOMPSON.

*Assault—Rape—Commitment—Jurisdiction of justices—Habeas corpus.*

*A. was charged with assaulting and abusing a woman. On the examination before the justices, the woman swore that A. had committed a rape on her. The justices convicted A. for the assault, and committed him to prison for six months:*

*Held, a good committal.*

*Overend*, Q.C. moved for a *habeas corpus* to bring up the body of William Thompson, a prisoner now under confinement in Preston gaol, Lancashire, with a view to his being discharged. It appeared that on the 2nd Nov. an information was laid against the prisoner for assaulting and abusing a woman named Susannah Taylor; on the following day he was taken before the magistrates, when the prosecutrix gave evidence, which, if true, would go to show that a rape had been committed on her person by the prisoner, and the magistrates thereupon committed him to prison for six calendar months. It was now contended that the charge, as stated by the prosecutrix, was such an one as ought to be tried by a jury; that as soon as the woman had deposed to the felony having been perpetrated, the magistrates were ousted of their jurisdiction, and they were bound to commit the prisoner for trial; they could not in such a case deal with the charge summarily, for their jurisdiction was gone; they had only power to convict in cases of assault. [COCKBURN, C.J.—Suppose the justices were of opinion that there had been no rape, and no assault with intent, but merely an assault.] As soon as the charge of rape was made they ceased to have jurisdiction. [COCKBURN, C.J.—The man is brought before the justices, and no objection is then made; the prisoner did not demand to be tried by a jury, but was content with the justices' decision, and they believed him to be guilty of an assault. HILL, J.—The charge was entered as an assault, which was

consistent with the evidence; the man might possibly have committed a grossly indecent assault, and yet it might not be with an intent to commit a rape, and the justices believing that, convicted him of the lesser offence. COCKBURN, C.J.—The woman first of all treats it as the minor offence, the justices doubt the evidence as to the higher offence.] There was a further objection to the commitment, that nothing was said in it as to whether the defendant was to be imprisoned with or without hard labour.

*Rule refused on the first point, granted on the last.*

Tuesday, Nov. 13.

SOMERVILLE v. MIREHOUSE.

*Justices—Action against—Mistake of law—Quashing order.*

*Upon a summons for nonpayment of church-rates, the ratepayer set up a demand by the collector for the rate, and a refusal by himself to pay it, more than six months before the application for the summons to oust the jurisdiction of the justices (11 & 12 Vict. c. 43, s. 11); on which the other side proved a second demand and refusal within the six months, whereupon the justices made an order for payment (53 Geo. 3, c. 127). This order was removed by certiorari, and quashed on the ground that the cause of complaint was complete on the first demand and refusal:*

*Held, that the justices were not liable to an action for making the order, though the ratepayer had incurred costs in quashing it.*

This was an action against two justices of the peace for the county of Gloucester. From the facts alleged in the pleadings it appeared that the plaintiff was the occupier of a mill, and duly rated to the church-rate, and that he was summoned before the defendants, as justices, to show cause why he neglected and refused to pay the rate; that there was a demand by the collector and a refusal to pay by the plaintiff more than six months before the application for the summons, and another demand and refusal within the six months; that it was contended that the cause of complaint was complete upon the first demand and refusal, and that therefore the justices had no jurisdiction to entertain the summons (11 & 12 Vict. c. 43 s. 11); that the justices held that the second demand and refusal to pay the rate was sufficient to give them authority, and they accordingly made an order for payment on the plaintiff; that the order was then brought up by *certiorari* into this court, and quashed on the ground that the cause of complaint was complete upon the first demand and refusal.

There was a demurrer to the declaration on the ground that it disclosed no cause of action.

*J. Gray* in support of the demurrer.—The action will not lie. It may be taken that the justices acted wrongly in making the order. There is nothing to show that their so doing was not an honest mistake as to the law, and no malice being alleged, the action will not lie. The justices may have acted without jurisdiction, but that under the circumstances gives no cause of action. The 11 & 12 Vict. c. 44, s. 2, says that for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, any person injured thereby may maintain an action without alleging malice or want of reasonable and probable cause, provided nevertheless that no such action shall be brought for anything done under such conviction or order until after such conviction shall have been quashed. There is no new cause of action given by the statute, and this action is not brought for anything done under the order. This is only an error of judgment on the part of the justices, and the costs of quashing the order cannot constitute a cause of action. It is *damnum absque injuria*: (*Harman v. Tappenden*, 1 East, 555; *Ackerley v. Parkinson*, 3 M. & S. 411.)

Q. B.]

CLEMENTS v. SMITH.

[Q. B.]

*Lush* (A. *Wills* with him) for the plaintiff.—This was a matter of which the justices had no jurisdiction.

HILL, J.—The subject-matter of complaint was within the jurisdiction of the justices, and when before them the plaintiff set up by way of answer to it a demand and refusal more than six months before the application for the summons to oust the justices of their jurisdiction, to which the other side replied a second demand and refusal within six months. Upon that contention the justices were bound to give a decision, and they did so, but they gave a wrong one.

*Lush*.—Here the plaintiff incurred costs in quashing the order so made.

HILL, J.—If you are right there ought to be an action in every case in which a conviction is quashed, to recover the costs of quashing it.

*Lush*.—The effect of the limitation in 11 & 12 Vict. c. 43, s. 11, is to put the justices in the same position as if they had no jurisdiction at all.

HILL, J.—The true rule is laid down in *Barton v. Bricknell*, 13 Q. B. 393, which, unless the defendants can be fixed with malice, is a decision in point.

COCKBURN, C.J.—Here the subject-matter was within the jurisdiction of the justices, and it was their duty to decide the point raised. It is like an erroneous direction as to whether a case is taken out of the Statute of Limitations by evidence tending to that purpose.

*Lush*.—It would be like the case of a warrant which recited all the facts on the face of it, and which would therefore manifestly be bad on the face.

By the COURT, Judgment for the defendants.

Wednesday, Nov. 14.

CLEMENTS (appellant) v. SMITH (respondent).

*Turnpike toll—Cart laden with barley going to be ground for barley-meal for the owner's pigs—Exemption—3 Geo. 4, c. 126, s. 32.*

*By the General Turnpike Act, 3 Geo. 4, c. 126, sect. 32, no toll is to be demanded for any horse or carriage employed in conveying any hay, straw, fodder for cattle, and corn in the straw which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder, or corn in the straw.*

*Held, that a cart laden with barley, going to be ground for barley-meal for the owner's pigs, and one laden with barley-meal for such pigs, were exempt from toll under the foregoing section.*

This was a case stated by justices under the 20 & 21 Vict. c. 43. It appeared that an information was laid by the appellant, who was the toll collector at a gate upon a turnpike-road in Essex, against the respondent, for having on the 16th Jan. last claimed and taken the benefit of exemption from toll, he (the said respondent) not being entitled to the same, contrary to the provisions of the 3 Geo. 4, c. 126, s. 36, and the 9 Geo. 4, c. 77, s. 17.

It appeared that the respondent on the day in question came to the toll-gate kept by the appellant with a horse and cart, and claimed to pass and did pass through without payment of toll, alleging that he was carrying threshed barley to the mill to be ground into meal for his master's pigs, and that on his return laden he again claimed to pass and did pass through the same gate without payment of toll, on the ground that he was laden with barley-meal to be used as food for his master's pigs. It was proved on behalf of the respondent that at the time of the alleged offence he was the servant of a Mr. Wood, an occupier of land at Rochford and Hawkwell; that the barley which he was conveying was grown on his master's farm, whence it was taken to the mill to be ground into meal for feeding pigs upon the farm; that on his return from

the mill his cart was laden with barley-meal delivered to him at the mill as the produce of another parcel of his master's barley, grown on the said farm, which had been previously sent to be ground; that the said meal was afterwards actually consumed by his said master's pigs on his said land; and that the said horse and cart had not been employed in any other way during the same day. On these facts the justices decided that the barley and barley-meal were both fodder for cattle, within the meaning of the 3 Geo. 4, c. 126, s. 32; and further, that, if not fodder for cattle, they were agricultural produce grown on the lands of the owner, and not bought, sold, or disposed of, or going so to be, within the meaning of the same section, and as such were exempt from toll: and on these grounds they dismissed the information.

By the General Turnpike Act, 3 Geo. 4, c. 126, s. 32, it is enacted that "no toll shall be demanded or taken by virtue of this or any other Act or Acts of Parliament on any turnpike-road for (*inter alia*) any horse, beast, or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying, on the same day . . . any hay, straw, fodder for cattle and corn in the straw which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder, or corn in the straw, potatoes, or other agricultural produce, and which has not been bought, sold, or disposed of, nor is going to be sold or disposed of."

*Round* now appeared for the appellant, and contended that the respondent was not exempt upon either occasion when he passed through the toll-gate, for that neither barley nor barley-meal was within the exemption; that barley itself was not exempt was obvious from the exemption given to corn in the straw. [COCKBURN, C.J.—The mention of corn in the straw certainly excludes corn itself, but then is not the barley in this case within the meaning of the word "fodder?" The Act seems to have intended to exempt food to be used for agricultural purposes.] Then as to barley-meal. That is a manufactured article. [COCKBURN, C.J.—So it may be said of hay.] It is difficult to say where the manufacturing process commences. It may be said that loaves of bread are agricultural produce. [BLACKBURN, J.—But they do not give loaves of bread to cattle.] Oil-cake may be said to be agricultural produce, and yet it would be clearly liable to toll. In this case the barley in the first instance was not being taken for the purposes of food—it was being taken to the mill to be ground, and the barley-meal that was brought back was not the produce of the barley that was then taken.

*Shaw*, for the respondent, was not called upon.

COCKBURN, C.J.—I think the justices were right in their determination. The words of the exemption are certainly large enough to comprehend the case, and the clause being intended in favour of agriculture it ought to be construed liberally. I had some difficulty at first in saying that barley going to be ground is to be considered as fodder for cattle; but I think that as soon as it is intended for fodder it may be considered as vested with the privileges of exemption; otherwise this difficulty may arise, that if produce intended for fodder has to be taken some distance to be prepared it may be subject to toll. Take the case of bruising oats—the bruising machine may be in one part of the farm whilst the oats are to be consumed in another, and in going to the machine it may be necessary to pass through a toll-gate, when, according to this argument, a toll might be demanded. So in the case which sometimes occurs in different parts where turnips are first boiled before eaten by the cattle—the boiling may take place at a distance from the place where the turnips are to be eaten, and there may be a turnpike in the way. But looking at what was the manifest intention of the Act, it is clear that it is intended that whenever the

Q. B.]

HAYES v. STEVENSON—DOICK v. PHELPS.

[Q. B.]

produce is destined for the food of cattle then the exemption exists.

HILL and BLACKBURN, JJ. concurred. (a)

*Judgment for the respondent.*

HAYES (appellant) v. STEVENSON (respondent).

*Vagrant Act—Being upon premises for an unlawful purpose—What is an unlawful purpose.*

By the *Vagrant Act*, 5 Geo. 4, c. 83, sect. 4, it is enacted that any person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose, shall be deemed a rogue and vagabond:

Held, that the words "any unlawful purpose" mean "for the purpose of violating some positive law," and that being upon such premises for the purpose of fornication is not an "unlawful purpose" within the meaning of the section.

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction of the appellant under sect. 4 of the 5 Geo. 4, c. 83 (the *Vagrant Act*). By that section it is enacted (*inter alia*) that "every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose," shall be deemed a rogue and vagabond.

In this case it was stated that the appellant was found in a private park with a female, being there for the purpose of fornication, and under the above section he was convicted, and sentenced to fourteen days' imprisonment.

St Leigh now appeared for the appellant, and contended that the words in the section, "for any unlawful purpose," meant any purpose that was criminal, and not merely immoral. [HILL, J.—Something punishable by statute or common law.] It could not have been intended to have included a party who was merely committing a trespass.

No one appeared in support of the conviction.

COCKBURN, C.J.—According to the construction which the justices have put upon the Act, any civil trespass would be within the meaning of the Act. A man who goes inside an area gate to court a servant-maid would be a trespasser, and so liable to be convicted. The Act must mean that the party is there for the purpose of violating some positive law. This is only a civil trespass, and not a criminal act.

*Conviction quashed.*

DOICK (appellant) v. PHELPS (respondent).

*The Watermen's and Lightermen's Act 1859 (22 & 23 Vict. c. 133)—Liability of unlicensed parties.*

Under the *Watermen's and Lightermen's Act 1859* (22 & 23 Vict. c. 133), it is an offence punishable upon summary conviction for any person, not being a freeman licensed in pursuance of the Act, &c., to act as a waterman or lighterman, or ply, or work or navigate any wherry, passenger-boat, lighter, vessel or other craft upon the river Thames, from or to any place or places, ship or vessel, within the limits, i. e., from Teddington Locks to Lower Hope Point, for hire or gain; and this, notwithstanding the exemption in sect. 7 of the said Act, and notwithstanding also that the vessel navigated has come from a distance beyond Teddington Locks.

This was a case stated under the 20 & 21 Vict. c. 43, as follows:—On the 11th Feb. last Thomas Doick appeared before one of the metropolitan police magistrates to answer the complaint of Alexander Phelps, a freeman of the Company of the Master Wardens and Commonalty of Watermen and Lightermen of the River Thames, for that on the 3rd day of the said month of February, upon the river Thames between Tedding-

ton-lock in the counties of Middlesex and Surrey, and Lower Hope Point, near Gravesend, in the county of Kent, to wit at the parish of Putney in the county of Surrey, the said defendant, not being licensed in pursuance of or qualified according to the Watermen's and Lightermen's Amendment Act 1859, did then and there unlawfully act as a lighterman, working and navigating a certain barge upon the said river for hire and gain, contrary to the said statute. Upon the hearing of the complaint it was admitted that at the time of committing the alleged offence the defendant was neither licensed nor qualified as aforesaid, and was acting as a lighterman, working and navigating for hire and gain on the said 3rd Feb., on the said river Thames at Putney, within the limits mentioned in the said Act, a barge carrying timber from the town of Guildford, in the county of Surrey, which is beyond Teddington-lock aforesaid, and also beyond the town of Kingston, in the county of Surrey; that the said barge was a flat-bottomed barge, and would have been deemed to be a western barge within the meaning of the 101st section of the 7 & 8 Geo. 4, c. 75, intitled "An Act for the better regulation of the watermen and lightermen on the river Thames between Yantlet Creek and Windsor." This Act was repealed by the first-mentioned Act, but it is, among other things, provided by the first-mentioned Act, sect. 7, that such repeal shall not affect any appointment or licence already made or granted under any enactment thereby repealed. The said 101st section of the repealed Act exempted from the operation of that Act barges navigating the Thames from Kingston, in the county of Surrey, and places above it, to London-bridge, so that such barges might have been navigated so far as London-bridge by persons neither freemen of the Watermen's Company nor their apprentices. The defendant contended that, as he was working and navigating what would have been deemed under the said repealed Act to be a western barge, his right so to act was preserved by the 7th section of the said first-mentioned Act; and also that the 54th section of the said first-mentioned Act, under which the complaint was laid, only applies to craft starting from or stopping at a place between Teddington-lock and Lower Hope Point aforesaid, and that as he had started from Guildford aforesaid, there being no evidence as to where he had stopped, he could not be convicted of an offence under the 54th section. The magistrate, however, decided that the defendant was guilty of the said offence, upon the grounds that the exemption in favour of western barges, referred to in the 101st section of the said repealed Act, not having been re-enacted in the said first-mentioned Act, did not then exist; that such exemption is not an appointment or licence within the meaning of the 7th section of the said first-mentioned Act, and that the 54th section of the first-mentioned Act applies to a barge starting from a place beyond the limits of that Act, as Guildford aforesaid, and navigated within such limits, as at Putney aforesaid, because such barge must necessarily be navigated on the river from Teddington-lock, the first place within such limits. He therefore adjudged the defendant to pay for his said offence the sum of sixpence and two shillings for costs.

By the 7 & 8 Geo. 4, c. 77, s. 101, it is enacted that nothing in the Act shall extend to any western barges; and that all flat-bottomed boats and barges navigated from the town of Kingston, in the county of Surrey, or any place or places beyond the said town, shall be deemed western barges, and shall and may be navigated on the said river Thames as far as London-bridge.

By the 22 & 23 Vict. c. 133, the former Act was repealed, but it was enacted by sect. 7 that such repeal shall not affect "any appointment or licence duly made or granted under any enactment hereby repealed."

By the 54th section it is enacted, that "if any person not being a freeman licensed in pursuance of this

(a) Wightman, J. was in the Divorce Court.

C. B.]

Re RAND AND GRIMWADE v. GREEN AND ANOTHER.

[C. B.]

Act, or an apprentice qualified according to this Act to a freeman, or to the widow of a freeman of the said company (except as hereinafter is mentioned), shall at any time act as a waterman or lighterman, or ply or work or navigate any wherry, passenger-boat, lighter, vessel, or other craft upon the said river, from or to any place or places or ship or vessel within the limits of this Act, for hire or gain (except as hereinafter mentioned), every such person shall forfeit and pay for every such offence any sum not exceeding forty shillings." &c.

Scotland now appeared for the respondent, and contended that, whatever exemption may have existed under the 7 & 8 Geo. 4, c. 77, s. 101, it no longer exists since the passing of the 22 & 23 Vict. c. 133, which wholly omits all reference to it, and that the provision in sect. 7 of the latter Act does not apply to such a case, it not being shown that the appellant had any appointment or licence.

Bovill, Q. C. (*Prentice* with him), argued, first, that the 22 & 23 Vict. c. 133, does not apply to a barge coming from a place not on the river Thames; secondly, that the old exemption is kept alive by sect. 7 of the 22 & 23 Vict. c. 133. [HILL, J.—It is really extraordinary, if the Legislature intended to preserve to such persons these rights with reference to western barges, that it had not been enacted in positive terms. COCKBURN, C. J.—The only exemptions are in favour of appointments and licences.] Then the appellant is not brought within the provision of the 54th section, as not acting as waterman or lighterman "from or to any place or places within the limits of this Act." The 66th and 67th sections also must be referred to.

COCKBURN, C. J.—The words of the two Acts are very similar, but in the last Act the exemption is not referred to. It seems to me to be exceedingly clear that the exemption was purposely omitted.

HILL and BLACKBURN, JJ. concurred.

*Conviction affirmed.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs.,  
Barristers-at-Law.

*Friday, Nov. 9.*

*Re RAND AND GRIMWADE v. GREEN AND ANOTHER.*

*Church-rate—Prohibition—Notice convening vestry-meeting.*

*A notice affixed to the church-door stating that "the churchwardens, overseers and other principal inhabitants of this parish are requested to meet in the vestry, &c., to examine the churchwardens' accounts and grant them a rate," is a good and sufficient notice, and a rate made thereunder is valid.*

Philbrick moved herein for a rule to show cause why a writ of prohibition should not go to the Arches Court of Canterbury to prohibit that court from proceeding in a suit of subtraction of church-rates pending in that court by the churchwardens of the parish of Hadleigh, in the county of Suffolk, against the defendants, who were joint occupiers of a farm and premises in that parish. The suit had been originally instituted in the Diocesan Court of Ely, and removed by letters of request into the Arches Court of Canterbury, and on its removal the promoters had propounded their libel, to the reception of which the defendants made several objections, but after argument the Official Principal of the Arches Court admitted the libel to proof, and decreed the defendants to bring in their responsive allegation. The first article of the libel pleaded in effect that the parish church was in need of repairs, that the churchwardens had not enough of funds in hand, wherefore they and other ratepayers of the parish, on the 14th July 1858, met in vestry to make a rate,

pursuant to notice in that behalf duly and legally given, that a church-rate was proposed, and an amendment negating that rate was carried, that a poll was demanded and the rate carried, and that the defendants were therein rated at 6*l.* 1*s.* 9*d.* The notice was annexed to the libel as an exhibit, and was as follows:—"Notice is hereby given. The churchwardens, overseers and other principal inhabitants of this parish are requested to meet in the vestry on Wednesday, 14th July inst., at half-past nine o'clock in the forenoon, to examine the churchwardens' accounts, and to grant them a rate. Given under our hands the 3rd July 1858. J. Rand, W. Grimwade, Churchwardens." It is contended that this notice is bad, because, first, it does not contain the name of the parish, and is not a sufficient notice convening a vestry meeting; secondly, it does not show that a vestry meeting will be absolutely held; thirdly, the notice is addressed to the wrong parties. The chief point arises on *Sturges Bourne's* Act, 58 Geo. 3, c. 69, s. 1; 7 Will. 4 & 1 Vict. c. 45. [ERLE, C.J.—At common law the notice was given orally in the church, and under Select Vestry Act, 7 Will. 4, in writing on or near the church-door?] Yes. The notice is addressed to the wrong parties, and does not include all that it ought to include, and is therefore bad. It is addressed to the churchwardens, overseers, and other principal inhabitants of the parish, and not to the parishioners, being ratepayers: (*Smith v. Deighton*, 8 Moore, 175; *Richardson v. Gladwin*, E. B. & E. 138; *Burn's Eccles. Law*, 378; *Medland v. Payne*, 4 Jur. N. S. 1283; *Arches Court*.) It has been held that small tenement occupiers have a right to attend the vestry meeting, though they have no right to vote. Furthermore, the notice is bad, because it includes within its terms persons not entitled to vote, for there are occupiers within the parish who reside without its bounds. [BYLES, J.—Residence is not a necessary qualification for a right to vote.] No. [ERLE, C.J. referred to a passage in the Institute upon the Statute of Bridges.] There is not at common law any authority upon this point; the court therefore will, it is hoped, give the parties an opportunity of discussing it, and obtaining an authoritative opinion upon the question.

ERLE, C.J.—I think that there ought to be no rule in this case. The duty imposed upon the churchwardens is to give a notice to those who have a right to attend at a vestry meeting of the parish, that the meeting will be held, and the purpose for which it will be held. Now, looking at the notice complained of in this instance, it appears to me to comply with all the requisites; it is a notice intended for the inhabitants of Hadleigh, but the words of the notice are, "the inhabitants of this parish," and it is supposed that the inhabitants of Hadleigh might be misled, and not know that they were the persons called upon to attend. But I remember that the notice originally was the older notice by the parish clerk in the parish church of the parish, and I remember, and believe, at the time the notices were so given, it was on those occasions "the inhabitants of this parish," not the inhabitants of the parish designated by the name of its saint, which might apply to a great many parishes where the church is dedicated to the same saint; it was a specific notice, and I think a written notice affixed to the door of the church in the particular parish is more capable of being understood, and would answer the purposes directed by the statutes better if it is directed "to the inhabitants of this parish," the parish where the church is situate upon which the notice is stuck. Then is it addressed to the persons who have a right to attend? At common law all are parishioners—all that are resident within the parish, and the term "resident" being extremely vague, there being very few defined rules fixed who shall be considered to be vagrant, who shall be considered as a guest, and who shall come within the

C. B.]

REG. v. THOMAS NEWELL HOLT.

[C. CAS. R.]

class of resident, having passed so many nights within the parish, the 58 Geo. 3 gave some defined rule by which it could be ascertained who had a right to attend at the vestry meetings when rates were to be made, and it is those who occupy property liable to be rated at that meeting. Then is this notice so addressed that any persons having a right to attend would, by reading the notice, so construe it as to consider themselves excluded? It is addressed "to the churchwardens and the overseers, and the other principal inhabitants of the parish." No case has decided that it is bound to be, in the terms of the statute, to the occupiers of rateable property. They have addressed it here to the principal inhabitants; and the parties objecting entirely fail to satisfy me that any of the persons who occupy rateable property are solely and more properly parishioners than the mere vagrants, or the parishioners generally; they entirely fail to satisfy me that they would consider themselves excluded; and though it is said there are two priests in holy orders inhabitants of the parish, who live in lodgings, and who might consider themselves to be inhabitants, and might come and find themselves, if they did come, excluded, it is an objection more in the nature of a fancy than a reality for the court to attend to. It is said that it is not a notice that the meeting will be held and those who choose to attend might be present, but it is worded in the form of requesting the parties to attend, and it is clear that language of a peremptory demand of no more force than the language of common courtesy would not render an instrument void. They are requested to attend to examine the accounts of the churchwardens and grant them a rate. It is clear that the purpose of the meeting is to make an ordinary church-rate. If an ordinary church-rate is in respect of money to be borrowed, or money borrowed to be paid off, or any unusual purpose, it ought to be specified. But in this case the words would indicate to my mind that it was an ordinary church-rate. I believe that nobody could misunderstand this notice in any of the respects in which it has been objected to, and it required some decree of astuteness to pervert the meaning and find a ground for contending that the notice was not properly expressed. I am willing to give every effect to the matters brought before us by Mr. Philbrick, and if I could entertain a doubt, beyond question I would grant a rule; but my mind positively refuses to see that the document is open to any of the objections he has made.

BULES, J.—I also am of opinion that this is a perfectly good notice. In country parishes generally, the persons who give these notices are unlearned and unskilful persons, and if there are any documents which should receive an indulgent construction rather than a strict and adverse one, they are documents of this nature. Now I agree with my Lord Chief Justice, that when we see it is a meeting of the churchwardens and overseers and other principal inhabitants, who are to meet in vestry, and to examine the churchwardens' accounts, and to grant them a rate, no reasonable man can suppose that it was not intended to make a church-rate at that meeting. With respect to the word "principal"—for that is the objection—it is admitted, if it had stood "and other inhabitants of this parish," it would have been right, for it is clear that a residence is not necessary in order to enable a person to vote in vestry if he is a rated occupier of the parish. That is one mode of testing it. Then the word "principal" shows that the word "inhabitants" is not to be understood in its strictest sense to mean everybody who sleeps in the parish; it is one class of persons who are in some respect or other superior to the other inhabitants living in the parish. I am not sure that it is not even more correct to say the principal inhabitants. In one sense they are the principal inhabitants, the taxpayers of the parish. I remember a

maxim of Lord Bacon—*Præsentia corporis tollit errorem nominis*—that if I give a ring to John Smith, and say, "William Jones, I give you this ring," that is a good gift to John Smith, because he is present, though misnamed; and if I give my ruby ring to John Smith and say "I give you this diamond ring," the misdescription is there immaterial, because the ring is present. That question would have arisen here if it had been "this parish," and the parish had been misnamed. But I cannot conceive a safer mode of giving a notice than, avoiding all questions of that kind, to stick the notice up in the most public place in the parish, and say "this parish," which is the same as saying "in the parish" on the church-door of which parish this notice is affixed. I think we should be encouraging very inconvenient and dangerous objections if we were to give the least sanction to criticisms on a notice drawn as this notice is.

KEATING, J.—I am of the same opinion. I think that in construing these notices we should take care on the one hand that the inhabitants should have fair and reasonable notice of the object of the meeting—that a meeting is to be called to contribute a rate, and that they shall be thoroughly informed of what is about to be done. I think this notice, like every other document, should receive a reasonable construction. We must see whether within the terms of it any person who could be called upon to contribute to a rate was likely to be misled, or have any doubt as to what was to be done, and when it was to be done. Now it seems to me that, notwithstanding the very ingenious objection to the notice by the learned counsel, it does give fair and reasonable notice to the parties liable to contribute to a church-rate, that a vestry was to be held, and that it was for the purpose of making such a rate. I therefore agree with the rest of the court in thinking that the rule should be refused. *Rule refused.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 10.

(Before ERLE, C.J., CROMPTON, J., CHANNELL, and BRAMWELL, BB. and HILL, J.)

REG. v. THOMAS NEWELL HOLT.

*False pretences—Evidence of guilty intent.*

*The prisoner was charged with obtaining a specific sum from W. by false pretences. It appeared that he was employed by his master to take orders, but not to receive moneys, and he was proved to have obtained the specific sum from W. by representing that he was authorised by his master to receive it. Evidence was then admitted of the prisoner's having obtained another sum of money from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way:*

*Held, that such evidence was not admissible for the purpose of proving the intent of the prisoner when he committed the acts charged in the indictment.*

Case reserved for the opinion of this court by the chairman of the general quarter sessions of the peace for the West Riding of the county of York, holden at Leeds on the 15th Oct. 1860.

The defendant T. N. Holt was tried on an indictment charging him with the misdemeanor of having obtained the sum of 9s. 9d. from Wm. Hirst by false pretences.

It appeared in evidence that the defendant was employed on the 19th April by one Luke Uttley to take orders for goods, but was not authorised, but forbidden, to receive money on behalf of Luke Uttley, nor did he at any time pay over or account for any moneys received to Luke Uttley; that on the 30th April the defendant obtained from W. Hirst the sum of 9s. 9d. charged in the indictment, by the representation that he was authorised by the said Luke Uttley to receive



C. CAS. R.]

REG. v. GEORGE OLIVER—REG. v. JOHN BURNSIDES.

[C. CAS. R.]

that sum on his behalf for goods delivered in pursuance of an order taken by the defendant.

The counsel on behalf of the prosecution tendered the evidence of one Samuel Uttley, to the effect that on a day not specified, but within a week from the said 30th April, the defendant obtained from him the said S. Uttley the sum of 11s. by a like representation that he (the defendant) was authorised by the said Luke Uttley to receive money on his behalf for goods delivered in pursuance of a like order taken by the defendant, such last-mentioned obtaining not being charged or in any way referred to in the indictment.

The counsel for the prisoner objected that the evidence so tendered was inadmissible.

I held, as chairman, however, that such evidence was admissible for the purpose of proving the intent of the prisoner when he committed the acts charged against him in the indictment.

I therefore received the evidence, but reserved the question whether it was properly admitted for the opinion of the Court of Criminal Appeal.

The prisoner was convicted and sentence of imprisonment for four calendar months in the house of correction at Wakefield, with hard labour, was passed upon him, and he is now admitted to bail to render himself in execution.

The question for the Court of Appeal is,

Whether the evidence of Saml. Uttley was or was not rightly admitted.

E. B. W. BALME, Chairman.

No counsel appeared to argue on either side.

ERLE, C.J.—This conviction must be quashed. In the statement of the case submitted to us we cannot find any facts that would warrant us to say that the evidence was admissible. *Conviction quashed.*

#### REG. v. GEORGE OLIVER.

*Indictment—Counts for grievous bodily harm and unlawfully occasioning actual bodily harm—Evidence of common assault.*

*Upon a count for assaulting, beating, wounding, and occasioning actual bodily harm against the statute, the prisoner may be convicted of a common assault.*

Case reserved for the opinion of this court by the chairman of the court of quarter sessions of the peace for the county of Northumberland, held at Alnwick, in the said county, on the 17th Oct. 1860.

The prisoner George Oliver was indicted at these sessions for a misdemeanor, of which indictment the following is a copy:—

"Northumberland to wit.—The jurors for our lady the Queen upon their oath present that George Oliver, on the 18th Aug. 1860, unlawfully and maliciously did inflict upon one Robert Bainbridge some grievous bodily harm, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

"Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Oliver afterwards, on the said 18th Aug., in the year aforesaid, unlawfully did make an assault in and upon the said Robert Bainbridge, and did then unlawfully beat, wound and ill-treat the said Robert Bainbridge, and did thereby then unlawfully occasion actual bodily harm to the said Robert Bainbridge, and then did other wrongs to the said Robert Bainbridge, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her Crown and dignity."

Upon this indictment the jury found a verdict of "guilty of a common assault."

An objection was taken by the counsel for the prisoner that this finding amounted to an acquittal, and he moved in arrest of judgment.

The court thereupon postponed the judgment, and reserved the following question of law, which had so arisen on the trial, for the consideration of the justices of either bench and barons of the Exchequer, under the provisions of the statute of the 11 & 12 Vict. c. 78, viz., whether the conviction can be sustained? And in the mean time that the prisoner be committed to the common gaol at Morpeth, until he shall enter into a recognisance, himself in 50*l.*, and two sureties in 25*l.* each, or one in 50*l.*, conditioned to appear at the court of quarter sessions to be held for the county of Northumberland next after he shall have notice given to him by the prosecutor to receive the judgment of this court, if it should be empowered to pass any such judgment.

CHARLES WM. ORDE,

Chairman of the said court of quarter sessions.

No counsel appeared to argue on either side.

By the COURT,

*Conviction on the second count affirmed.*

#### REG. v. JOHN BURNSIDES.

*False pretences—Indictment—Evidence.*

*An indictment for false pretences charged that the prisoner falsely pretended to the prosecutor that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him the prisoner about some carpet, and had asked him to procure a piece of woollen carpet, to wit about twelve yards, by which, &c. Whereas no such person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of woollen carpet.*

*The evidence was, that the prisoner stated to the prosecutor that he wanted some carpeting for a family living in a large house in the village, who had had a daughter lately married, and thereby obtained twenty yards of carpet from him.*

*The evidence to negative the false pretence was that of a lady living in the village whose daughter was married about a year ago, who stated that she had not sent the prisoner to the prosecutor for the carpet:*

*Held, that there was a sufficient false pretence alleged in the indictment, and that it was sufficiently negated by the evidence.*

Case reserved by the chairman of the Midsummer quarter sessions for the North Riding of Yorkshire for the opinion of this court.

At the Midsummer quarter sessions for the North Riding of Yorkshire, holden at Northallerton on the 3rd July 1860, John Burnesides was indicted for obtaining a piece of carpet under false pretences.

The following is a copy of the indictment:—

"North Riding of the county of York, to wit.—The jurors for our lady the Queen upon their oath present, that J. Burnesides on the 8th May 1860, unlawfully, knowingly and designedly did falsely pretend to one George Stonehouse, that a certain person who lived in a large house down the street, and had had a daughter married some time back, had been at him the said J. Burnesides about some carpet, and had asked him the said J. Burnesides to procure a piece of woollen carpet, to wit, about twelve yards. By means of which said false pretences the said J. Burnesides did then unlawfully obtain from the said G. Stonehouse twenty yards of woollen carpet of the goods and chattels of the said G. Stonehouse, with intent thereby then to defraud, whereas in truth and in fact no such person as aforesaid had then or at any other time been at the said J. Burnesides about any carpet, nor had any such person as aforesaid asked the said J. Burnesides to procure any piece of woollen carpet whatsoever, to the great damage and deception of the said G. Stonehouse, to the evil example of all others in the like case offending, against

[ROLLS.]

EVAN v. THE PORTREEVE, ALDERMEN, &amp;C. OF AVON.

[ROLLS.]

the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity."

The evidence was, that the prisoner went to the prosecutor's shop in the village of Snainton, and stated that he wanted some carpeting for a family living in a large house in that village who had had a daughter lately married. Upon this the prosecutor gave the prisoner about twenty yards of carpeting, which the prisoner afterwards sold in the neighbourhood to two different persons at a higher price than that which the prosecutor would have charged.

The only evidence to negative the false pretence charged in the indictment was that of a lady living in the village of Snainton, whose daughter was married about a year ago, who stated that she had not sent the prisoner to the prosecutor's shop for the carpet.

At the close of the case for the prosecution the prisoner's counsel objected,

That the indictment did not sufficiently allege any false pretence;

That upon the evidence there was nothing to go to the jury; and

Thirdly, that the false pretence alleged in the indictment had not been sufficiently negated by the prosecution.

The court decided that there was a sufficient false pretence in the indictment, and that there was evidence to go to the jury in support of it.

The jury returned a verdict of guilty.

The judgment of the court was reserved until the opinion of the Court of Criminal Appeal could be taken on the point raised by the prisoner's counsel.

The opinion of the court is therefore requested on the point reserved.

The prisoner was discharged on recognisance of bail to appear at the next Epiphany sessions to receive the judgment of the court.

CATHCART, Chairman.

No counsel appeared on either side.

By the COURT, Conviction affirmed.

### ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Thursday, Nov. 15.

EVAN v. THE PORTREEVE, ALDERMEN AND BURGESSES OF AVON (otherwise ABERAVON), GRIFFITH WILLIAMS AND HER MAJESTY'S ATTORNEY-GENERAL.

*Demurrer—Corporation—Injunction—Account—Discovery.*

*A plaintiff here may obtain a decree for discovery alone, in aid of an action at law, or of proceedings in another court; but if by his bill he prays for discovery, as incident to some further relief—and fails in obtaining such relief—he will not be entitled to the discovery.*

*A plaintiff filed a bill on behalf of himself alone as one of a corporation, against the corporation, their solicitor, and the Attorney-General, praying an injunction against the corporation, for an account, and for discovery. The bill did not disclose a case of trustees and cestui que trust as between the plaintiff and the corporation. The corporation demurred to the bill for want of equity and for want of parties:*

*Held, that the demurrer must be allowed.*

The bill in this suit was filed by the plaintiff, on behalf of himself only, against the defendants, the portreeve and burgesses of the town of Avon, their solicitor, and the Attorney-General—praying an injunction, an account and discovery against the corporation. The bill stated as follows:—That the plaintiff was a senior bur-

gess of the borough of Avon, otherwise Aberavon, in the county of Glamorgan, and was resident within the said borough: that the first-named defendants, either by prescription, or under some charter of incorporation, were, previously to the grants thereafter mentioned, and have since continued, and now are, a corporation by the name or style of "The Portreeve, Aldermen and Burgesses of Avon, otherwise Aberavon;" that the said corporation, previously to the sales thereafter mentioned, were seised or well entitled of or to hereditaments of considerable value in the said parishes of Avon, and also in the parish of Michaelstone-super-Avon, in the said county of Glamorgan, which hereditaments comprised divers inclosed pasture lands, mountain lands, marsh lands and lands let on building leases, liberties, franchises, a town-hall, and divers others hereditaments; that previously to the said sales there were more than eighty building and other leases of the said lands of which the several terms were unexpired, and the rents thereby reserved were payable to the said corporation, and the income arising from the said corporate property then was and now is of large amount; that the rights of the said corporation in and to certain of the said hereditaments of or to which they are now seised or entitled, originated in certain charters or deeds, including the deeds of which the following are translations, that is to say: first, a charter or deed under the seal of Leyson-ap-Morgan, Lord of Avene, otherwise Avon, aforesaid, as follows:—

"Be it known to this present and all further generations, that I, Leyson-ap-Morgan, Lord of Avene, son and heir of Morgan Vachan, have given, granted and by this present charter, have confirmed for myself, my heirs and assigns, to all my English burgesses, and also my chancers of Avene, and to their heirs and assigns, all liberties in my town of Avene, and my whole lordship within the limits of Avene, which the burgesses of Kenfig have within the town of Kenfig, and within the lordship of the Earl of Gloucester and Hereford, as much as in me lies, and also the duty of eight dishes of corn upon every . . . due to me, my heirs and assigns, for castle ward and assize. I have also granted for me, my heirs and assigns, to my said burgesses and chancers of Avene, and their heirs and assigns, freely, quietly, well and peaceably, and without any molestation or impeachment, house-bote and hedge-bote in all my tenants' woods, and they shall have common pasture freely, quietly, well and peaceably, for ever, in all places, woods and meadows, pasture and pasture grounds in the open time of the year, upon my lands, and all the pasture ground on the side of the dinas which lie between Karmoendreech and a place called Kae Kedrech in length and in breadth between the arable land of Tireakin and the arable land on the top of the dinas, at all times of the year; and if it should happen that my heirs or assigns should inclose any land, and the said inclosure be broken through by the cattle of the burgesses or chancers, the tenants are bound to repair and make up the said inclosure, and they shall also have common pasture in the open time of the year in all woodlands, meadows, pastures, and pasture-grounds belonging to my tenants, of what rank or condition soever they be. But for this grant, donation, and confirmation of this present charter, my burgesses and chancers aforesaid have paid me forty shillings sterling, and because I would have this my donation, grant and confirmation by this present charter to be of perpetual force and effect, I have corroborated this present charter with the impression of my seal, in presence of these witnesses, Thomas the Abbot of Margam, Ameas, rector of the church of Avene, Henry Clerk, the steward, Avene-Rees-ap-Morgan, Rees-ap-Cradock, and many others."

Secondly, a charter or deed, under the seal of Thomas de Avene, otherwise Avon, as follows:—"To all Christians who may see or hear this present writing,

[ROLLS.]

EVAN v. THE PORTREEVE, ALDERMEN, &amp;c. OF AVON.

[ROLLS.]

Thos. de Avon, as son of St. John Deavene, Lord of Avene, wishes everlasting salvation in the Lord. Know all men that I have granted, released, and for me and my heirs have quit claimed to all my burgesses and chancers, and all my Englishmen within my town of Avene and out of the town, all liberties in the said town of Avene in my whole lordship within the limits of Avene, which they have and enjoy by virtue of a grant from Lord Leyson-ap-Morgan, in words to this effect:—Be it known to this present and all future generations that I, Leyson-ap-Morgan, have given, granted, and by this my present charter have confirmed to all my English burgesses and chancers of Avene, and their heirs and assigns, all liberties in my town of Avene and throughout my whole lordship within the limits of Avene, which the burgesses of Kenfig have in the town of Kenfig, with the lordship of the Earl of Gloucester and Hereford as far as in him lies. I have also granted for me, my heirs and assigns, to my said burgesses and chancers of Avene, and their heirs and assigns, freely, quietly, well and peaceably, and without impeachment, house-bote and hedge-bote in all my tenants' woods, and they shall have common pasture freely and peaceably for ever in all places, woods, meadows, pastures, and pasture grounds in the open season of the year upon my lands, and also that pasture ground on the side of the dinas, which is between Karmoendreech and a place called Kae Kedrech, and from the arable land on the top of the dinas at all times of the year; and if it should happen that I, my heirs or assigns, should inclose my lands, and the inclosure be broken through by cattle of the said burgesses or chancers, the tenants are to repair the said inclosure, and they shall also have common pasture in the open time of the year in all woods, lands, meadows, pastures and pasture grounds belonging to my tenants, of what rank or quality soever they be; and moreover, I, Thomas, son of St. John De Avene, have granted, released, and for me and my heirs, have quit claimed to all my burgesses and chancers, and all my Englishmen, all that pasture ground which lies between Pyll y-Scythan-a-Clawr Person, and between the burrows or sea shore, and the lands called Clawr Leyson, and the land called Tir Madun, to be depastured by all their cattle; and that they may also have common pasture everywhere in my burrows at all times of the year with all their cattle, so that neither I, the said Sir Thomas, nor my heirs or assigns shall have it in our power to challenge, claim, or demand any right or title in the aforesaid liberties, but are for ever by these presents excluded therefrom. And I Sir Thomas de Avene and my heirs and assigns will warrant, discharge and maintain, and defend for ever all the liberties and all the premises aforesaid to all the said burgesses or chancers, and their assigns, against mankind. But for and in consideration of this my grant, release, donation and quit claim my said burgesses and chancers have paid in hand two marks of sterling money. In witness whereof I have set my seal to this present quit claim before these witnesses, Henry, Abbot of Margam, Thomas, Rector of Avene, John-Lovet-with-my-Rese-Ley-a-William, ab-Owen and Madock-Lloyd-Evan, ab-David-Vach, and many others. Dated at Avene the next Monday after the feast of St. Mark the Evangelist, in the 24th year of the reign of King Edward the 3rd, after the conquest.

Thirdly, a charter or deed as follows:—"Edward Le De Spencer, Lord of Glamorgan and Morganwg, to his sheriff, bailiff, officers and others, his liege people to whom these presents shall come greeting—know ye that we have of our special grace and favour granted to our burgesses of our town of Avon, their successors and heirs for ever, all the liberties under written, namely, that they have the same liberty to buy and sell all manner of goods and merchandises whatsoever within our lordship of Glamorgan and Morganwg and else-

where, as well within the liberties and without, and be as free from toll, custom, package, kayage, stallage, pontage, murrage, parrnage, and all other customs and duties for all manner of goods, wares, and merchandises by them sold or bought, as are our burgesses of Kenfig and Neath; we have also granted to our said burgesses, their successors and heirs for ever, two fairs annually in our town of Avon, viz., the first fair to be kept upon the feast of St. John the Baptist, and the second fair upon the feast of All Saints, the both to be held upon the vigils or eve of the said feasts as well as upon the festival days themselves, and that our said burgesses of Avon, their heirs and successors for ever, do take and receive, or cause to be received in toll, and through toll and other customs and duties upon all manner of goods and merchandises within our said town or its liberties, from those that buy and sell, or that pass through the said town of Avon or its liberties, with any goods or merchandises, with as full powers as our burgesses of Kenfig and Neath do, those only excepted who, within our lordship of Glamorgan and Morganwg are by ancient right excepted from paying toll and custom; but, nevertheless, so that the portreeve of the said town of Avon, for the time being, shall yearly give in an account of all toll and duties so taken and received to us and our heirs for ever, in our exchequer at Cardiff. In witness thereof the seal of our Chancery of Cardiff annexed to these presents, before these witnesses, John Davis, &c. Dated at our Castle of Cardiff, the 20th day of April in the 47th year of the reign of King Edward the 3rd, after the conquest."

That, after the date of the last-mentioned charter, and by some means unknown to the plaintiff, the said portreeve, aldermen and burgesses of Avon, otherwise Aberavon, acquired, and for many hundred years have had and enjoyed, a good title to the fee-simple of all and singular the hereditaments, franchises and liberties comprised in the said several charters, and also to the fee-simple of the lands subject to the said liberties, and also to the fee-simple of divers other hereditaments acquired and held by them in their corporate capacity.

All the hereditaments so vested in the said corporation have always been and are subject to certain trusts in favour of the individual members of the said corporate body, and also as to certain proportions of the rents, issues and profits of all of the said hereditaments, to certain trusts in favour of the town and inhabitants generally of Avon, otherwise Aberavon aforesaid; and every burgess, on his admission as a burgess, has from time immemorial taken, and still takes, an oath to preserve the hereditaments belonging to the said corporation for the benefit of the said corporation, and of the said town and inhabitants, and not to consent to or join in any alienation prejudicial to the said corporation or town. The said private and public trusts are evidenced by divers provisions, rules and ordinances contained in charters, or which have obtained by custom or been duly made by the said corporation.

The plaintiff charges that there are divers charters, deeds, declarations of trusts, or other instruments in writing, declaring the trusts of the said corporate property or parts thereof which the defendants ought to discover.

The bill also stated that, although the burgesses of the said borough were well entitled to, and of right ought to enjoy the right of pasture for their cattle in and upon all the marsh and mountain lands of the said corporation, and also a voice in the management of the property of the corporation, the thirty-three senior burgesses, of whom the plaintiff was one, were well entitled to and of right ought to enjoy, the right of an allotment of three acres apiece to each of the said senior burgesses, for the purpose of the exclusive pasture of their cattle during their respective natural lives. All the burgesses of the said borough were

[ROLLS.]

EVAN v. THE PORTREEVE, ALDERMEN, &amp;c. OF AVON.

[ROLLS.]

entitled to participate in the surplus income of the said corporation property which remained after satisfying such public trusts as aforesaid, in favour of the said town and inhabitants, according to certain shares and proportions, and in manner the particulars whereof were unknown to the plaintiff, and the defendants, the said corporation, ought to discover such particulars, and whether the said right of participation is regulated by any instrument in writing, or by prescription in ancient customs, and whether there are any records or registers of such customs.

That monthly courts have from time immemorial been held, and of right ought to be held for the transaction of the business of the said corporation. At such courts the said portreeve presides, and the said burgesses have each a voice in the decision of matters considered thereat, and all the burgesses ought to be summoned to attend such courts by special or general notices, according to the nature of the business to be transacted at such courts. That in or about the year 1848, the defendants, the said corporation, applied for and obtained an Act of Parliament enabling them to erect a public market-house and slaughter-houses. The short title of such Act is "The Aberavon Market Act 1848," and in the preamble thereof it is recited, that the Earl of Jersey had agreed with the portreeve, aldermen and burgesses of the said town and borough, to convey to them by way of free gift certain lands, tenements and hereditaments situate in the said town and borough, and particularly described in the schedule A to the said Act annexed, and the site whereof was convenient for the erection of a market-place and place for holding fairs for the said town and borough, and after the incorporation in the said Act of the Markets and Fairs Clauses Act 1847, and certain provisions of the Commissioners Clauses Acts 1847, and of the Lands Clauses Acts 1847, it is thereby enacted, that the said corporation might construct a market-place and place for a fair as therein mentioned on the lands described in the said schedule A, and also a market-place for the sale of cattle, and also provide slaughter-houses for the slaughtering of cattle for the supply of the said town and borough, and the neighbourhood thereof, and divers powers are given to the said corporation for such purposes, and they were empowered to take such stallage rents and tolls as in the schedule to the same Act are specified. And by the 21st section of the same Act it was enacted, that all moneys arising from stallage rents and tolls to be levied or taken under the authority of the said Act, from any lessees or mortgagees thereof, and other property thereinafter mentioned, should be applied, first, in paying the expenses of obtaining the said Act, and incident thereto; secondly, in making and maintaining the market or fair, and works connected therewith, and the slaughter-houses so to be established or constructed as aforesaid, and in the payment of the interest and repayment of the principal of all moneys borrowed on the security of the said works, stallage rents and tolls, and that the residue of such moneys (if any) should be retained by the said portreeve, aldermen and burgesses, and be applied by them as they should think fit.

The bill next stated that the recital that the lands in the said schedule A were a free gift from the said Earl of Jersey is erroneous, inasmuch as the said corporation granted and conveyed certain lands, part of the hereditaments so vested in them as aforesaid, to the said earl, in consideration of the said conveyance or gift from him of the said lands mentioned in the said schedule A; *vide* *infra*, a certain tract of sand and land near the sea-shore, which has since become considerably enhanced in value; that the said corporation erected and constructed the said market-place and slaughter-houses and place for holding a fair according to the provisions of the Aberavon Market Act 1848, and to defray the expenses

of such works they mortgaged the whole or part of the hereditaments vested in them to a person named Daniel to secure 3000*l.* and interest, which sum was unduly applied in payment of the said costs and other liabilities unduly incurred by the said corporation; that the said corporation was not included in the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, and has not been since brought within the operation of such Act of Parliament; that, in or about the year 1850 certain inhabitants of the said borough of Avon applied to the Lords of her Majesty's Privy Council for a charter of incorporation under the last-mentioned Act of Parliament, but such application was refused.

The defendants, the said corporation, opposed such application and incurred costs to a large amount thereby, and to defray such costs they borrowed a further sum of 3500*l.* from some other person or persons, and executed a further mortgage of all or part of the said corporate property to the said mortgagees to secure the last-mentioned sum; such sum was unduly applied in payment of the last-mentioned costs and other liabilities unduly incurred by the said corporation.

The plaintiff by his bill then charged that the said several mortgages were not authorised by the said constitution of the said corporation or within their powers, and that the same ought to have been, but were not, authorised by a monthly or other meeting or court of burgesses duly summoned for such purpose. The plaintiff was never duly summoned to attend any meeting for the purpose of considering such mortgages or either of them. A second application had been made to the said Lords of her Majesty's Privy Council for the grant by her Majesty of a charter of incorporation for the said borough under the said Municipal Corporations Act, and was now pending. The defendants, the said corporation and their said mortgagees being apprehensive that the said corporate property might be taken out of their control in case such charter should be granted, in or about the month of Feb. 1860 proceeded to sell the property comprised in the said securities and other the property of the said corporation, and have since such date sold and disposed of and conveyed away a large proportion of such property, but no account of the application of the proceeds of such sales had ever been furnished to the plaintiff, but he had been informed that the several mortgages thereinbefore mentioned had been fully paid off and satisfied. The bill further stated that the said sales had been conducted in a hurried, reckless and improvident manner, and were made against the express protest of certain of the burgesses, including the plaintiff, and published in the public newspapers, and the property sold had been disposed of at prices much below its real value. Such sales had not been authorised by any monthly or other meetings or courts duly summoned for such purposes, nor had the plaintiff been duly summoned to attend the meetings for such purposes; in fact, the said portreeve and certain other officers of the corporation arranged the holding of the said courts and the manner of issuing summonses or notices to attend the same, so as practically to exclude a large proportion of the burgesses.

The said sales made in and since the month of Feb. 1860 comprised all the property of the said corporation, except the said market-place for a fair and slaughter-houses so erected on the lands described in the said schedule A to the said Aberavon Market Act, and the town-hall of the said borough, and such last-mentioned particulars were the only hereditaments now remaining unsold. The last of such sales took place in or about the 3rd Sep. 1860, when a large tract of mountain land was sold to a Mr. Robert Parsons for a very inadequate price, and contrary to the express protest of many of the said burgesses.

The moneys arising from the several sales so made as aforesaid had been applied in divers undue and

improper ways, partly in payment of bills of costs unduly incurred for legal proceedings, and partly in payment of other debts unduly incurred by the defendants the said corporation. The said corporation also borrowed from divers other persons unknown to the plaintiff divers other sums of money, amounting together to between 2000*l.* and 3000*l.*, and such sums have been unduly applied.

The plaintiff by his bill then further charged that the solicitors or solicitor from time to time, in and since the year 1853, employed by the said corporation, or some or one of them, had taken and had conveyed to them or him certain parts of the said corporate property in consideration of and in lieu of payment of bills of costs from time to time incurred by the said corporation for legal proceedings, and the defendants the said corporation ought to discover the particulars of all such conveyances, and the several considerations for the same; and that the purchase-money received for such sale as aforesaid and the several sums so borrowed on mortgage as aforesaid, had not been duly applied or distributed according to the constitution of the said corporation and the trusts attached to the said property thereof, and that the defendants the said corporation ought to set forth an account of the particulars of which the said corporate property consisted previously to the sales so made thereof as aforesaid, and also of the particulars of the corporate property so sold as aforesaid, and when and to whom such sales were made, and how the purchase-moneys arising therefrom had been applied and distributed, and whether in any manner invested, and also of the particulars of which the property vested in the said corporation now consisted, and what was the annual income thereof; that the defendants the said corporation ought also to set forth shortly the several deeds, charters, ordinances, records, rules, minute-books, or other instruments in writing, and also all customs within their knowledge regulating the said corporation and the property thereof, or showing the constitution thereof; that the defendants the said corporation had successfully offered for sale, and they threatened and intended to sell the market-house and the town-hall and the said slaughter-house and other the remaining property vested in the said corporation, or part thereof, and to distribute the proceeds of such sale amongst certain individual members of the said corporation, or otherwise to apply the same contrary to the constitution of the said corporation, and in violation of the trust attached on the property thereof. Such conduct was contrary to the wishes of a large number of the said burgesses and against their protest; and that the defendant Griffith Williams was the common attorney of the said corporation, and the several facts and things aforesaid were within his personal knowledge, and he ought to discover the same.

The bill then contained the charge as to documents, and concluded with a prayer, that the defendants, the said portreeve, aldermen, and other burgesses of Avon, otherwise Aberavon aforesaid, might be restrained by the order and injunction of the court from selling or disposing of, or offering for sale, the said market-house, market-place, or place for holding fairs, slaughter-houses, town-hall, or any other hereditaments remaining vested in them upon such private and public trusts as aforesaid; that an account might be taken of the hereditaments sold by the said portreeve, aldermen and burgesses of Avon, otherwise Aberavon, in and since the month of Jan. 1860, or from such other date as this court should think fit; and also of the proceeds of such sales, and the application of such proceeds, and of the mortgage moneys so borrowed as aforesaid, and also an account of the hereditaments, moneys and property now vested in the said corporation; and that the defendants the said corporation, and also the defendant Griffith Williams, might make a full discovery of the several matters aforesaid; and for further relief.

To this bill the defendants the corporation demurred for want of equity, and the cause now came on to be argued upon that demurrer. A demurrer was also made, *ore tenus*, at the bar, for want of parties.

*Selwyn*, Q.C. (*Speed* with him), in support of the demurrers, contended that the plaintiff ought to have filed the bill on behalf of himself and all other persons in the same interest with himself, but he had not done so: or, since it was clear from the statements in the bill that there must be other parties having such an interest, they ought to have been made parties, but that was not done. Further, the suit ought to have been instituted by the Attorney-General. With regard to the plaintiff's general equity to sue the corporation, this bill was a fishing bill, for discovery, founded on a claim to relief to which the plaintiff was not entitled. The bill was one by a member of the corporation against the corporate body, when the proper remedy was by *mandamus* at law. What the plaintiff wanted was, to show that the corporation had been, and intended to be, guilty of improper acts—acts *ultra vires* their charter. As to past acts, the plaintiff sought to impeach some sales already effected; and, as to future acts, to restrain some proposed sales and mortgages of the corporation property. For that he had alleged no sufficient case, for he had shown no proper trust on the part of the defendants; and *prima facie* every corporation not within the Municipal Corporations Act was entitled to deal with its own property as it chose. Upon the whole case they contended that the plaintiff was not entitled to the relief, by way of injunction or otherwise, that he prayed for: (*The Shrewsbury and Birmingham Railway Company v. The North-Western Railway Company*, 6 H. of L. Cas. 113; *Jackson v. The North Wales Railway Company*, 13 Jur. 69.)

*R. Palmer*, Q.C. (*F. H. Colt* with him), for the plaintiff, insisted that it was apparent on the face of the bill that the defendants, the corporation, were trustees of their property for the purposes of the corporation; and that, as the plaintiff was himself a member of the corporation, they were therefore trustees for him. The plaintiff had alleged a specific claim, as an individual Burgess of the town of Avon, and that claim involved a right to a part of the land on which the buildings mentioned in the bill, and the subject-matter of the sales and mortgages, were situated. It could not therefore be said he had no right to sue the corporation. Further, the members of the corporation had sworn not to alien the corporation property; therefore there was a clear trust imposed on them not to do so—above all things, not to do so if prejudicial to any one of the body: (*Attorney-General v. The Corporation of Cork*, 3 Dr. & W. 294; *Ward v. The Society of Attorneys*, 1 Coll. C. C. 370; *Adley v. The Whitstable Company*, 17 Ves. 315; *Dummer v. The Corporation of Chippenham*, 14 Ves. 245.)

*Selwyn*, Q.C. was not called on to reply.

THE MASTER OF THE ROLLS.—This bill cannot be supported. The case is one of a single individual, a Burgess and a member of the corporation of Avon, suing the corporation, in order to impeach certain sales and mortgages already made by them, and to obtain an injunction to restrain them from selling or mortgaging other parts of the property of the corporation. He also prays for discovery against the corporation and their attorney. A distinction was endeavoured to be drawn in the course of the argument between a municipal and a trading corporation. Now, *prima facie*, a municipal corporation which is not within the Corporation Act—and that is the position of this corporation—may dispose of all its own property as it pleases; and if a person seeks to restrain such a corporation from so doing, he must establish a case of a trust to the contrary, in which he is himself interested. A trust of that character may be of two kinds: it may be either general or private. For instance, a person might give

ROLLS.]

READ v. FREEMAN.

[C. B.]

a sum of money to a corporation, in trust for the children of A. B., to be paid to them when they shall respectively attain the ages of twenty-one years. That is a private trust. Then, again, a person may give a sum of money to a corporation for the benefit of the inhabitants of a town, as for the paving, draining, lighting, or some other improvements of the town. That is a general, or public trust. In the latter case, if you wish to enforce the trust, you must institute a suit in the name of the Attorney-General, and by way way of information, against the corporation; and that suit is one on behalf of all the persons interested in the trust. In the case of private trusts, if all the persons interested are too numerous to be made parties, the practice of this court allows some of them to sue on behalf of themselves and all others in the same interest with them. How, then, does the present case stand with reference to these doctrines? The plaintiff in this case states that he is a private individual, and a member of the corporation which he is suing; but he also shows by his bill that he appears in this suit in a public character; for he says that the interests in respect of which he is suing are common to all the burgesses of the town of Avon, he himself being also a Burgess. In support of those positions which he assumes, he sets up, or endeavours to set up, a case of a trust on the part of the defendants, the corporation, for the benefit of, amongst other persons, himself. The documents on which he relies to establish the trust are set out by him in the fourth paragraph of his bill. [The M. R. read that paragraph containing the charters as above stated, and continued.] I am of opinion that these documents, so stated, import no such trust of either kind; no trust either general (or public) or private; none that can be considered sufficient to support the plaintiff's bill. So far as they at all approach a trust—if indeed a trust there be—they import not a private but a public one, in the enforcing of which, as I have said, the Attorney-General is a necessary plaintiff, and the suit for that purpose should be commenced by information. Well, but taking the plaintiff's case as it stands, and coming on, as it does, upon demurrer to the bill, the facts stated by him must, by the ordinary rules of pleading, be taken most strongly against him; and I find that, it being necessary for him to establish a trust, he really alleges something short of what, in fact, he wants. He makes a general allegation of a trust, for the proof of which resort must be had to particular facts. But these particular facts, as they are stated by the plaintiff in his bill, do not, in my opinion, at all establish the conclusion in support of which he adduces them. In the case of *Frietas v. Dos Santos*, 1 Y. & J. Exch. 574, a very apposite judgment was delivered by the Chief Baron of the Court of Exchequer. There the general allegations had reference to certain accounts, in support of which the particular facts stated in the plaintiff's bill were set out, but as they were set out they proved all the accounts to be on one side, and the court in that case allowed the demurrer to the bill. This present case appears to me to be identical in principle with that; and so far as regards the demurrer for want of equity, in that respect it must be allowed. But then it was suggested that each member of the corporation had taken an oath not to alienate the corporate property, and that the defendants were now about so to do. In support of the arguments for the injunction founded on that assumption, the case of the *Attorney-General v. The Corporation of Cushei* was referred to. But that case was very different from the present one. In that Irish case the oath was clearly distinct and unconditional; and the question was, whether an alienation of part of the corporate property to a member of the corporation for an adequate consideration was not contrary to the oath taken by the alienors in their corporate capacity? Lord St. Leonards said that

the alienation was contrary to the oath; and observed that the oath there imposed was in lieu of an implied trust, binding upon the consciences of the members of the corporation. But that is very different, as I have said, from this case. The oath there was, that there should be no alienation at all. Here, however, the oath is clearly conditional, and does permit some alienations, for it prescribes that the alienation is not to be prejudicial to the interests of the corporation. [The M. R. read the paragraph of the bill relating to the oath, as above stated, and continued.] But who is to be the judge whether the alienation is or is not prejudicial? Clearly the corporation, who are to exercise the power of alienation. But in addition to all these considerations, the trust here, if as I have said any trust there be, is a public one, and the enforcing of it should have been by or at the suit of the Attorney-General. The case of the *Whitstable Company* was one of a corporation in the nature of a partnership, whose business it was to divide the profits among the partners to the concern—one of them said he had not received his share of the profits. But that was evidently the case of a private trust, which this court is bound, by all its rules, to administer—bound, that is to say, unless there be a title or remedy for the plaintiff at law. But that case is one quite distinct from the present, in which, as I have more than once observed, if there be a trust at all, it is a public one, and for the due enforcing of which this suit is not properly framed. The plaintiff here has alleged that some part of the corporation property has been sold, and he seeks an account of the moneys arising from such sales, and of the property now vested in the corporation. He also seeks a discovery in aid of that account. I am of opinion that he is not entitled to such discovery, as he is not in this case entitled to the other relief which he prays. Discovery may be obtained without further relief, by a plaintiff in this court, in aid of an action at law, or of proceedings in another court; but if the plaintiff's bill, in addition to discovery, also seeks, as connected with it, any other relief here, and he fails in obtaining such relief, he is not entitled to the discovery. I am of opinion that the demurrer to this bill must be allowed.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYO, Esqrs.,  
Barristers-at-Law.

Nov. 13 and 23.

READ v. FREEMAN.

*Appeal against highway-rate—Application for costs by the respondent under 12 § 13 Vict. c. 45, s. 5, and 11 § 12 Vict. c. 43, s. 27.*

*The defendant had appealed against a highway-rate, and had entered into the necessary recognisances, pursuant to 5 § 6 Will. 4, c. 60, to pay such costs as should be awarded by the justices at the quarter sessions; the appeal was heard and the rate confirmed, and an entry made to that effect in the minute-book by the clerk of the peace. At the end of this entry was an entry, "costs agreed to be taxed out of court—taxed at 33s. 7s." After the sessions an appointment for the taxation of the costs of the appeal was made by the clerk of the peace, of which the appellants had notice, but did not attend, and the costs were then taxed. Some time previous to this a general order had been made by the quarter sessions that the costs of every appeal should be taxed by the clerk of the peace during the sessions, and be paid by the losing party, unless an order should be made to the contrary. An application was then made by the plaintiff to the quarter sessions, under the 12 § 13 Vict. c. 45, s. 5, and 11 § 12 Vict. c. 43, s. 27, to enforce the payment of*

C. B.]

READ v. FREEMAN.

[C. B.]

*those costs, and they were asked to issue a distress-warrant, which was objected to by the defendant: Held, that, under the circumstances, the magistrates would be right in granting the application.*

This was a case stated pursuant to the stat. 20 & 21 Vict. c. 43, s. 2.

At a petty sessions holden at Swindon, in the county of Wilts, on the 16th Feb. 1860, before G. Daubeney and four other justices of the peace of Swindon, in the said county of Wilts,

William Read, surveyor of highways, of the parish of Swindon aforesaid (hereinafter called the plaintiff), made an application, in pursuance of the 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27, to enforce payment by H. E. Freeman, of Swindon aforesaid (hereinafter called the appellant), and W. Woolford, of Swindon aforesaid, of the sum of 33*l.* 7*s.*, being the costs of an appeal by the said appellant to the court of quarter sessions of Wilts against a highway-rate made for the parish of Swindon aforesaid, on which appeal the rate was confirmed, as in the certificate hereinafter mentioned. In pursuance of a summons issued on the information and complaint of the said plaintiff, requiring the attendance of the said appellant and the said W. Woolford, the said appellant, appeared at the said petty sessions, but the said W. Woolford did not appear. It was proved that the said appellant and W. Woolford, under sect. 105 of 5 & 6 Will. 4, c. 50, duly gave notice of appeal against a highway-rate of the parish of Swindon, and duly entered into recognisances with sufficient sureties, before a justice of the peace, pursuant to and in the form required by the above-mentioned section of the said statute of 5 & 6 Will. 4, c. 50, to pay such costs as should be awarded by the justices at the general or quarter sessions.

That the said appeal was duly entered at the general quarter sessions of the county of Wilts, held at Warminster on the 29th June 1858, and was on the application of the appellants respited to the then next sessions for the county of Wilts, to be holden at Marlborough, on the 19th Oct. 1858, when the said appeal was heard and determined, and an entry in the minute-book of the sessions, of which the following is a copy, was at the said sessions made by the clerk of the peace, and which entry was produced to us at the hearing of the said information by J. E. Judd on behalf of the clerk of the peace, and proved to have been so made by the clerk of the peace as aforesaid:—*"Townsend and Browne, H. E. Freeman, and W. Woolford (appellants) v. Kincair.—The highway rate of the parish of Swindon, 9th June 1858. Costs agreed to be taxed out of court. Taxed at 33*l.* 7*s.* 19th Oct. 1858. Rate confirmed, subject to the opinion of the Court of Q. B. on a case to be agreed upon."*

The above entry was and is the only entry in the said minute-book made as to the judgment of the court of the result of the appeal at the said quarter sessions, and save as aforesaid there was no entry of judgment in the said appeal.

It was proved that no application was made to the court of quarter sessions, or anything said to or by the court on the subject of the costs of the said appeal. It was proved, that on the 14th April 1859, and after the said sessions, an appointment for the taxation of the costs of the appeal to the court of quarter sessions was made by the said clerk of the peace, and that the appellants had notice of such appointment, but did not attend, and the costs were then taxed at 33*l.* 7*s.*, and that afterwards in June 1859 the Court of Q. B. heard and determined the said case, when the said order of quarter sessions, confirming the said rate, was confirmed by the said Court of Q. B. It also appeared that the payment of the said sum of 33*l.* 7*s.* had been demanded of the appellant; and W. Woolford, by

the plaintiff's solicitor, on the 6th Jan. 1860, and that they had not paid the same. It was proved that an order or rule of the said court of quarter sessions was made at the general quarter sessions of the peace held at New Sarum on the 4th April 1843, as follows: "That from and after the 1st Dec. next, the costs of every appeal tried shall be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court shall decide such appeal, unless the court shall then make any order to the contrary;" and that such rule or order was in force and had not been annulled at the time of the hearing of the said appeal. A certificate of the clerk of the peace was proved and received, though objected to by the appellants, which certificate had been applied for by the plaintiff, and granted by the clerk of the peace under the 11 & 12 Vict. c. 43, s. 27, and was as follows: "Office of the clerk of the peace for the county of Wilts. In the matter of an appeal, wherein H. E. Freeman and W. Woolford were appellants against the highway-rate of the parish of Swindon. I hereby certify that at a court of general quarter sessions of the peace, holden at Marlborough, in the said county of Wilts, on the 19th Oct. 1858, an appeal by the said H. E. Freeman and W. Woolford against the highway-rate for the parish of Swindon, in the said county of Wilts, bearing date the 9th June then last, came on to be tried, and was then heard and determined. And the said court of general quarter sessions did thereupon confirm the said highway-rate, subject to the opinion of the Court of Q. B. upon a case stated. And I do certify that at the general quarter sessions of the peace, held at New Sarum, in and for the said county, on the 4th April 1843, it was ordered as follows, that is to say, that from and after the 1st Dec. next the costs of every appeal tried shall be taxed by the clerk of the peace during the same sessions, and be paid by the party against whom the court shall decide such appeal, unless the court shall then make any order to the contrary; and that such last-mentioned order has not since been altered or repealed, and is now in full force. And I also certify that, upon the trial of the above appeal of H. E. Freeman and W. Woolford against the highway-rate of Swindon, the court made no order contrary to the said order of the 4th April 1843; and that the respective solicitors for the appellants and respondents then and there agreed that the costs of such appeal should be taxed by the clerk of the peace out of court. And I further certify that the solicitors of the said appellants having objected to attend the taxation of such costs, I did, on the 14th April 1859, attend the respondents' solicitor, and taxed the costs of the respondents at the sum of 33*l.* 7*s.*, which sum I consider fair and reasonable to be paid to them by the appellants for their costs in and about the said appeal. And I do further certify that the said sum for costs has not, nor has any part thereof, been paid to me. Dated 7th Feb. 1860. JOHN SWAYNE, Clerk of the Peace."

It was proved that after the taxation of the said costs the clerk of the peace had added to the entry of the minute of judgment of the court of quarter sessions, on the hearing of the appeal above set forth, the words "Taxed at 33*l.* 7*s.*," which appeared at the foot of such minute. Upon this evidence the said plaintiff W. Read asked for a distress-warrant against the appellant for the said costs, when it was objected and contended, on behalf of the appellant—first, that as the appellant had duly entered into such recognisance as aforesaid, &c., pursuant to 5 & 6 Will. 4, c. 50, and sect. 105, the justices had no jurisdiction to enforce payment of the above-mentioned costs by a distress-warrant; secondly, that no order, judgment, or determination had been made or come to by the court of quarter sessions for the payment of the costs in the matter of the above-mentioned appeal; thirdly, that the justices had no

C. B.]

BRUMFITT v. BREMNER.

[C. B.]

jurisdiction, under the circumstances, to issue a distress-warrant for the said costs; fourthly, that it had not been proved to the justices that a valid or sufficient order or judgment had been made or given by the court of quarter sessions for the payment of costs in the matter of the above-mentioned appeal; fifthly, that the certificate signed by the clerk of the peace did not certify or show that the court of quarter sessions had ordered the appellants to pay any costs, or directed to whom such costs should be paid; and that such certificate was not in conformity with sect. 27 of 11 & 12 Vict. c. 43.

Whereupon four of the justices adjudged and determined that a distress-warrant should issue to enforce payment of the sum of 33*l.* 7*s.* and 6*d.* costs; and the appellant being dissatisfied with such determination as aforesaid, as being erroneous in point of law, hath, pursuant to sect. 2 of stat. 20 & 21 Vict. c. 43, duly applied to the justices in writing, within three days after the said determination, to state and sign a case, setting forth the facts and grounds of such determination, for the opinion of the Court of C. P.; and the facts above stated are accordingly set forth and stated in such case, and the opinion of the court was requested whether, upon the facts, the justices were right in determining that such distress-warrant should be issued.

*Prentice* for the appellant.—Sect. 27 of 11 & 12 Vict. c. 43, only applies to cases where no recognisances have been entered into, and therefore does not apply in this case; the main question is, whether sect. 5 of 12 & 13 Vict. c. 43, applies where they have been entered into. In this case no order of payment of costs was made by the quarter sessions; some years since the court of quarter sessions made a general order, that the costs of every appeal should be taxed by the clerk of the peace during the same sessions, unless the court should make any order to the contrary; assuming that they have the power to make such an order, they must indorse every order in the same way; but here they have made an order without saying anything about the costs, but they ought to have done so. No order whatever was made by the quarter sessions that the appellant should pay, but after the sessions are over an entry is made by the clerk to that effect. The costs should not only be taxed at the same sessions, but also adopted; this is the rule laid down in *Burn's Justice*, tit. "Appeal," 175. He also cited *Reg. v. Justices of Merionethshire*, 6 Q. B. 163; *Ex parte Holloway*, 1 Dowl. 26; and as to the order of costs being a judicial act, *Reg. v. The Recorder of Cambridge*, 27 L. J. 160, M. C.

*Phipson* for the respondent.—There is nothing in the first objection as to the Act not applying when recognisances are entered into. Then, as to order for payment of costs, and execution issued being valid under 12 & 13 Vict. c. 45, s. 18, see *Reg. v. Huntley*, 3 El. & Bl. 172. Then it is said that there has been no order, but the parties agreed as to the taxing of costs; and then there was the general order that, unless an order was made to the contrary, the party losing should pay the costs. *Reg. v. Mortlock* was also cited, 7 Q. B. 470. [ERLE, C.J. referred to *Reg. v. Long*, 1 Q. B. 740.]

*Prentice* in reply.

*Cur. adv. vult.*

Nov. 23.—ERLE, C.J. now delivered judgment.—Some of the objections on this appeal need only a short answer. The 12 & 13 Vict. c. 45, s. 5, empowering the sessions to give costs on all appeals to either party, disposes of the two questions raised by Mr. Prentice, whether the order of the sessions was bad under the 11 & 12 Vict., which statute does not extend to cases where there is, as here, a recognisance, and which statute makes provision in respect of paying costs by the clerk of the peace. So, as to the point that there was no adjudication giving costs, ex-

pressed orally by the court, the answer is, it was tacitly expressed by a standing order that costs would follow the event unless the court should interfere, which was a rule of practice known to both parties, and it was a rule specifically applied to this case by the officer having the authority of the court making the entry ordering costs, with the knowledge of both parties. As to the remaining objection, the costs were taxed by the clerk of the peace after the end of the sessions. Although the taxation ought by law to be by the court, still the performance of that duty by its officer, if subsequently adopted by the court, has been often recognised as valid. See *Reg. v. Mortlock*, 7 Q. B. 459, and *Seewood v. Mount*, 1 Q. B., where it is said a rule requiring taxation by the court by no means prevents the court from directing their officer to tax the costs, and adopting his taxation as their own act, and inserting the amount in the order. But this must be done by the court before the end of the sessions; and a difficulty was raised in this case because the last-mentioned rule of law had not been complied with. The difficulty, however, is got over by an answer to the objection, in the nature of a personal exception to the appellant, because in effect the allowance during the sessions was brought about by the appellant himself consenting to delay, and therefore, as against him, it must be taken to have been properly done. It was on his representation of consent that his opponent altered his position and allowed the delay. There are authorities for giving effect to the consent of the party in this way. In *Rex v. Long*, 1 Q. B. 746, where the costs were taxed after the end of the sessions without consent, Lord Denman observes: "If the party to be burdened with costs consents, the judgment may perhaps be given *nunc pro tunc*, though the taxation be out of court; otherwise if there be no consent." And in *Reg. v. The Shrewsbury and Hereford Railway Company*, 25 L. T. Rep. 65, it appeared that the taxation had been after the end of the sessions by consent, and when the order of sessions was brought up for execution the party who had to consent moved to set aside the order on account of such a taxation after the end of the session. Lord Campbell refused the rule, saying: "The point is not now whether the sessions had jurisdiction to make the order, but whether the appellants are not precluded by their own act from taking the objection;" and the court held that it did. This case is an authority for us to adopt, and on these grounds we are of opinion that this objection fails, and that the appellant cannot take advantage by his attorney disputing that which he had consented to do. We think there was no weight in the objection that the consent was not proved by legal evidence; the clerk certified that there was consent, and as far as appears on the case, the justices were not wrong in acting on it as an undisputed claim. Our judgment will therefore be for the respondent with costs.

*Judgment for the respondent.*

Attorneys—Townsend and Ormond for the appellant, and H. Kinnear for the respondent.

Tuesday, Nov. 20.

REGISTRATION APPEAL.

BRUMFITT (appellant) v. BREMNER (respondent).

County vote—Notice of objection—Entry of objector's name in register after list printed—6 Vict. c. 18, ss. 34, 47 and 49.

By the 47th section of 6 Vict. c. 18, the clerk of the peace is to sign and deliver the books containing the lists of voters, on or before the 30th Nov., to the sheriff of the county; and by sect. 49 such books, so signed and given into the custody of the sheriff, are to be the register of persons entitled to vote.

An objector gave due notice of objection to a person who claimed to have his name retained on the register. When the claim came to be sustained before



the revising barrister, it appeared, on turning to the bound copy of the register of voters, which was produced from the custody of the sheriff, that a sheet thereof had been pasted into the book after it had been bound, upon which the name of the objector had been inserted, numbered 5638 A, between names of other voters, numbered respectively 5638 and 5639.

On or about the 29th Dec. various copies of the register were sold to persons applying for them, which copies did not contain the name of the objector. The objector having called the attention of the clerk of the peace to the omission of his name, they referred to the revise of last year's register, and found that the name was not initialled by the revising barrister as intended to be erased, but that the barrister having evidently run his pen through the name by mistake, had passed his thumb over the wet ink, and so occasioned the appearance of an erasure, which had misled the clerk of the peace in making out the list. At the time when the objector called attention to the circumstance, the register, though bound and ready for signature and delivery, had not been signed by the clerk of the peace and delivered to the sheriff, its length, and certain difficulties which had arisen in printing, having prevented this being done by the 30th Nov., the time fixed by the statute. The clerk of the peace therefore determined that the name of the objector should be interlined in print, and the sheet containing such interlineation substituted for the sheet in which the objector's name had been omitted, and this was done.

The revising barrister held that such sale of copies of the register by the clerk of the peace was a publication of the register, and an adoption by the said clerk of the peace of the signature printed at the end thereof; that he had no power afterwards to insert the objector's name, or make any alteration in the register, and consequently that the name of the objector was not legally on the register, and the name of the person objected to must be retained:

Held, that the decision of the revising barrister was wrong, and must be reversed; that the list did not become a register until it had been signed by the clerk of the peace and delivered out to the sheriff, and down to that time it was in the power of the clerk of the peace, and his bounden duty, to make that which was to be the list correct:

Held, also, that the provision of the Act, requiring the clerk of the peace to deliver the register on or before the last day of November in the current year to the sheriff, was directory only, and the failure to do so, where arising from unavoidable obstacles, as in the present case, did not avoid the register.

The following case was stated by the revising barrister:—

At a court held by me (one of the barristers appointed to revise the list of voters for the southern division of the county of Lancaster) 1860, for the revision of the said list, William Brumfitt objected to the name of William Birchall being retained in the Ashton-in-Mackerfield list of voters for the southern division of the county of Lancaster.

The notice of objection was as follows:—

"Notice of Objection.

"To Mr. William Birchall, Edge-green-lane, Ashton-in-Mackerfield.

"Take notice, that I object to your name being retained in the Ashton-in-Mackerfield list of voters for the southern division of the county of Lancaster.

"Dated this 18th day of Aug. in the year 1860.

"(Signed) WILLIAM BRUMFITT, of No. 108, Netherland-road north, in the township of Everton (late of No. 26, Devonshire-place), in the township of Everton.

"On the register of voters of the parish of Liverpool."

On turning to the bound copy of the current register of voters, which was produced from the custody of the sheriff, it appeared that the sheet numbered 313 had been pasted into the book after it had been bound, and upon this sheet the name of Wm. Brumfitt was inserted as follows:—

5638 A.	Brumfitt, Wm.	St. Devonshire-place, Everton.	Freshold House.	Four-court at Mr. Roberts & others tenants.
---------	---------------	--------------------------------	-----------------	---

The number prefixed to the name preceding Brumfitt's was 5638<sup>b</sup>; to the name succeeding, 5639.

A copy of the sheet numbered 313, showing the interlineation and signed by me, is hereto annexed.

It was proved that on the 12th Dec. 1859 Mr. Burne, of Manchester, applied by letter, inclosing P. O. order for 1*l*., to the deputy clerk of the peace for the county of Lancaster, for two copies of the register of voters for South Lancashire, and that they replied promising that the copies should be sent as soon as they were ready.

That about the 29th Dec. 1859, the deputy clerks of the peace sent to Mr. Burne two copies of the register, which had their names printed on the last sheets thereof respectively thus, "Birchall and Wilson, deputy clerks of the peace." That neither of the copies contained the name of William Brumfitt, the objector, on the 313th sheet. That similar copies of the register were also sold to other people, and amongst the rest to the said William Brumfitt himself.

That on the 13th Jan. 1860 the deputy clerks of the peace wrote as follows to Mr. Burne:—

"Preston, 13th Jan. 1860.

"Sir,—You will perceive by the inclosed sheets of register, that there has been an error in the printing, the name of William Brumfitt having been omitted.

"We shall therefore be obliged by your returning us the sheets paged 313 in the copies we sent you on the 29th ult., and substituting the inclosed for them."

That the attention of the deputy clerks of the peace was first called by the objector himself to the omission of his name from the register of voters so sold, and after the sale thereof. That in consequence of his application to have his name inserted, they looked at the revise of last year's register, and found that the name was not initialled by the revising barrister as intended to be erased, but that the barrister having evidently run his pen through the name by mistake, had immediately passed his thumb over the wet ink, and so occasioned an appearance of erasure which had misled them. That the register, although bound and ready for signature and delivery, had not, at the time of this application by the objector, been signed by the deputy clerks of the peace, and delivered to the sheriff as required by the statute, the length of the register, and difficulties which had arisen in the printing, having prevented their doing so before the 30th Nov., the time fixed by statute. That they therefore determined that the name of the said William Brumfitt should be interlined in print as it now appears on the 313th sheet; and the sheet with such interlineation was substituted for the original sheet in the whole of the registers, and in the bound copy of the register, which was by them signed and delivered to the under-sheriff after such substitution.

It was contended that the sale by the deputy clerks of the peace of copies of the register bearing their signature, although printed in previous to their sign manual, was an adoption by them of such signature, and that they had no power afterwards to make any alteration in the register, which was from that moment perfectly formed; and that inasmuch as such copies, when sold, did not contain the name of William Brumfitt, his name was not now legally upon the register of voters of the southern division of the county of Lancaster.

C. B.]

BRUMFITT &amp; BRENNER.

[C. B.]

It was argued by William Brumfitt that I had no jurisdiction in the matter, but must receive the official register as delivered to me by the deputy clerk of the peace, he being the person appointed by the statute of Victoria to deliver the register then in force to the revising barrister; but, if not the register legally in force for the time being, then the register for the previous year in which the name of the said William Brumfitt duly appeared, must be held to be still in force.

I held that such sale by the clerks of the peace of the copies of the register to Mr. Burne and others must be taken as the publication of the register, and as an adoption by them of the signature printed at the ends thereof respectively, and that they had no power afterwards to insert any name, or make any alteration in the register.

I therefore decided that the name of the objector was not legally upon the register of voters for South Lancashire, and declined to receive the notice of objection given by him against the vote of Mr. Birchall, whose name was consequently retained on the list of voters for the township of Ashton.

If my decision was right, the list of voters is to remain as amended by me; and, if wrong, the names of the said William Birchall and the other names hereinafter mentioned are to be removed from the list of voters.

And as the validity of a great number of notices of objection by the appellant affecting the names mentioned in the schedule depend upon the same point of law, and each of which were appealed against; so Brumfitt was named appellant and Brenner respondent on behalf of himself and 1500 other persons.

The name of 1500 others annexed are retained.

*Webby* (with him *Aspinall*) for the appellant.—The decision of the revising barrister was wrong, and the names should have been removed from the register. By 6 Vict. c. 18, s. 34, the clerk of the peace at the opening of the first court for the county shall deliver to the barrister all the lists of voters for the then current year, with the marginal additions as aforesaid, and lists of the persons objected to in the said year, relating to said county, and also one or more printed copies of the register of voters then in force for the said county; and the overseers of every parish or township shall attend the court to be holden for revising the lists relating to their parish or township, and shall deliver to the barrister the original notices of claim and notices of objection, given to them as aforesaid, and the clerk of the peace and overseers shall, if required, answer upon oath all such questions as the barrister may put to them, and produce all documents, papers and writings in their possession touching any matter herein mentioned. Then there is the 47th section, which is material, and that enacts that the list of voters for each county, signed, &c., shall be forthwith transmitted by the revising barrister to the clerk of the peace of the same county, and he shall keep the said lists among the records of the session, and shall forthwith cause the said lists to be copied and printed in a book or books, arranged with the names in each parish or township in strict alphabetical order according to the surnames, and with every polling district in alphabetical order, and with every parish or township within such polling district likewise in the same order, and shall after the last list for each polling district insert a list in like alphabetical order of all persons whose names shall not appear in any of the said lists for such polling district, but who shall in manner hereinbefore mentioned have been registered by the revising barrister to vote at the polling place of such last-mentioned district, and shall in the said book prefix to every name "its proper number, beginning the numbers from the first name, and continuing them in a regular series to the last name; provided always that a number as aforesaid shall be prefixed to the name of every per-

son in every such list inserted after the last list for every polling district as aforesaid; and no number, but an asterisk only, shall be prefixed to the name of the same person in the list of the parish or township in which his name originally appeared; and every such book shall be printed and arranged in such manner and form, that the list of voters of and for each parish and township may be conveniently, and completely cut out and detached from all the other lists of voters, so that all the lists for every or any polling place, or the list of every or any single parish or township, may be ready for the purpose of this Act, or for sale; and the said clerk of the peace shall sign and deliver the said book or books on or before the last day of November in the then current year, to the sheriff of the court, to be by him safely kept," &c. Now, in the present case the clerk of the peace complied with these directions of the statute, so far as he might, but as the completion of the printed list was a physical impossibility by the 30th Nov., it was not delivered to the sheriff until on or about the 13th Jan. The 49th section declares that the printed book or books, so signed by the clerk of the peace and given into the custody of the sheriff, shall be the register of persons entitled to vote at any election between the last day of November and the first day of December in the following year, &c.; and with that section must be read the 27th section, which enacts, "if no list be made out or published, the former list is to remain in force." It is submitted that words in the 47th section as to the delivery of the register book to the sheriff on or before the 30th Nov. are directory only and not imperative. If this were not so, the consequences would be that unforeseen and unavoidable delay by the printers, or a mistake such as in this case where the finger of the revising barrister blotted the list, would deprive persons entitled to the franchise of their vote. This could not have been the intention of the Legislature, and therefore this appeal should be allowed.

*Monk* (*Power* with him) for the respondent.—Although the votes of no less than 1500 persons depend upon this question, irrespective of that, so important a question as this has not been before the court since the passing of the Reform Bill. If the court looks narrowly at the 47th section, it will be seen that the Legislature have given to the clerk of the peace not the slightest discretion; he may not tamper with or alter the register in the minutest particular. If the court should hold that clerks of the peace may make omissions or alterations in the register, they will hand over the constituencies to men who often are not only attorneys, but parliamentary agents, and generally active political partisans. The numbering in the present case is not perfect and consecutive as the Act requires, for 5638 A is interplaced between 5638 and 5639. The register, it is contended, is a register before delivery to the sheriff, and the mere act of such delivery has nothing to do with its validity. When the clerk of the peace has caused the register to be printed he has made a register, and when he has signed and published it the same is complete. On 13th Nov. appellant applied for a register, and was answered that two copies should be sent as soon as ready, and such copies were eventually sent: (*Re Allen*, 28 L. J. 256, C.P.) The register was signed about 13th Jan., but it was a register even before signature. A printed signature is as good as a sign manual. Are 1500 voters to be deprived of their right by this accident? The clerk of the peace had done all that the Act requires, except delivering the books to the sheriff, and that does not matter. As to there not having been time enough to print the register before the 30th Nov., there was a clear month, which was more than enough. If, as the appellant contends, this clause is directory only, and not imperative, the clerk of the peace, if, for the purposes of party, he were deter-

C. B.]

BRUMFITT v. BRENNER.

[C. B.]

mined to defeat the object of a register, might resolve to keep and withhold the register, taking any personal consequences that might arise, his object being to promote the interests of his party. If the register is not a register till delivered to the sheriff, then in this case there was no register till the 13th Jan., whereas there ought to have been one on the 1st Dec., so that the statute would not be complied with. If the court entertains any doubt on the question, it should be given in favour of the franchise.

*Welsby* in reply.—The persons objected to could not have been misled by the state of things here. It has been contended that the register is complete before delivery to the sheriff; at what moment does its completeness date? Is it when the clerk has copied the last name, or when the printer has struck off his first proof? It is contended that it only becomes a register when signed and delivered to the sheriff, and its existence and validity as a register cannot depend upon what has here been contended for: (*Davies v. Hopkins*, 3 C. B., N.S., 176.)

*ERLE, C.J.*—I am of opinion that the revising barrister in this case was wrong, and that the signed list delivered to the sheriff became the register of this county. The provisions of this Act are made for the purpose of defining with certainty who shall be entitled to vote, and to preclude inquiry at the time when the franchise is to be exercised; and the Act contains a series of provisions—some of them may be essential, some of them may be directory only; and whenever the question may arise, it may be extremely material for the tribunal before whom it is brought to consider whether the requirements of the Act of Parliament can be dispensed with. But it is well known in the law that most of the requirements of the Legislature are to be treated as directory only. I think the intention of the Legislature was to have all the duties performed by the parish officers, and those duties to be performed by the clerk of the peace at the specified times, and all those series of acts are to be performed before the document became the register of the county; there was to be, if I may so say, an internal finish of the series by the clerk of the peace putting his signature to those lists which he had arranged alphabetically and procured to be printed and numbered, with a variety of duties to be performed; it was to have an internal finish on the part of the clerk of the peace by his putting his signature to it, and an external finish by his having delivered it out as the register so completed by him, and delivered out to the public officer, who would have to see to the exercise of the franchise, and, as I consider, what was to be relied on by him at the time when the election should take place. I think that where the party intended to sign, and intended to deliver out—it being found that all parties acted *bonâ fide* in this instance—that the clerk of the peace intended to reserve to himself the right of signing when it was essential to sign, and the right to deliver when the time arrived for delivering. All those steps are essential circumstances to make a list become a register; and therefore, till the time when those two matters of completion have taken place, this list had not become the register; and down to that time it was in the power of the clerk of the peace—nay, it was the bounden duty of the clerk of the peace—to make that which was to be the list correct, according to the correction of the revising barrister. It should be noticed that some of the ink which the revising barrister intended to use for the purpose of erasing the name on the list before he came to the name of Mr. Brumfitt, had become placed over the name of Mr. Brumfitt, and by mistake Mr. Brumfitt's name, not at the time upon the register, ought to have been kept upon the register by the clerk of the peace; and till that series of acts had arrived at their complete finish the

clerk of the peace was doing his duty in correcting the error, and putting in the name. Now, one of the acts which he is called upon to do is to put correct numbers on every name in a numerical series in correcting the list after they have been properly printed in this way, by inserting the name either by transposition of all those numbers, or correction, as near as could be consistently with the Act of Parliament. I think he did his duty in treating the numerical law of the numbers put on the names as directory only, and that the statute was substantially complied with in putting 5638 A after 5638, marking it as inserted in that place. I think that to be one of the requirements properly considered by him to be directory only, and that the register did not become void because before the name of Mr. Brumfitt there was one of the component numbers. I am also of the same opinion in respect to the delivering copies to the sheriff before the 30th Nov. That would not avoid the register. It was well put by Mr. Welsby, that if it was a day too late, if that was essential, the register would be avoided. But I do not think that that can be maintained. I think there is a great deal in Mr. Welsby's argument by way of question, if the register is a register before it has been signed *aimo signandi*, and delivered out with the intention of delivering a complete register, when can it be said it has become a complete register? At the time it is in printer's office, soon after the compositor has set the name up? I think the selling of the copies before it was complete was selling that which the parties believed would be a complete copy of the register, although from intervening events it was not correct, and he gave notice of the mistake made. I consider that the revising barrister was wrong in holding that this had not become the register which was signed by the clerk of the peace and delivered to the sheriff. We have been very much pressed with the consequences of the result of this decision. We are bound to regard what the law is on the subject, and to endeavour as far as possible to shut out from our attention the consequences, further than, if painful results follow, the matter is of course regarded with the greatest anxiety; but the leading aspect of the case we cannot alter, whether one person is disfranchised or a greater number. The rule of law is as I have endeavoured to express it; and in my opinion, therefore, the judgment ought to be for the appellant.

*BYLES, J.*—I am of the same opinion; and I think that a great deal of light is thrown upon this case by the provisions of the 41st section; because that provides what the barrister is to do, and is particularly to be attended to, because it is quite clear what is meant by the word "signed" in that section, which is afterwards adopted, by reference, in the section in question: "The barrister shall in open court write his initials against the name respectively expunged or inserted, and against any part of the lists in which any mistake shall be corrected or any omission supplied, or any insertion made by him, and shall sign his name to every page in the lists so settled." Now, he is to sign his name in open court. It is perfectly clear, therefore, that he is to sign his name after having written his initials, and the signature and the word "signed" are meant signed in the popular sense; he shall write his name. In this case he, by mistake, began to obliterate the name in question, but put no initials, blotted the ink over it, and hence the mistake arose; and that name was omitted from certain printed documents—I will not call them copies, because they were not copies of the list, and they were not copies of the register—certain printed documents which were on the 29th Dec. sent by post. Now, then, after this mistake had been discovered—and (though it was not apparent in this case) it must have been before the 13th Jan.—the clerk of the peace does

C. B.]

Re THE NORTH WINGFIELD CHARITY.

[V.C. W.]

what by law he is bound to do, he writes his name at the bottom of the register and delivers the register to the sheriff. That is a complete register, at all events; and then a copy of that complete register is forwarded to the person who had formerly a document which purported to be a copy of the register, but which was not. Now then, the question is (I have hitherto assumed that the list was the register), what was the register? Now the statute, in sect. 49, says that the said printed books so signed as aforesaid by the clerk of the peace or town-clerk respectively, and given in to the custody of the sheriff, shall be the register of the persons entitled to vote; and that ought to be done, no doubt, on or before the last day of November; but here it was not done till afterwards. Now the first question is what is meant by the words "so signed?" The word "signed" occurs again at the end of the 47th section, and with reference to the same signature; "the said clerk of the peace shall sign and deliver the said book or books before the last day of November." It occurs again at the beginning of the same section, "on the said list of voters for each county signed as aforesaid;" that is, by the barrister. It is clear, therefore, having reference to the 41st section, and comparing it with the commencement of the 47th, that the word "signed" is used in the beginning of this very section, the 47th, in the ordinary sense, signed with his own hand. I should further observe, that construction is fortified by the fact that in the 49th section the word "signed" is used in contradistinction to the word "print," because it is "the said printed book or books so signed as aforesaid." It seems to me, though it is not necessary for the decision of this question, it must be admitted that the Act of Parliament intended that the clerk of the peace should do an act which would call his personal attention to the correctness of the document he was about to sign, and that he should sign it according to the ordinary meaning of the word "sign." But, however that may be, there is no register until it is signed in some sense or other, and delivered to the sheriff. The first document which was signed and delivered to the sheriff was a document which was signed and delivered to the sheriff about the 10th or the 11th Jan., and it seems to be the register. With respect to what has been said about these requisitions of the Act of Parliament being "directory," that perhaps is hardly a proper expression to be used; they are more than directory—they are imperative; and if the duty they describe is so obligatory, if a man wilfully neglect it, then undoubtedly he is indictable; and it is not clear that he should not be criminally responsible if he should be guilty of gross negligence; at all events, they are imperative. It is one thing to say that a duty is imperative and obligatory, to be dealt with under the penalty of indictment; it is another thing to say the observance of and a strict and literal compliance with it, is a condition precedent to the validity of a document. I should only repeat what has been referred to by Mr. Welsby and the Lord Chief Justice, if I were to dilate upon the monstrous consequences which would follow if all these minute directions were to be held conditions precedent to the validity of documents. In short, allowing the whole weight to Mr. Monk's objection, that there is an inconvenience in this, that some persons have been misled, there is a choice of inconveniences; there is a much greater inconvenience on the other side, because it would be treated as the true register, and the real register gives no copy of the list. I must say that I entertain no doubt that the decision of the revising barrister should be reversed.

KEATINGE, J.—I am also clearly of opinion that the revising barrister was in error in his decision upon this occasion. It is admitted, on all hands, that the name of the objector was included in the list signed by the revising barrister; that list is this copied by the clerk

of the peace, or those whom he employed, and one or two of those which may be termed new copies is sold. After that sale the clerk of the peace discovers the mistake, and I am clearly of opinion that if, having discovered the mistake, he had delivered to the sheriff a copy of the register without that mistake being corrected, he would have failed in his duty. I am of opinion that, so far from having failed in his duty in correcting the mistake, he was bound to correct it. Now I entirely agree with the observations that have been made by my Lord and my brother Byles with reference to the construction of the 47th and 49th sections, and I think that there would be indeed great confusion if we were not to abide by the terms of sect. 49, and to hold that the list signed by the clerk of the peace, with the intention of signing, and delivered by him to the sheriff, would be a register. Now, Mr. Monk has argued very forcibly, and pointed our attention to the serious results that might occur from the clerk of the peace tampering with the register. In the first place this case finds that all the proceedings were *bonâ fide*. But I do really think that the observation of Mr. Monk would be equally applicable to the state of things he contended ought to have existed here; because, if the sale of one copy of the register is to preclude the clerk of the peace from correcting the register according to the list signed by the barrister, it seems to me to open the door quite as wide to tampering with the list by the clerk of the peace and the register, and doing that which I conceive to be his duty to do in correcting a mistake in the list signed by the officer. It appears to me, therefore, that the revising barrister was clearly in error, and his decision should be reversed and judgment given for the appellant.

*Judgment for appellant.*

### V. C. WOOD'S COURT.

Reported by W. H. BENNET, Esq., Barrister-at-Law.

Wednesday, June 27.

Re THE NORTH WINGFIELD CHARITY.

*Charity—Scheme—Repairs of old and new church. A trust had been created in 1705 for the benefit of the parish church of A. The parish of A., by an Order in Council in 1852, had been divided into two ecclesiastical districts. It was alleged that the chancel had been repaired by the rector, and not out of the trust-funds. Semble, that the trust-funds ought not to contribute to the repair of the chancel. It was sought to apportion the amount of the trust-funds for the benefit of each of the two district churches, rateably.*

*Held, that as the primary object of the charitable gift was the old church, the trustees could not be compelled to make any apportionment. But that, if any surplus remained after paying for the repairs of the old church, it might be applied to the repair of the new church.*

This was a summons adjourned from chambers into court, for the purpose of considering a scheme proposed for the administration of a charity founded by Thomas Brailsford in 1705. By deed-poll of that year, Brailsford conveyed certain lands to the rector and four trustees for the use and benefit of the parish church of North Wingfield, in the county of Derby. It appeared that the parish of North Wingfield was, by Order in Council in 1852, divided into two ecclesiastical districts; and in the new district of Clay-cross a church had been built. The questions arising upon the present application were—first, whether the rector, who was one of the trustees of the charity, was entitled to be repaid out of the trust-funds the amount expended by him upon repairing the chancel of North Wingfield church; secondly, whether any apportion-

ment of the funds could be made so as to include the new church and the inhabitants of the new district in the benefit of the trust. Some question was raised as to the terms of the original gift, a document purporting to be a translation of the deed-poll of 1705, and apparently made in 1773, containing the words "to the use of the parish of North Wingfield," omitting the words "or parish church," which were contained, however, in a deed of 1741, reciting the original deed.

*Chapman Barber, Fischer and Berkeley*, for the various parties interested.

*Wickens* for the Attorney-General.

The VICE-CHANCELLOR said that it was desirable that further evidence should be furnished as to the repair of the chancel, &c. It would be a very strong circumstance against the rector's case if, while standing by as a trustee, the chancel had never been repaired out of the trust-funds, but always at his expense. He must take the words parish, or parish church, contained in the deed of 1741, as being the most correct version of the original gift, and that the parish church was the primary object of the charity. He could not say that it was not for the benefit of the parish that the chancel should be repaired out of the trust-funds, to the relief of the rector, for the means of the rector and his adequate sustentation were of very great importance in the parish, especially to the poor. But as to allowing the money expended in the repairs of the chancel, it was a matter which must depend on what had been the custom heretofore, the burden of showing that the chancel had been repaired out of the funds being thrown upon the rector. If he failed to show it, then the scheme would, in this respect, stand unaltered. With respect to the apportioning the fund between the old and the new district, the trustees could not be compelled to make an apportionment. The primary object of the trust was the benefit of the parish church. The inhabitants of the new district were bound to contribute to the repair of the old church, and to this extent they participated in the benefit of the trust, for they were not only thereby relieved from the burden of the rate, but also, which was perhaps as important, from the attendant agitation. It did not appear at present that there was any surplus, but if there should be any surplus after repairing the old church, it would be desirable to apply it to the repair of the new church, and to this extent also the scheme might be varied.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HEATHLEY, Esqrs., Barristers-at-Law.

Thursday, Nov. 15.

REG. v. JUSTICES OF SOMERSETSHIRE.

*Highway—Nonrepair—Justices—Order to indict—* 5 § 6 Will. 4, c. 50, ss. 94, 95.

*To give justices jurisdiction to make an order for the repair of a highway, or to indict the parish where the liability to repair is denied, two facts must exist—the road in question must be a highway, and it must be out of repair. Where the liability of a parish to repair a road has been denied, and an indictment preferred under sects. 94, 95 of the Highway Act, and a verdict of not guilty found in favour of the parish, the justices are not bound to direct a second indictment on a fresh information before them under sects. 94 § 95.*

*Kinglake*, Serjt. moved for a rule calling on certain justices of Somersetshire to show cause why they should not make an order for an indictment to be preferred against the inhabitants of East Coker for the non-repair of a highway. It appeared that an information had been laid by John Bennett, pursuant to sect. 94 of the Highway Act, 5 & 6 Will. 4, c. 50, and that

the surveyor of the parish attended the hearing and denied the liability of the parish to repair the road in question. It also appeared that the justices on a previous occasion had directed an indictment to be preferred under sect. 95 against East Coker for the nonrepair of the same road; and that at the trial one question raised was, whether the road was a highway, and that the jury found a general verdict in favour of the parish. The justices on the present occasion refused to direct another indictment to be preferred. It was now contended that it was compulsory on the justices to direct an indictment to be preferred (*Reg. v. Arnould*, 8 El. & B. 550); that if the verdict for the parish was an answer to the indictment, it might be given in evidence upon the trial of the new indictment; that the statutory alteration in sects. 94 and 95 of the Highway Act was in substitution of the old mode of presentment of a highway when out of repair, which might have been resorted to many times over. [*BLACKBURN*, J. referred to note in *Reg. v. Heanor*, 6 Q. B. 748, where it appeared that sect. 95 only applies where the existence of the highway is admitted.]

*COCKBURN*, C.J.—It is discretionary with the court to grant this rule, and in the exercise of our discretion we do not think proper to do so. Our refusal to grant a rule does not exclude the applicant from resorting to the common law remedy by indictment. The jury having negatived the fact of the liability of this parish to repair the road by their verdict, there ought not to be a rule granted. The statute only intended an order of justices to be made where the liability of the particular parish to repair came into issue, not where a jury had already determined that question. If that were not so, a parish might be perpetually harassed by fresh indictments on the same ground.

*HILL*, J.—Sects. 94 and 95 only apply to cases of admitted highways. To give the justices jurisdiction under those sections, there must be, first, a highway; and, secondly, it must be out of repair. The justices are to determine the facts, by sending a competent person to view the same and report thereon, or inspect it themselves. Having satisfied themselves of the facts, then, if the liability to repair is not disputed, they may order the surveyor to repair, but if it is disputed they are to order an indictment to be preferred. But unless these two facts exist they have no jurisdiction to order an indictment to be preferred.

*BLACKBURN*, J.—The words of the statute do not say that when any person chooses to assert that a road is a highway, the justices are obliged to make the order in question, but only when there is a highway, and it is out of repair, they shall make an order as directed.

*Rule refused.*

Saturday, Nov. 17.

*Ex parte* WILLIAM THOMPSON.

*Habeas corpus—Warrant of commitment—Omitting to state whether imprisonment is to be with or without hard labour.*

*Where by a statute giving justices a power to commit summarily they are empowered to commit the offender to prison for a certain period, with or without hard labour, and in their warrant of commitment nothing is said about hard labour, it is to be taken that they did not mean to give hard labour, and the warrant is not objectionable for omitting to state whether the imprisonment is to be with or without hard labour.*

*Upon supporting a rule, counsel will not be permitted to argue any points decided upon moving for the rule nisi.*

This was a rule for a *habeas corpus*, to bring up William Thompson, now a prisoner in Preston gaol, Lancashire, upon a summary conviction for an aggravated assault upon a female, under the 16 & 17 Vict. c. 30, s. 1. The only ground upon which the rule

Q. B.]

COLLUMPTON v. BRIGHTELMSTON, *ex parte* JOHN HOWSE.

[Q. B.]

said was granted was that the warrant did not state whether or not the prisoner was to have hard labour: (*see Ex parte William Thompson*, 3 L. T. Rep. N.S. 294.) By the above statute it is enacted, "When any person shall be charged before two justices of the peace . . . with an assault upon any female whatever . . . either upon the complaint of the party aggrieved or otherwise, it shall be lawful for the said justices . . . if the assault is of such an aggravated nature that it cannot in their or his opinion be sufficiently punished under the provisions of the statute 9 Geo. 4, c. 31, to proceed to hear and determine in a summary way, and if they shall find the same to be proved, to convict the person accused; and every offender so convicted shall be imprisoned in the common gaol or house of correction, with or without hard labour, for a period not exceeding six calendar months," &c.

Now showed cause, and contended that the warrant was perfectly good, for, as it said nothing about hard labour, no hard labour could be imposed, and that if hard labour were not intended to be given, it was not necessary to negative it in the warrant. He also referred to the 11 & 12 Vict. c. 43, the form in schedule I 3, which is applicable to a conviction when the punishment is to be imprisonment, having the words "and there to be kept to hard labour" in brackets, to be inserted only where hard labour forms a part of the judgment.

*Occurrent*, Q.C. (*Wheeler* with him) was called upon, and he argued that the warrant was bad for uncertainty in not stating whether the defendant was to be imprisoned with hard labour or not. [HILL, J.—By saying nothing about hard labour, the justices have adjudicated that he is not to have hard labour.] The gaoler looks to his warrant, and he does not know what to do. [COCKBURN, C.J.—By the forms in Jervis's Act, where there is to be hard labour, it must be stated. The justices have omitted to say anything about hard labour, and therefore it must be taken that they did not intend to give it.] Then there are other objections which I am entitled to take, as the present rule is general. [HILL, J.—No; by the rules of practice no argument can be heard upon any point decided upon moving for the rule.]

By the COURT, *Rule discharged with costs.*

COLLUMPTON (appellants) v. BRIGHTELMSTON (respondents), *ex parte* JOHN HOWSE.

*POOR-LAW—Expenses of maintenance of a pauper—When not removable—When payment to be enforced.*

*The expenses of maintaining a pauper after the time limited for giving notice of appeal cannot be recovered from the parish of settlement, unless at the time of making the order of removal it is duly suspended.*

*Where, therefore, an order of removal was made, and at the expiration of the time for appealing (no notice having been given) the pauper was retained in the relieving parish in consequence of her then pregnancy, and after delivery she was removed, and the expenses of her maintenance demanded:*

*Held, that these expenses could not be recovered: Held, also, that sect. 11 of the 11 & 12 Vict. c. 43, applies to an order of justices made for the payment of such expenses, and that an application for them must be made within six calendar months of the time when demanded.*

This was a case stated by justices under the 20 & 21 Vict. c. 43. It stated as follows:—

At a petty sessions of her Majesty's justices of the peace for the borough of Brighton, in the county of Sussex, held at the town-hall, Brighton, in and for the said borough, on the 15th Dec. 1859, before us, William Alger, Esq., Arthur Bigge, Esq., and William

Mellet Hollis, Esq., an information was, on the 5th Dec. 1859, laid before the undersigned, Arthur Bigge, by Samuel Thorncroft, assistant overseer of the poor of the parish of Brightelmston, in the borough aforesaid, charging that the churchwardens and overseers of the poor of the parish of Collumpton, in the county of Devon, and Henry Hill, assistant overseer of the poor of the same parish, being the parish to which one Elizabeth Hill and her illegitimate child James Hill, poor persons, had been adjudged to belong, had refused, and still did refuse, to pay to the directors and guardians and the assistant overseer of the poor of the parish of Brightelmston aforesaid, the sum of ten pounds, twelve shillings and threepence, being the cost and expenses of the relief and maintenance of such poor persons, under an order of two justices of the peace for the county of Sussex, dated the 6th Oct. 1853, for the removal of the said Elizabeth Hill and her said child from the said parish of Brightelmston to the said parish of Collumpton, from the time of notice of such order and of the said poor persons having become chargeable to the said parish of Collumpton.

The facts of the case proved before us were as follows:—

That on the 6th Oct. 1853 an order for the removal of Elizabeth Hill and her illegitimate child James Hill from the said parish of Brightelmston to the said parish of Collumpton was duly made by two of her Majesty's justices of the peace for the said county of Sussex.

That on the 14th Oct. 1853 a copy of the said order of removal with notice of chargeability and grounds of removal was duly sent by post by the directors and guardians of the poor of the said parish of Brightelmston to the overseers of the said parish of Collumpton.

That the said Elizabeth Hill was at the time of the said order being made maintained in the workhouse of the said parish of Brightelmston; that she was pregnant at that time, and was delivered at the said workhouse on the 3rd Jan. 1854; that by reason of such pregnancy and delivery, and the delicate state of her health consequent thereupon, she could not be removed under the said order till the 9th March 1854; that during all that time she continued an inmate of the workhouse of the said parish of Brightelmston, and that during such time her said child James Hill died.

That on the said 9th March 1854 the said order was executed by the delivery of the said Elizabeth Hill and the infant to which she had given birth after the making of the said order, with a duplicate of the said order and a statement of charges for maintenance, to the assistant overseer of the said parish of Brightelmston, for the maintenance of the said paupers, but was not then paid, and had not since been paid.

That the said sum of 10*l.* 12*s.* 3*d.* had been expended by the said parish of Brightelmston for the maintenance of the said Elizabeth Hill and her said child James Hill and her said infant from the time the copy of the said order of removal and the notice of chargeability and grounds of removal were sent to the overseers of Collumpton aforesaid to the time of the said Elizabeth Hill and infant being removed under the said order; and that the sum of 3*l.* 12*s.* 3*d.* was expended more than six years before the said information was laid.

It was objected by the attorney for the defendants,

First, that the information ought to have been laid within six months from the time of the said sum of 10*l.* 12*s.* 3*d.* being demanded as required by the 11 & 12 Vict. c. 43, s. 11, and that this was not a proceeding excepted from the operation of that Act by the 35th section thereof.

Secondly, that the order ought to have been sus-

Q. B.]

Ex parte CRAWSHAY.

[Q. B.]

pended, and notice of such suspension sent to the overseers of Collumpton.

Thirdly, that the moneys expended more than six years before the said information was laid were irrecoverable by reason of the Statute of Limitations.

We decided against the defendant, and made an order for the payment of the 10*l.* 12*s.* 3*d.* and the costs incurred before us; and the grounds of our decision were that we considered this proceeding was by the 35th section of 11 & 12 Vict. c. 43, excepted from the operation of that statute; that the said Elizabeth Hill was not, at the time of making the said order, unable to travel from any cause other than her pregnancy, which did not afford legal grounds for the suspension of the said order; and that the Statute of Limitations was no bar to the recovery of the money expended more than six years previously to the said information being laid as directed by the 4 & 5 Will. 4, c. 76, s. 84.

By the 35 Geo. 3, c. 101, s. 2, it is enacted, "That in case any poor person shall from henceforth be brought before any justice or justices of the peace for the purpose of being removed from the place where he or she is inhabiting or sojourning by virtue of any order of removal, and it shall appear to the said justice or justices that such poor person is unable to travel by reason of sickness or other infirmity, or that it would be dangerous for him or her so to do, the justice or justices making such order of removal are hereby required and authorised to suspend the execution of the same until they are satisfied that it may safely be executed without danger to any person who is the subject thereof, which suspension shall be indorsed on the said order of removal and signed by such justice or justices."

By sect. 84 of the 4 & 5 Will. 4, c. 76, it is enacted, "That the parish to which any poor person whose settlement shall be in question at the time of granting relief, shall be admitted or finally adjudged to belong, shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person, and such cost and expense may be recovered against such parish in the like manner as any penalties or forfeitures are by this Act recoverable. . . . Provided always, that no charges or expenses of relief or maintenance shall be recoverable under a suspended order of removal, unless notice of such order of removal, with a copy of the same, and of the examination on which such order was made, shall have been given within ten days of such order being made to the overseers of the poor of the parish to whom such order is directed."

By the 11 & 12 Vict. c. 43, s. 11, it is enacted, "That in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

By sect. 35 of the same Act it is enacted, "That nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish, township, or place," &c.

*Tomlinson*, for the appellants, contended that the order was bad: first, because there was no suspension of the order of removal under the 35 Geo. 3, c. 101, s. 2, as there should have been to have rendered the appellants liable to the cost of maintenance; secondly, that the respondents were out of time in applying to justices for the order for payment, more than six years having elapsed since the demand of payment by them of the appellants.

*Denman*, for the respondents, argued first, that

no order of suspension could have been made at the time the order of removal was made, as the woman was not unable to travel by reason of sickness or other infirmity, pregnancy not being such a sickness or infirmity (*Reg. v. Kendal*, 28 L. J. 163, M. C.), and that as the suspension could not have been made at the time of the making of the order of removal, it could not have been made afterwards (*Reg. v. Llanellchid*, 29 L. J. 102, M. C.; 4 & 5 Will. 4, c. 76, s. 84); secondly, that the 11th section of the 11 & 12 Vict. c. 43, does not apply, the 35th section of the same Act exempting from its operation all warrants or orders for the removal of any poor person: (*Reg. v. Chadgrave*, 20 L. J. 23, M. C.; *Reg. v. Chadgrave*, 12 Q. B. 206.)

*COCKBURN, C. J.*—As regards the first question, I am of opinion that the case does not fall within the operation of sect. 84 of the 4 & 5 Will. 4, c. 76. It is clear that as regards the expense of maintaining the pauper during the twenty-one days after notice of chargeability, the parish of settlement would be bound to reimburse the removing parish. This is provided for by the 84th section of the 4 & 5 Will. 4, c. 76. But the statute says nothing as to the expenses of maintenance after the settlement is admitted. Cases may easily occur where supervening sickness might arise after the order of removal is made, but before it is executed, so as to render it dangerous or cruel to execute the order, and this cannot be avoided by a suspension then of the order, which must according to the decisions be made at the same time as the order of removal itself. Unfortunately this is a *casus omisus* in the statute, and there is no power given to recover the subsequent expenses of maintaining the pauper through sickness after the settlement is decided and the order of removal made and not executed; and it is to be hoped that some member of the Legislature now present will take some steps to remove this very serious defect in the statute. With regard to the point as to the limitation of time, I think that, under the 84th section of the 4 & 5 Will. 4, c. 76, the removing parish can recover from the parish of settlement the expenses of maintaining the pauper between the service of the notice of chargeability and the expiration of the twenty-one days or longer during which the question of settlement remains undecided. The removing parish may apply for an order for payment of this amount, but the prosecution of such an order must be commenced within six months after the expenses are ascertained and demanded. It is no doubt true that the 35th section of the 11 & 12 Vict. c. 43, exempts all warrants or orders for the removal of poor persons from the operation of the statute, but such an order for payment is not a warrant or order of removal, though it is certainly a consequence of an order of removal. There are costs incidental to the delay in removing the pauper, and it is proper that a parish which consists of individuals in a constant state of change should be promptly made acquainted with the amount of those charges. I think, therefore, the respondents fail on this point also, and that the order must be quashed.

*HILL* and *BLACKBURN, JJ.* concurred.

*Order quashed without costs.*

Monday, Nov. 19.

Ex parte CRAWSHAY.

*Criminal information—Inciting to enlist as a foreign volunteer.*

*This court refused to grant a criminal information, at the instance of a private individual, against the proprietor of a newspaper for inserting articles in his paper tending to incite and encourage persons to volunteer to serve in Garibaldi's army.*

*Bovill, Q.C.* (*Couch* with him), on behalf of George Crawshaw, moved for a rule, calling on John Baxter Langley, the proprietor and publisher of the *Daily*

Q. B.]

REG. v. THE INHABITANTS OF ELSWICK.

[Q. B.]

*Chronicle and Newcastle Advertiser*, and also of a weekly paper published in the same place, to show cause why a criminal information should not be filed against him. It appeared that Mr. Crawshaw had formerly been mayor of Gateshead, and the present application was made in consequence of certain articles which had appeared in Mr. Langley's newspapers, as it was now alleged, inciting and encouraging persons in England to enlist in the army of General Garibaldi, and the publication of which articles it was now contended amounted to a misdemeanor. [COCKBURN, C.J.—Is this a case in which it is competent for a private person to come forward and ask for the interposition of the court? Have you any precedent, Mr. Bovill, for such an application? If this is an offence, it is an offence against the State, and it is for the Attorney-General to interfere; but I never heard of a private person making such an application. BLACKBURN, J.—I certainly never heard of a private individual applying thus in a matter in which he had no private and personal interest. HILL, J.—Cannot you indict? COCKBURN, C.J.—You ask us to sanction a private individual taking up a public question which the Attorney-General has not thought right to interfere in.] This charge was brought before the justices at Newcastle, and they decided not to entertain it, but said the prosecutor had his remedy in the Q. B. I now apply to this court as the highest court of criminal jurisdiction. [BLACKBURN, J.—Assuming Mr. Langley had been guilty of a misdemeanor, and assuming that the justices did wrong in refusing to interfere, is that any reason why we should do so? So far as my memory goes, nothing has ever been done approaching to such a step.] As this is a matter relating to the public, all persons are more or less interested in it. [COCKBURN, C.J.—If anything, it is an offence against the State, and the proper officer to prosecute is the Attorney-General, and if he does not do so it is not for a private individual to come forward.] I may then assume that, even if I were to succeed in making out a case, the court would decline to interfere. [COCKBURN, C.J.—It is such a case, I think, as a private person should not interfere in, and by so doing supersede the authority of the Attorney-General. We must leave you to the ordinary remedy which the law gives you. Mr. Crawshaw may, if he please, bring the matter under the notice of her Majesty's law officers, who will decide whether they think it necessary to interfere; all we say is, that we do not grant a criminal information at the instance of a private individual, but he must be left to prefer his bill of indictment, or to such other proceedings as he may be advised.

HILL and BLACKBURN, JJ. concurred.

Rule refused.

Wednesday, Nov. 21.

REG. v. THE INHABITANTS OF ELSWICK.

*Poor—Settlement—Apprenticeship—Renting a tenement.*

*As apprentice used to work and sleep at B. during the week, returning on Saturdays to his father's at G., and sleeping there on the Saturdays and Sundays. On the last day of service, a Wednesday, he left off work at four p.m., at B., and went to see his mistress at N., and then proceeded to G. and slept there that night:*

*Held, that G. was his place of settlement under the apprenticeship.*

*A pauper rented a shop and two rooms on the ground floor. They opened into a passage, at the end of which was a front entrance into the street, and a back entrance into the yard. The upper part of the house was occupied by another tenant, who had a right to use the passage and doors, and had a key thereof, and who cleaned a portion of the passage: Held, that the pauper did not gain a settlement by renting a tenement within the 6 Geo. 4, c. 57.*

Case stated for the opinion of this court at the Midsummer sessions, Newcastle-upon-Tyne, on appeal against an order of removal of a pauper and his wife from the parish of Elswick to the parish of Gateshead.

The facts necessary to elucidate the points decided are as follow:—

The pauper was bound apprentice by indenture to Mrs. Richardson, a plumber and glazier in extensive business in Northumberland, from March 29, 1803, for seven years, and in the course of his employment he used to go to Bedlington on the Monday, remain there during the week at work, sleeping at a place provided by his mistress, and return to his father's at Gateshead on the Saturday, and sleep there on Saturdays and Sundays.

At the close of his apprenticeship he was working at Bedlington, and on the last day (a Wednesday) of it he worked there until four o'clock, and then set off to Newcastle, where he saw his mistress, and then went to Gateshead and slept at his father's house that night.

The appellants contended, upon these facts, that the pauper's settlement by apprenticeship was in Bedlington parish.

They further contended that a settlement was gained in Westgate township, under the following circumstances:—

The plaintiff took a shop and two rooms in Blenheim-street, in the township of Westgate, for one year, at the rent of 12*l.*, and occupied it from Aug. 1851 to Aug. 1852, paying the usual taxes. The house consisted of two stories and a basement. The basement is approached by steps down the area, and has no connection with the shop and rooms on the ground floor, occupied by the pauper. The shop door and the door of the room behind open into a passage running from back to front of the house, at each end of which is a door. The upper floor was let to a tenant who had a right of way along the passage, through the doors, front and back. Each had a key of the outer door, and cleaned a portion of the passage. It was contended that this was a separate and distinct tenement within the meaning of 6 Geo. 4, c. 57.

The sessions quashed the order, subject to the opinion of this court.

*Davison* in support of the order of sessions.—First, the pauper having resided both in Bedlington and Gateshead, for forty days in each place, acquired his settlement in the place where he slept the last night during the apprenticeship, and that was in Bedlington. For the purpose of the apprenticeship, the sleeping on the Tuesday night was the last night. The apprenticeship was put an end to before the Wednesday night. [COCKBURN, C.J.—Did he not continue an apprentice until the following day? Could you have doubted this, if he had continued to work until the usual hour of leaving off on the last day, and then left to sleep at Gateshead?] The mistress having sent him to work at Bedlington, he would have been bound to sleep there during the apprenticeship: (*R. v. St. Mary, Canterbury*, 2 B. & Ald. 382; *R. v. Barnesley*, 7 East, 381.) [COCKBURN, C.J.—He continued an apprentice until the following morning. It is quite clear that the settlement was gained in Gateshead.] Secondly, the pauper gained a settlement by renting a tenement in Westgate township. It is submitted that the right of way along the passage is not material, and that the pauper occupied a distinct and separate tenement within the 6 Geo. 4, c. 57: (*R. v. Usworth*, 5 A. & E. 261; *R. v. Henley-on-Thames*, 6 A. & E. 294.) [BLACKBURN, J. cited *Parke, B.*, in *Monks v. Dykes*, 4 M. & W. 569, as to the meaning of term "dwelling-house."]

*Liddell*, contra, was stopped by the court.

COCKBURN, C. J.—We are all agreed that there was no such renting of a tenement as would give a set-



Q. B.]

STEELE v. HAMILTON—REG. v. OVERSEERS OF HEMSWORTH.

[Q. B.]

tlement under the Act. The authorities establish that one building may be so divided among different tenants with separate entrances for each tenant, as practically to be separate and distinct houses, if the severance is so complete, and the access to each such that the other tenants have no right or enjoyment thereof. That, however, is not the case where they have a common entrance; there the house is but one dwelling-house, occupied by distinct tenants. The case is not within the principle on which *R. v. Usworth* was decided.

WRIGHTMAN, J. concurred.

HILL, J.—I am of the same opinion. Patteson, J., in *R. v. Wootton*, 1 A. & E. 236, said: "I have always thought that the words 'a separate and distinct dwelling-house or building' in these statutes meant separate and distinct as to any other person; that the tenant should not hold part of a house." Now in this case the holding was not separate and distinct as to the entrance, but the tenants enjoyed the entrance in common. And Littledale, J., in *R. v. Usworth*, observed: "There were in this house three floors, and the access to each was by separate outer doors. I think, therefore, that each was a distinct tenant, and that Waddell occupied a separate and distinct dwelling-house within the meaning of the statute." Here the tenants had not an entrance by distinct outer doors.

BLACKBURN, J.—I am of the same opinion. The test seems to be, whether the tenants have separate and distinct outer doors. Here they have not.

*Order of sessions quashed.*

STEELE (appellant) v. HAMILTON (respondent).  
*Medical Registration Act—Pretending to be a registered surgeon—Evidence.*

The respondent was summoned upon an information before the stipendiary magistrate of Liverpool, and a complaint laid by the appellant, secretary of the Liverpool Medical Registration Association, which charged the respondent with having, on the 21st Feb. 1860, wilfully and falsely pretended to be a surgeon and general practitioner or apothecary, or using a name, title, addition, or description implying that he was registered by law as a surgeon, contrary to the form of the statute, whereby he had incurred a penalty not exceeding 20*l.*, under the New Medical Act, 21 & 22 Vict. c. 90, s. 40.

On the hearing it was proved that the respondent had given a certificate in the following terms:—"Medical certificate—I hereby certify that I attended William Hayes, late of 110, Mill-street, who died 21st February; cause, enteritis; and I have no reason to attribute his death to poison, violence, or criminal neglect.—Signed, JOHN HAMILTON, Botanic Surgeon, Boston, U.S., and 94, Mill-street, Feb. 22, 1860."

Over the door of the house where the respondent carried on his business was painted, in large legible characters, "J. Hamilton, Surgeon," and in very small letters underneath, "Boston, U.S., not registered in England"; and upon a glass panel of the door was painted, "J. Hamilton, anti-registered surgeon." The word "anti-registered" was written in small letters in scroll-work between the name and the profession, and was illegible except upon close inspection.

The magistrate dismissed the information.

The question for the court was whether, under the circumstances, there was sufficient evidence to warrant a conviction under the 40th section of the Medical Act.

*L. Temple.*—No doubt the case of *Pedgrift v. Chevalier*, 2 L.T. Rep. N.S. 360, is against the appellant so far as it applies to this case. Under the 40th section a person may be convicted either for wilfully or falsely pretending to be a surgeon, or for assuming any name or description implying that he is registered under the Act, or that he is recognised by law as a physician, surgeon, &c. [COCKBURN, C.J.—There is no pro-

vision that prevents a man from practising as a surgeon; the penalty for so doing is that he is disqualified from recovering his fees and from holding certain offices.] Sect. 37 enacts that no certificate required by any Act from any physician, surgeon, &c., shall be valid unless the person signing the same be registered under the Act. [HILL, J.—Any person present at the death may give such a certificate as the one here: 6 & 7 Will. 4, c. 86, s. 25.] It is very difficult to prove that a man was not in practice before 1815. [HILL, J.—You might prove that he was not forty years of age, or something that would cast on him the onus of proof that he was in practice before 1815.]

*Cook Evans* for the respondent.

By the COURT.—There is nothing to show that the respondent was not a surgeon. *Appeal dismissed.*

REG. on the prosecution of WRIGHTSON v. OVERSEERS OF HEMSWORTH.

*Poor-rates—Tithes—Composition—Local Inclosure Act—Award.*

*An Inclosure Act granted an annual rent of 4*s.* per acre to the rector of the parish in lieu of tithes, and enacted that all allotments and the annual rent to the rector should at all times be rated proportionably with other lands in the parish, and to prevent the settling of such proportions from creating disputes between the rector and parishioners, the rector's rate for ever thereafter should be in such proportion to the rates of the parish as the commissioner should fix as the proportion the rector should pay, considering the nature of a money payment.*

The commissioner awarded that the rector's proportion should be "one-fourteenth part of the amount of the rate so made by me as aforesaid," which he declared to be 295*l.* upon 4140*l.* 8*s.*, the rateable value of the lands in the parish:

*Held, that such award was bad, not being what the Act directed him to do, and that a rate founded upon it could not be supported.*

This was a case from the West Riding sessions for the opinion of this court, on an appeal by the rector of Hemsworth, in the West Riding of Yorkshire, against a poor-rate.

The rector was assessed at 356*l.*, being one-fourteenth part of 4987*l.*, the value of the lands within the parish under the following circumstances:—

In 1803 a local Act was passed, the 43 Geo. 3, for the inclosure of waste lands in the parish of Hemsworth. There had been a previous Inclosure Act.

Sect. 10 requires the commissioner to allot to the rector of the parish a certain portion of the waste lands in lieu of the tithes arising out of the waste lands to be inclosed.

Sect. 11 recites that it is expedient that all the tithes upon the other lands in Hemsworth not directed to be inclosed should be extinguished, and in lieu, compensation awarded to the rector, and then enacts that the annual compensation of 4*s.* shall be paid to the rector for the time being for ever, subject to the average price of wheat, for every acre of land within the parish.

Sect. 17 enacts that, to prevent the settling of such proportions from creating disputes and differences between the rector and his parishioners, the rate to be assessed on the amount of the rents to be given by this Act to the rector in lieu of his tithes for the old inclosure, shall for ever hereafter be in such proportion to the rates to be assessed for the whole of the said parish as the commissioner (who is hereby directed to ascertain the value of the estates within the parish) shall fix as the proportion which, considering the nature of a money payment, the rector ought to pay.

The commissioner in his award directed that the rate to be assessed on the rector, in pursuance of sect. 17, should be one-fourteenth part of the amount of the rate "so made by me as aforesaid." And he found the amount of the rateable value of the lands to be

Q. B.]

REG. v. SAYERS AND THACKWELL.

[Q. B.]

4140l. 8s., and the fourteenth part (295l.) as the rector's proportion.

Recently a fresh valuation of the lands in the parish was made, and it was found that the rateable value had increased to 4987l., and the rector's assessment was increased to 356l., as being the fourteenth part.

The rector appealed to the quarter sessions, but that court confirmed the rate, subject to the opinion of this court.

*Campbell Foster* in support of the order of sessions.

—The 16th section of the Act enacts that the allotments and annual rent granted to the rector by sect. 11 shall at all times be rated proportionably with other lands within the parish. Then sect. 17 enacts, in order to prevent the settling of such proportions from creating disputes between the rector and his parishioners, the rector's rate for ever thereafter should be "in such proportion to the rates" to be assessed for the whole parish as the commissioner shall fix as the proportion which the rector ought to pay, considering the nature of a money payment. Then the commissioner having fixed the proportion at a fourteenth, that is the proportion of all future rates which he is to pay. [BLACKBURN, J.—What is the meaning of the words in the award, "so made by me as aforesaid?"] They may be treated as surplusage, or the award may be considered invalid *pro tanto*.

*Manisty* and *Wrat* for the appellant.—The sessions have assumed that the rector was to be rated at one-fourteenth of the increased value of the lands in the parish. If this construction is correct, it may be ruinous to the rector; e. g., if a railway was to come through the parish, and thereby greatly increase the value of the lands in the parish, and the rector be bound to pay one-fourteenth of that increased value, it might absorb the whole of his income.

The COURT intimated that they were prepared to say that the commissioner's award was invalid upon this subject, and that it would necessarily follow that the rate could not then be sustained. The appellant's object being then gained, it would not be necessary to ascertain the correct construction of the statute.

*Manisty*.—That will content the appellant.

COCKBURN, C.J.—I am of opinion that the award of the commissioner is bad in this respect, and that it does not do that which the Act prescribes. The parties, therefore, must stand on their ordinary legal rights. The Act prescribes that the commissioner shall fix the proportion which the rent given by the Act to the rector is to bear to the general rate of the parish. It is very true that the commissioner is directed to ascertain the value of the real property in the parish, and the purpose in so doing is to enable him to ascertain the proportion of the rector's rate to future rates, regard being had by him to the nature of a money payment in lieu of tithes, being of a more advantageous nature. The Act does not require him to fix a given sum, but only the proportion which the rector's rate is to bear to the future rates. The commissioner is not to determine a fixed sum for all future rates, but a fixed proportion; and when the commissioner ascertained the precise sum, he did not do that which the Act directed him to do, and therefore the award, *quoad* the rector's rating, is bad. The rate in question, therefore, cannot be supported, and the parties will stand in the same position as if the Act had not passed.

WIGHTMAN, J.—I have had very great doubts whether the argument of the appellant was not well founded, as to the construction to be put upon the Act. I am inclined to think that the words of sect. 17 rather imply that, as the rector stood in a more advantageous position by having a money payment granted to him in lieu of tithes than the rest of the parish, and that all that the commissioner had to do was to ascertain the amount to be paid by the rector to the

future rates. However that may be, I agree with the rest of the court that the award is invalid *pro tanto*.

HILL, J.—If Mr. Manisty's argument were good, the duty of the commissioners would have been very simple, merely to determine a given sum which the rector was to pay for all time thereafter; but the Act does not impose such a duty on the commissioner. The words "considering the nature of a money payment" are a key to the construction of the whole section. The commissioner does not appear to have done the duty imposed on him, and therefore the award, *quoad* this fact, is void.

BLACKBURN, J.—I think the Legislature intended, as has since been done in the Health of Towns Act, to rate one description of property higher than another, on the ground that it was not just to rate them all alike, and that, considering a money payment was more advantageous than the usual mode of collecting tithes, the commissioner was to determine the proportion the rector was to pay in all future rates, and not having done that, the award is bad. *Rate quashed.*

Monday, Nov. 26.

REG. v. SAYERS AND THACKWELL (Justices of Gloucester).

*Certiorari*—*Tithe Commutation Amendment Act*—23 & 24 Vict. c. 93, s. 28—*Notice of application to the justices for delivery of sealed copy apportionment.*

The 28th section of the 23 & 24 Vict. c. 93, enacts that "whenever any person other than the persons legally entitled to the possession of the same, shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for any two justices of the peace for the county or other jurisdiction within which the lands mentioned in the said apportionment are situate, upon the application of any person interested in the lands or rentcharge, and upon fourteen days' notice in writing of such application to the person or persons in whose custody such copy shall be at the time of such application, to hear and determine such application," &c. *Held*, that such notice refers to a notice of an application that has already been made; and where a fourteen days' notice had been given of an intention to apply to the justices, and they heard the application *ex parte*, and made an order under the above section, this court granted a writ of *certiorari* to quash the same.

*Milward* moved for a rule calling on the Rev. Andrew Sayers, clerk, and John Cann Thackwell, Esq., two of her Majesty's justices of the peace for the county of Gloucester, to show cause why a writ of *certiorari* should not issue to bring up a certain order of the said justices dated the 18th Oct. last, whereby it was adjudged and ordered that Edmund Edmonds, who did not appear, should forthwith deliver up to the churchwardens of the parish of Newent, in the county of Gloucester, the sealed copy of the confirmed instrument of apportionment of and for the said parish of Newent, and that the same be deposited by them the said churchwardens in the vestry of the parish church of Newent aforesaid; that a fine of 20s. for each day that the said sealed copy of the said confirmed instrument of apportionment should be retained by the said Edmund Edmonds, contrary to the terms of the said order and adjudication, should be paid by the said E. Edmonds, as the person retaining the same; and that the sum of 8s. costs be forthwith paid by the said E. Edmonds to Mr. Hill, and on nonpayment of the same to be recovered by distress. From the affidavits it appeared that Mr. Edmonds was an attorney practising at Newent, and was the duly appointed receiver of the tithe rentcharge for the said parish payable to the vicar; that on the 27th Sept. last he was served with a notice signed by John Hill, one of the churchwardens

of his intention to apply to the justices for the delivery up of the sealed copy of the confirmed instrument of apportionment, and that on the 13th Oct. he delivered the same into the possession of the Rev. Arthur Andrew Onslow, the vicar of the said parish, and that on delivering the same to the said vicar, the said E. Edmonds requested the said vicar to give notice thereof to the said John Hill. The order in question assumed to have been made by the said justices under the authority of the 28th section of the Tithe Commutation Amendment Act, 23 & 24 Vict. c. 93, which enacts that "Whenever any person other than the persons legally entitled to the possession of the same shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for any two justices of the peace for the county or other jurisdiction within which the lands mentioned in the said apportionment are situate, upon the application of any persons interested in the lands or rentcharge, and upon fourteen days' notice in writing of such application to the person or persons in whose custody such copy shall be at the time of such application, to hear and determine such application, and upon hearing such application the said justices may order such copy to be removed from the custody of the person holding the same, and to be deposited in such other custody as the said justices having reference to the security and due preservation of such copy and to the convenience of the parties interested therein may think fit, and may impose a fine not exceeding 20s. for each day that any such copy shall be retained contrary to the terms of such order upon the person so retaining it, and may make such further order concerning the notice to be given of such removal and deposit, and concerning the costs of such application, and the said fine, or of any opposition thereto, as they may think reasonable." No summons had been issued, and the order was made on the *ex parte* application of Hill, Edmonds not appearing.

*Macnamara* showed cause in the first instance.—The notice referred to in the section, which was in this case duly given, is substituted for a summons; the same thing has been enacted in the Recovery of Small Tenements Act, and in other Acts. [COCKBURN, C.J.—There the party complained against is not subject to fine.] The Highway Act may also be taken as an illustration. [BLACKBURN, J.—Does not it rather point to a notice of the application having been made after it has been made?] It is a condition precedent, and the question is, upon the facts here stated, have the justices acted in excess of jurisdiction or without jurisdiction. The *certiorari* having been taken away, no such writ can issue on the merits.

COCKBURN, C.J.—The statute being loose in its expressions, we must pursue the safer course.

BLACKBURN, J.—I take it that it clearly lies with you in the present case to show that the Legislature have dispensed with any preliminary step.

COCKBURN, C.J.—Where there is a serious doubt whether the section points to an application thereafter to be made, or one that has been made, the safer course is to say that it refers to an application that has been made.

HILL and BLACKBURN, JJ. concurred.

*Rule absolute to quash the order.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY, and S. M'CULOCH, Esqrs., Barristers-at-Law.

Wednesday, Nov. 14.

ELLIS (appellant) v. KELLY (respondent).

*Medical Practitioners Act, 21 & 22 Vict. c. 90*  
—*Doctor of Medicine pretending to be—Matter of fact for justices to determine—Appeal—Summary Proceedings (Justices) Act, 20 & 21 Vict. c. 43.*

*The Medical Practitioners Act, 21 & 22 Vict. c. 90, s. 40, enacts, that any person who shall wilfully and falsely pretend to be, or take, or use the name or title of (inter alia), Doctor of Medicine, or any name, title, addition, or description, implying that he is registered under that Act, or that he is recognised by law as a physician, practitioner in medicine, &c., shall upon summary conviction pay a sum not exceeding 20l. The respondent had on a brass plate on his gate "Dr. Kelly," called himself and was called "Dr. Kelly." He had a diploma of the University of Erlangen, in Bavaria, which authorised him to practise medicine throughout Germany. His name was on the medical register as "Mem. Royal Coll. of Surgeons, England, 1856, Lic. Soc. Apoth. Lon. 1856," but not as Doctor of Medicine. The respondent was summoned before justices for the penalty under the 40th section, for taking and using the name of Doctor, and title of Doctor of Medicine, not being on the Medical Register as such. They dismissed the complaint. On appeal to this court under the Summary Proceedings of Justices Act:*

*Held, that the justices acted quite right. The respondent was not guilty of any offence created by the above enactment; and by*

*Wilde, B., that it was a question of fact for magistrates only to decide, not one of law to be reserved for the opinion of this court, as decided in Ladd v. Gould, 1 L. T. Rep. N.S. 325:*

*Held, also, that on an appeal against the determination of justices under the 20 & 21 Vict. c. 43, the party in support of the information or complaint is entitled to begin the argument.*

The following case was stated by the magistrates of Middlesex for the opinion of this court. John Ellis informant, Hubert Edmond Charles Kelly defendant:—Middlesex, to wit.—This is an information preferred by John Ellis, of Pinner, Middlesex, gentleman, against Hubert E. C. Kelly, of the same place, surgeon, for having on the 2nd Nov. last, at Pinner, in the said county, wilfully and falsely pretended to be, and did take and use the name or title of a doctor of medicine, thereby implying that he is so registered under the Act 21 & 22 Vict. c. 90.

The defendant having appeared before us the undersigned upon summons, to answer the said information, it was thereupon proved on the part of the said John Ellis as follows:

First, that the said defendant has had for years past and on the day named in the information a brass plate affixed on the outer gate of his residence, on which is "Dr. Kelly." He put in a published copy of the last Medical Register, in which defendant's name appears as follows, "Kelly, Hubert Edmond Charles, Pinner, Middlesex, Mem. Royal Coll. of Surgeons, England, 1856, Lic. Soc. Apoth. Lon. 1856." Has heard him call himself Dr. Kelly; there is no other Dr. Kelly at Pinner but defendant.

For defence a document purporting to be a diploma of the University of Erlangen, in Bavaria, was put in, and in support of its genuineness the following witnesses were called:—

Gustavus Morris Strauss, doctor of philosophy of Berlin, sworn.—That he was acquainted with diplomas of the University of Erlangen. That one of the seals attached to the one produced was that of the Great University, the other the seal of the Medical Faculty. That the diploma permitted the person therein named (H. E. C. Kelly) to practise medicine throughout Germany; believed the signature of one of the professors (Rosnhuit) attached to the diploma to be genuine, as he had received a letter from Professor Rosnhuit, but had never seen him write or sign his name. On cross-examination stated he did not know the regulations of that university, but at five other

[Ex.]

ELLIS v. KELLY.

[Ex.]

universities in Germany personal attendance to study before obtaining a diploma was necessary. Had seen Rosshut's signature to a letter once. Is employed to translate German works.

Adolph Reinecher, doctor of medicine of Berlin, sworn.—The diploma produced is of the form and shape of those of Erlangen, the seals to it, being pendent, are not like those now used, which are impressed. That formerly diplomas of philosophy of German universities were to be had for money, but not those for medicine. No one who was residing in England could obtain a medical diploma without examination. He had seen diplomas of Erlangen precisely like that produced.

The complainant contended that the diploma put in by the defendant was not legally proved to be authentic and genuine, nor that the person named in it was the defendant, and that the same might have been proved if the defendant had left the document at the registration office, when the council would, through the Dean of Faculty of Erlangen, have ascertained the fact of its being genuine or not; and that if even these facts had been duly proved, the defendant not being registered as qualified by that diploma to practise as an M.D., he did commit the offence charged in this information, by having the title of "doctor" on his brass plate in front of his house: and also that the possession of such foreign diploma did not entitle the defendant to use the title of doctor of medicine in this country without being liable to the penalty imposed by the 40th section of the said Act, 21 & 22 Vict. c. 90.

The defendant, by counsel, urged: First, that, even without the diploma, there was no evidence of the title being used wilfully and with false pretence; secondly, that the mere use of the title could not necessarily imply that he was registered in the words of the information; thirdly, that the diploma and the evidence respecting it was abundant to show that there was no wilful false pretence; that the diploma was conclusive evidence of his being qualified to use the title of M.D. either in this or any foreign country; that there was no evidence of his having practised as an M.D.; that being registered as a surgeon and apothecary, it was not compulsory on him to register as M.D., and that, being possessed of this diploma, he could not be convicted of falsely pretending to be or using the title of M.D. within the provisions of the statute creating the offence.

We, the undersigned justices of the peace for the said county of Middlesex, upon the hearing of the said information, dismissed the same with costs against the said complainant, for the following reasons: That it was proved that the defendant had practised in Pinner as a medical man, assuming the title of doctor of medicine, and that he was not registered in the Medical Register as a doctor of medicine; that the document produced to us as purporting to be a diploma from the University of Erlangen has not been proved; that the possession of that document so far justified the defendant in assuming the title of doctor of medicine that he could not be said to have assumed such title wilfully and falsely within the meaning of the Act (sect. 40 of the Medical Registration Act), but we were of opinion also that the Act does prohibit the use in England of the title of doctor of medicine obtained by virtue of any foreign diploma, unless the same is registered according to the provisions of the Act.

The opinion of the Court of Exchequer is therefore requested: first, whether the Medical Registration Act, 21 & 22 Vict. c. 90, prohibits the taking and using of the title of doctor of medicine by any medical man in England, unless the said title be duly registered according to the provisions of the Act; secondly, whether if the court should be of opinion that the Act does prohibit the assuming of such title, the defendant, under the circumstances, can be held to have so done wilfully

and falsely within the meaning of the 40th section. If the opinion of the court should be in the negative on either question, then our judgment will be confirmed; but if the opinion of the court should be in the affirmative on both questions, then the case is to be remitted to us for further consideration.

Given under our hands at Edgware, in this county, this 10th July 1860.

EDWD. WM. COX.

GEO. F. HARRIS.

Robinson, for the respondent, in support of the decision of the justices who had dismissed the information, claimed the right to begin.

Codd, for the appellant, claimed the right to begin in support of the conviction. He stated that the practice adopted in the Court of Q. B., as well as in this court, was that the party in support of the conviction began: (*The Blackpool Local Board of Health v. Bennett*, 4 H. & N. 127; 28 L. J. 203, M. C.) In *Gardner v. Whitford*, 4 C. B., N. S., 665, the Com. Pleas held, after a conviction, the appellant was entitled to begin.

By the COURT.—The party in support of the information or complaint is entitled to begin.

Codd for the appellant.—The Act prohibits the use of the title of doctor of medicine, and there was no evidence to justify the magistrates in assuming his title from the document produced before them. Sect. 15 of the Medical Act provides that every person possessed of any one or more of the qualifications described in the schedule A to the Act, shall, on payment of a fee, &c., be entitled to be registered on producing to the registrar, &c., the document conferring or evidencing the qualification in respect whereof he seeks to be so registered, &c. Sect. 27 provides that the registers are to be printed and published yearly, and called "The Medical Register," and a copy thereof purporting to be so printed and published shall be evidence in all courts, and before all justices of the peace, &c., and the absence of the name of any person from such copy shall be evidence, until the contrary be made to appear, &c. Sect. 34, that after the 1st Jan. 1859 the words "legally qualified medical practitioner," or "duly qualified medical practitioner," or any words importing a person recognised by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament, shall be construed to mean a person registered under this Act; and sect. 40, that any person who shall wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description, implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence pay a sum not exceeding 20*l*. Schedule A contains amongst other things: "Doctor of medicine of any foreign or colonial university or college practising as a physician in the United Kingdom before the 1st Oct. 1858, who shall produce certificates to the satisfaction of the council of his having taken his degree of doctor of medicine after regular examination, or who shall satisfy the council, under sect. 45 of the Act, that there is sufficient reason for admitting him to be registered." The Act therefore prohibits the use of the name of doctor or title of "doctor of medicine," unless the diploma of the person using it be duly registered, which was not the case here; and therefore the question is, whether upon the wording of the Act the fact of having a foreign diploma gives the defendant a colourable right to take the title of a physician. The justices did not think even that diploma proved, and the evidence of its authenticity failed. [POLLOCK, C. B.—We think it was sufficiently proved.] The justices thought not, and so the case states. [POL-

[Ex.]

ELLIS v. KELLY.

[Ex.]

LOCK, C. B.—When a case is sent for our opinion, we give our judgment according to the right of the matter.] If a person be duly qualified, but not registered, he comes within the 40th section; his non-registration is a violation of it. [POLLOCK, C. B.—It appears that the respondent is registered both as a surgeon and an apothecary.] But not as an M.D., which he professes and represents himself to be; he knows he is not on the register as M.D., and he therefore wilfully and falsely pretends to be what he is not, and comes within the Act. [POLLOCK, C. B.—Suppose a person is a surgeon and a doctor of laws, which might happen, surely he can call himself doctor if he thinks proper to do so. If a man is on the proper medical register, why may he not call himself what he likes in that capacity? The Act of Parliament was passed to prevent persons not being duly qualified to practise surgery imposing upon the public. The defendant is qualified as an M.D. and registered as surgeon and apothecary, and you can only charge him with assuming to be a member of the College of Physicians when he is only, according to the Medical Register Act, in reality a member of the College of Surgeons. There is no pretence for saying that he wilfully and falsely pretended to be a member of the College of Physicians, within the meaning of this Act of Parliament. This charge is virtually here, not that he assumed a title he had no right to, but that he did not cease to use it.] Had he any right to assume the title here of M.D. and use it, without being on the register as an M.D.? The Act says he shall not; if he does, he shall be liable to a penalty. This case is distinguishable from *Pedgrift v. Chevallier*, 29 L. J. 225, M. C., where the evidence did not appear to be sufficient for a conviction before the justices in the first instance. Erle, C.J. there said: "Unless we can see the essential facts proved necessary to support this conviction we are bound not to confirm it. There is nothing in the case to show that the appellant was not in practice as a surgeon before the Act passed; there is nothing to show that he did not possess a diploma from some one of the learned bodies who are entitled to confer it; there is nothing to show that he was not recognised by law as a surgeon, so far as a person might be entitled to practise the lawful trade of a surgeon, and entitled to enforce his rights; there is nothing to negative his qualification. The only facts are that he called himself a surgeon, and was not registered. I do not think that that is enough, for it cannot be maintained that every person who calls himself a surgeon without being registered is liable to be convicted." Here the evidence given before the justices was sufficient to justify a conviction.

*Robinson*, contra, for the respondent.—Dr. Kelly has since caused his diploma to be registered; he has a perfect right now therefore to practise as an M.D. (He was stopped from argument by the court.)

POLLOCK, C. B.—I am of opinion that the respondent is entitled to our judgment. There can be no doubt that he has been called "Doctor" for many years past, that he assumed the title, and, as the case finds, that he practised as a medical man. It appeared that he had a diploma of a foreign university, which authorised him to use the title of Doctor of Medicine, and practise medicine throughout Germany. His name was upon the Medical Register of this country as a surgeon and apothecary, and having a diploma which authorised him to call himself "Doctor" out of England, why not here? He is most certainly not within the terms of the 40th section of the Act as being a person who wilfully and falsely pretends to the title, and liable to be summarily convicted for the offence. The justices were quite right in dismissing the complaint, and I think this appeal should be dismissed with costs.

BRAMWELL, B.—I am of the same opinion, and it

only shows the reasonableness of the rule laid down at the commencement of this case, that the party in support of the information or complaint should begin his argument; the burden of proof is on him, and he it is who should first seek to establish if he can the offence laid. If he does not, there is at once an end of the matter. Now here I am of opinion there is no offence charged to which the respondent is liable. The Medical Practitioners Act contains a prohibition against persons being or pretending to be doctors of medicine, surgeons, apothecaries, or general practitioners, without being first duly qualified and registered as the Act directs. I think sect. 40 was intended as a protection for the public, as it provides, that if any person should wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, licentiate in medicine, surgeon, general practitioner, apothecary and so forth, or any name, title, addition, or description implying that he is registered under that Act, or recognised by law as such, shall upon summary conviction pay," &c. The respondent is clearly entitled to be recognised as a surgeon, general practitioner and apothecary. He is on the register as such, and I think the object of the statute was to prevent persons pretending to be duly qualified, and assuming a title to which they were not entitled, when in fact they had no qualification; as if any one wilfully and falsely called himself M.D. when only a member of the College of Surgeons; and I am confirmed in this by sect. 30, which provides that every person registered under this Act) the Medical Act, 21 & 22 Vict. c. 90) who may have obtained any higher degree or qualification other than the qualification in respect of which he may have been registered, shall be entitled to have such higher degree or additional qualification inserted in the register in substitution for, or in addition to, the qualification previously registered, on payment of such fee as the council may appoint." The respondent has a diploma as doctor of medicine of a foreign university, which may be substituted for that which is on the register, or by sect. 15 and schedule A of the Act may, besides the other titles he has registered already, be registered too; he would be then qualified to practise as a physician in England. The case merely states he practised as a medical man. The next thing is, if he has practised as M.D. at all, has he done it wilfully and falsely, contrary to sect. 40 of the Act of Parliament? What is the meaning of the Act? Why, that any person should wilfully and fraudulently pretend to be an M.D., surgeon, apothecary, &c., when in fact he is not. It must be done intentionally if at all, and when he is not entitled to be registered. Well, did the respondent do it here? Clearly he did not. He is on the register as a surgeon and apothecary; and he has also a foreign diploma entitling him to the degree of M.D., and he has put "Dr." on a brass plate on his gate; and because he has not got that diploma registered are we to say that he has pretended to be and use the title of doctor of medicine with an intention on his part to do wrong? I am of opinion that he has not done so within the meaning of the Act of Parliament, and that this appeal should be dismissed.

CHANNELL, B.—I am of the same opinion, and think the justices were right in determining that the respondent having the diploma produced before them, could not be said to have assumed the title of doctor of medicine wilfully and falsely within the meaning of the Medical Practitioners Register Act, and I come to that conclusion for the reasons which have been given by my brother Bramwell. [The learned baron then referred to the way in which the case had been stated.]

WILDE, B.—The only question for us to determine is, whether the respondent has wilfully and falsely pretended to be a physician and doctor of medicine within the meaning of this Act of Parliament, when he is not. It appears to me to be a question of fact; the

[Ex.]

Re WILLIAM THOMPSON.

[Ex.]

fact being that the respondent has practised as a medical man; that he is on the Medical Register as a surgeon and apothecary; and that having a diploma of the university of Erlangen in Bavaria, which entitles him to use the title of "Dr." and practise medicine throughout Germany, he has put "Dr." before his name on his door-plate. A case has been handed up to me within the last few minutes, of *Ladd v. Gould*, 1 L. T. Rep. N. S. 325, very similar to the present, in which the Court of Q. B. held it was a question of fact for the magistrates to decide, not one of law to be reserved for the opinion of the court, and I think with the Court of Q. B. it is a question of fact; but I concur also with the rest of this court in thinking the magistrates acted rightly in dismissing the complaint upon this occasion, and that the respondent is entitled to our judgment.

*Appeal dismissed; judgment for respondent, with costs.*

Attorney for the appellant, *H. Palmer*.

Attorney for the respondent, *Robinson*.

Nov. 22 and 26.

Re WILLIAM THOMPSON.

*Aggravated assault* — 16 § 17 Vict. c. 30 — *Charge of rape* — *Jurisdiction of magistrates* — *Habeas corpus*.

Where an information charged a prisoner with having unlawfully assaulted and abused a woman, and after a discussion between the attorney for the prosecutrix, the attorney for the prisoner, and the justices, it was agreed not to proceed with a charge of rape under that information, but to proceed under the Aggravated Assaults Act, and the only evidence of the assault was that given by the prosecutrix herself, who swore that the prisoner violated her person against her will, and the magistrates thereupon convicted the prisoner of an aggravated assault under the 16 § 17 Vict. c. 30, and sentenced him to six months' imprisonment:

Held (per Pollock, C.B. and Wilde, B.), that an assault with intent to commit any other offence is itself an offence distinct from a common assault. That by 9 Geo. 4, c. 31, and 16 § 17 Vict. c. 30, magistrates have jurisdiction over common assaults only. That where the jurisdiction depends on certain facts being proved or not proved, the decision of the magistrates as to the proof of those facts is conclusive, but that the court will consider the facts so as to determine what was the nature of the charge before the magistrates; and that on the facts of this case the magistrates had exceeded their jurisdiction by convicting on a charge of assault other than a common assault:

Held, contra (per Bramwell and Channell, BB.), that in point of form, a charge of assault only was brought before the magistrates, and that it was not competent for the court to review the evidence on which the decision of the magistrates was founded.

William Thompson was convicted of an aggravated assault upon a woman under the 16 & 17 Vict. c. 30, and committed to Preston gaol for six months.

The information, which had been drawn up by the magistrates' clerk, who was a layman, charged the defendant Thompson with "unlawfully assaulting and abusing the complainant;" and when the attorney for the prosecutrix proceeded to charge the defendant Thompson before the magistrates with having committed a rape, it was objected for the defendant that the information did not charge him with a felony; and after some argument between the attorneys and the justices, it was agreed that the case should be taken under the Aggravated Assault Act. The only evidence of the assault was that given by the prosecutrix her-

self, who distinctly swore that the defendant had committed a rape upon her.

The commitment stated "That, whereas William Thompson, of Oswaldtwistle, county of Lancaster, to wit, manager of a cotton factory, was duly convicted before two justices of the peace, upon the information and complaint of Susannah Taylor, of Belthorne, in the township of Oswaldtwistle, single woman, for that the said William Thompson, within three calendar months last past, to wit, on the 29th Oct. 1860, at the township of Lower Darwen, in the lower division of the hundred of Blackburn, in the said county of Lancaster, did unlawfully assault and abuse the said Susannah Taylor, contrary to the statute in such case made and provided; and the said justices did find the said assault to be proved, and to be of such an aggravated nature that it could not, in the opinion of the said justices, be sufficiently punished under the provisions of the stat. 9 Geo. 4, c. 31, and the said justices did therefore, in pursuance of the statute passed in the sixteenth year of the reign of her present Majesty, entitled, 'An Act for the better prevention and punishment of aggravated assaults upon women and children, and for preventing delay and expense in the administration of certain parts of the criminal law,' adjudge that the said William Thompson for his said offence should be imprisoned in the house of correction at Preston, in the said county, for the space of six calendar months."

Under these circumstances a rule *nisi* had been granted calling on the justices to show cause why a *habeas corpus* should not issue to bring up the body of the said William Thompson, on the ground that the justices had no jurisdiction in the matter.

*J. Kaye* now showed cause.—It was contended, first, that the conviction was not before the court, but only the commitment, and that being regular and good upon the face of it, being drawn up in accordance with the forms in Jervis's Act, would be a sufficient return to a writ of *habeas corpus*, and that the court could not, as the conviction was not before them, inquire into the evidence upon which the justices acted. Secondly, the question as to the degree and sufficiency of evidence and the credit due to witnesses is a matter solely within the discretion of the magistrates, and the court will not interfere unless it appear that there was no evidence whatever to support the conviction: (*R. v. Bolton*, 1 Q. B. 66; *Paley on Convictions*, 107.) In this case there was clearly sufficient evidence of an assault to support the conviction, and the fact that further evidence was given tending to show that a rape had been committed does not invalidate their decision, as not only were they confined to the offence stated in the information, but it might well be that they were satisfied with the evidence of the assault, but not satisfied with the evidence of the more serious offence. Thirdly, that the word "abuse" in the information did not necessarily mean "ravishing" and that prefixing the word "unlawfully" showed that a misdemeanor was intended. Fourthly, that supposing the information was for a rape, and the evidence only made out an offence included in but not amounting to the felony, the magistrates were justified in convicting for the lesser offence.

Overruled, Q.C. (*Wheeler* with him) in support of the rule.—The information meant more than a common assault, and the employment of the word "abuse" gave notice to the magistrates of the more serious charge (18 Eliz. c. 7, s. 4), and the evidence of the woman pointed to rape or nothing. No private arrangement between the parties could give the magistrates the right to adjudicate in such a case; they should either have committed the prisoner for trial or have discharged him. Even if they did not consider that the charge of rape was established, it was evidently either an "assault with intent," or at least an indecent assault; and in either case their jurisdiction was ousted:

[Ex.]

Re WILLIAM THOMPSON.

[Ex.]

(14 & 15 Vict. c. 100, s. 29.) By 9 Geo. 4, c. 31, justices were empowered to deal summarily with common assaults; and by 16 & 17 Vict. c. 30, they are authorised to inflict a more severe punishment for aggravated assaults, but that gives them no power to deal with charges of rape, assault with intent, nor with indecent assaults. If the word "abuse" took the case beyond an aggravated assault, their summary jurisdiction was at once ousted: (22 & 23 Vict. c. 17.)

*Curr. adv. vell.*

*Nov. 26.*—POLLOCK, C.B.—In this case an application was made the other day by Mr. Overend for a writ of *habeas corpus*. Cause was shown, and Mr. Overend and Mr. Wheeler were heard in support of the rule. The court being equally divided the rule will be discharged; but it is right, perhaps, shortly to state the grounds on which it appears to me that the writ ought to have issued. It appears that the conviction and commitment were under the 16 & 17 Vict. c. 30, by which magistrates are empowered, if they think an assault to be of an aggravated character, to extend the imprisonment that may be inflicted under the 9 Geo. 4, c. 31, from three months, which that statute empowers, to six months, which the magistrates may award under the 16 & 17 Vict. The objection to the conviction and the warrant founded upon it was this, that the magistrates have exceeded their jurisdiction; and it appears that their jurisdiction is founded upon this: by the 9 Geo. 4, if complaint be made of a common assault (the statute does not say an assault merely, but it says a common assault), if complaint be made of a common assault, the magistrates have a right to deal with it, and to award to the party found guilty of a common assault any term of imprisonment not exceeding three months. It may be material to consider, what is the meaning of the expression "common assault." It appears to me that it means an assault not accompanied by any circumstances that give to the assault the distinct character of an offence recognised by the law as something more than an assault. I certainly cannot understand that expression to mean anything else. The assault may be accompanied with a violent killing, and then it would be manslaughter or murder; an assault may be accompanied with violation of the person of a woman against her will, and then it would be a rape; it may be accompanied with circumstances that leave no doubt of an intention to commit a rape, it would then be an assault with intent to commit a rape; it may be accompanied with circumstances that show that there was an intention to kill, and an assault with intent to commit a rape is only a misdemeanor, it is not a felony; but an assault with intent to kill is to this hour a capital felony. It may be an assault for some other purposes, which it is not necessary to repeat here now. Thus it may either be a capital felony, or a felony, or nothing but a misdemeanor; but, in my judgment, an assault with intent to commit a rape is as distinct an offence from a common assault as murder is distinct from rape. They both are distinct from an ordinary assault, or an assault for a purpose not amounting to felony, but yet going beyond a common assault, and the circumstance of that being an assault (as a common circumstance in all these cases) does not identify the two crimes so as to make them more or less of the same class of offence. That is an assault with something beyond; but still, having taken that away from the assault, in my judgment there is as much distinction in point of law between a common assault and an assault with intent to commit a rape as there is between larceny and perjury, and I do not think that it was ever intended that they should be confounded together. Well, then, the statute of the 9 Geo. 4, having taken means to limit the authority of the magistrates to inquire into a common assault, in my judgment this authority is not extended by the 16 & 17

Vict., which, although it does not repeat the expression "common assault," and speaks merely of an assault, but of a more aggravated character, refers back to the power of punishment under the 9 Geo. 4, and says, if the assault is of so aggravated a nature that the magistrates think the powers of the 9 Geo. 4 not sufficient, they shall not be limited to three months, but may award imprisonment for a term not exceeding six months, with or without hard labour. It appears to me that, under these provisions of the Legislature, the magistrates have no authority except to inquire into a charge of common assault; that when that charge is made for any other aggravated assault distinguished by the law and marked out for a different mode of punishment, they ought to hold their hand and send the case for trial at the sessions, if the sessions be competent to inquire into the offence, or at the assizes, if the offence be of such a nature that it ought to go there. Then the question that I have to put to myself, in point of fact, with reference to these proceedings is this, What was the charge made before the magistrates? If it was a charge of common assault, they have jurisdiction; if it was a charge for an assault of a different character, they had no jurisdiction. The case of *Rez v. Bolton* is a very able summary of the law upon this subject, and it points out with remarkable precision, in my judgment, the occasions on which the questions of jurisdiction must be left entirely to the magistrates. There are cases where the jurisdiction depends upon certain facts being proved or not proved. Where that is the case, if the magistrates have dealt with the fact as being proved, and have exercised a jurisdiction upon that footing, no court can inquire into their authority. Their decision upon the fact is conclusive with reference to any question of appeal, or application to any court whatever. But when the nature of the charge is undoubted, and it turns out that the charge is not a charge which gives them jurisdiction, then it appears to me neither *Rez v. Bolton* nor any other authority prevents the Superior Courts in Westminster-hall from entertaining the matter and looking at the evidence. What was the charge that was really made on the present occasion? The information states that the charge is for assaulting and abusing a certain woman. The complaint is, upon the face of the information, something more than a mere assaulting. The very expression (for the information was in writing) appears to me to import assaulting and something more; but when one hears the evidence, it seems to me that every possible doubt must be removed, and I think the Court of Q.B., before whom this matter was brought, and who did not grant a rule to show cause upon this part of the case, were not in the position in which we are; for we have had, in addition to the rule to show cause, affidavits filed on the part of those who support the conviction and the warrant, and who resist the rule for the *habeas corpus*; we have a statement made distinctly of all that took place before the magistrates, and there the information being for an assault, and clearly something more, called abusing, it appears to me that the moment the complainant had to give her evidence, she forthwith detailed a complete case of absolute violation of her person against her will. It appears to me that, without entering into any very nice inquiry as to what is the meaning of the word "abuse," there are very strong grounds for thinking that the word "abuse" as applied to a woman—and I am not aware that in any case it has been used except with reference to sexual intercourse; certainly it has in more than one Act of Parliament had that meaning applied to it—that the term "abuse" apparently always imports something of that nature. Well then, we have those facts; the information is for assaulting and abusing, and the evidence has disclosed on the part of the complainant a statement of facts that con-

[Ex.]

Re WILLIAM THOMPSON.

[Ex.]

stitute a complete violation of her person against her will. Can any one say that that was a charge of a common assault? I think it was not. If there was no charge of a common assault made—if there was no evidence of a common assault, that is, merely a common assault—in my opinion the magistrates had no jurisdiction. It, however, may be suggested that that is a decision of the magistrates in point of fact and conclusive with us, which I admit it to be where the mere question of truth or falsehood of the facts is to determine the matter; and it may be said, "Oh, they believed the woman as to the mere assault, but disbelieved every other part of her story, and they disbelieved it was either an actual rape, or an attempt to commit it." But it appears to me that would only be trifling with what I think it is our duty to take care of, namely, that the magistrates do not exceed their jurisdiction, and exercise a power of sending one of her Majesty's subjects for six months to prison, and possibly with hard labour (though hard labour was not given in this case), the effect of which would be to put an end to all further inquiry about the rape, which, after the judgment of the magistrates, you would have no right to deal with. They cannot in substance pardon it by treating it as a common assault and disbelieve the woman. In my judgment, therefore, their duty was to have sent the case to be tried at the assizes, and to have held their hands with reference to any supposed jurisdiction of their own. I own that it appears to me that I should be ascribing to the magistrates a course of investigation which I cannot bring myself to believe to be the truth. It appears to me that the moment it came out that the charge of assault was accompanied by this charge of rape, it was the duty of the magistrates instantly to say, "No consent of the defendant will give us jurisdiction; we have no right to deal with that matter at all. We will stay our hands and the party must take his trial at the assizes." Instead of that, the magistrates appear to have sentenced the party to six months' imprisonment—they certainly did not give hard labour, though if they had believed the woman it was difficult to say that they ought not to have done so; but it is a very unintelligible proceeding to say that they believed the woman so far as to the assault, and they utterly disbelieved her with respect to the rape, or any attempt at rape. And therefore, as they cut it all down to a mere common assault, they had jurisdiction to deal with that under the statute. I own, with the profoundest respect for my brethren who do not entertain the same opinion as myself, I cannot help thinking that it borders on trifling with our duty to apply the decision in the case of *Rex v. Bolton* to such a state of things. I cannot bring my mind to believe that the magistrates acted under any such notion of their duty or their rights. I cannot believe that they acted as they did because they believed the woman as to the assault, and disbelieved her as to the rape. If they disbelieved so material a matter, and they thought she was swearing falsely, I think they would have dismissed the matter altogether, and not have sent the man without a trial by a jury to an imprisonment for six months. Thinking therefore, as I do, that there was no charge of a common assault—that the charge was really of a distinct, substantive and different offence, namely, a charge of rape, or at least an assault with intent to commit a rape, both of which are entirely distinct from the charge of assault, and thinking that the magistrates had no right when that charge was made to give themselves jurisdiction by believing a part of the case and disbelieving the remainder—in my opinion the writ of *habeas corpus* ought to go; at all events, we ought to have the man here, and have it fully argued before us whether that conviction and the warrant of commitment can be sustained in law.

BRAMWELL, B.—I regret that my opinion should

be adverse to that of my Lord, because I would rather this court should be agreed; but I think this rule should be discharged. A preliminary objection was taken by Mr. Kaye that the conviction was not before the court, which I advert to only to show that it has not been passed over, and it is not to be supposed that we take it to be ill-founded; but the matter having been discussed upon the other point, and I being prepared to express an opinion upon it favourable to Mr. Kaye, it is not necessary, as far as I am concerned, to entertain that preliminary objection, or to determine whether it is well founded or not, and it is not to be supposed that we say it is not. Now, assuming that the documents before us are sufficient upon the face of them to warrant the detention of the prisoner, inasmuch as he would upon their being returned have to be remanded, unless he could show a want of jurisdiction, the question whether this rule should be made absolute seems to me to be a question of whether or not it is shown that the magistrates had jurisdiction. As my Lord has put it—and I go entirely along with my Lord in his reasoning, for the purpose of showing what the jurisdiction of the magistrates was—I think they had no power to convict this man in the way they have done, except upon the charge of an offence of which they have convicted him. That seems to be a truism; but the reason I make the remark in that way is, that, though no doubt cases may occur where a particular charge being brought against a man, and it turning out he is not guilty on that charge, the magistrates have not jurisdiction to entertain the one of which he is guilty, yet it not being necessary, as it was not necessary in this case, that there should be an information in writing, the magistrates, no doubt, instead of going through the form of solemnly dismissing the first charge, and asking the parties to go into a new charge, and make their statements over again, may say, "The offence is not proved, we dismiss it, and such another charge is preferred, and we convict on that;" that is possible; but in point of form they ought to dismiss any charge brought before them if not well founded, and separately entertain another. In this case the question, to my mind, is, whether a charge was brought before them of an assault? Because, if it was competent for them, and they were bound to hear it, to entertain and determine it; and if they did determine it, and it was made out, it seems to me that we have no power to investigate the propriety of their proceedings. Therefore, to my mind, the question is whether a charge was brought before them of a character of which they could convict the defendant? And I go along with my Lord in his reasoning, that if it had been a charge of rape they ought not to have convicted him of this offence, and ought to have dismissed the charge. So also I am inclined to think, if it had been a charge of any of the assaults which my Lord has referred to, which are not common assaults, they ought to have dismissed the charge. Again I say, therefore, the question to my mind is, whether the charge was a charge of the offence of which they have convicted him? and I think it was. The written complaint was, that the prisoner had assaulted and abused the female who made the complaint. I confess, to my mind, the word "abuse" has no meaning; it is not a word of art, it is not a technical word, except in a different sense to that which has generally been imputed to it in popular language; it may mean either to call names or abuse by words; perhaps, correctly speaking, it means any private misuse in office, or a man abusing his powers; and other instances might be shown. It is also very possible that magistrates may abuse their power when cases of this description are brought before them—that is, misuse it. The only way in which I find it used as a term of art is in a way which, to my mind, shows it does not mean ravish; because I



[Ex.]

Re WILLIAM THOMPSON.

[Ex.]

find it used in a statute in this way:—The 16th section of 9 Geo. 4, c. 31, says: "Whereas on trials for the crimes of rape and the carnally abusing girls under the respective ages herein mentioned;" that is to say, on charges of rape and on charges which are not charges of rape, but "carnally abusing" young females. There, to my mind, the word abuse is manifestly used as different from the word rape: it may include rape no doubt, or it may not; yet the statutes, particularly the 9 Geo. 4, c. 31, s. 16, enact "That if any one shall unlawfully carnally know and abuse," that is unlawfully carnally abuse, whether with or without consent, there may be an abusing, although no rape. To my mind, therefore, this word, without the proper concomitants "did carnally know," and "unlawfully and carnally," really has no meaning at all. If I take it to have any meaning, I should say it had the meaning which at first sight one would suppose it indicated, that the female was under age; and, in point of fact, with reference to this particular woman, it seems to me to be meaningless. But then the only expression used is, "the defendant did unlawfully assault her," together with words which may or may not mean he did something else, but which in my mind have no definite meaning. I think, therefore, that upon the written information before the magistrates there was nothing to preclude their entertaining a charge of common assault, though they would have been precluded if it had been said he feloniously assaulted with intent or attempted to commit a rape, or any of the other offences that are not common assaults. Well, that being the written information, and that being the written charge, was there anything else to show that the magistrates believed there was any ambiguity about it, and that the charge was one of rape? I refer to the charge, independently of the evidence, for a reason that will appear presently. Now, the only other statement of any charge we have had before us is the charge in the opening of the prosecutrix's attorney, who undoubtedly began by saying he made a charge of rape, and on that an objection was taken by the opposite party, "You cannot go into that, because the written charge which we are called upon here to investigate is not a charge of rape." But the affidavit of the prosecutrix's attorney says: "I agreed to this; and I think it was agreed to, and we went into a charge of a common assault;" which my brother Channell said, as I thought very properly, in the course of the argument, is the charitable construction; not that at the end of the evidence the justices did what they ought not to do, and agreed to suppress the charge of rape and go into another which they had proper jurisdiction to go into; but that they agreed to take the charge of common assault under the belief that the objection of the prosecutrix's attorney was well founded. I think this is not only a charitable way of looking at it; but I think a more correct verbal construction of the affidavits, because the attorney says not only "do not go into the charge of rape," but he says, "go into a charge of assault, if you please." I cannot say I object in point of law, that the justices could not do that; for, though the objection was founded on ignorance, the justices acted on it, and after the objection of the prosecutrix's attorney to the charge of rape the charge preferred was of common assault, and not a charge of any of the statutory assaults to which my Lord has referred, as to which I confess I agree that if there had been such a charge it would have been wrong for the magistrates to convict of the offence, and they ought, at all events, specifically to have dismissed it if they did not think it well founded, and then entertain the new one to be brought before them of a common assault. However, by this process of reasoning, I have brought myself to the opinion that the charge made before the magistrates is a charge of an assault, and one which they were

competent under the statute to entertain. That being so, to my mind there is an end of the case; because, if they were competent to entertain it, it matters not that it was not supported by evidence on which they ought to have acted; it matters not that there was abundant evidence on which they ought to have come to an opinion that an offence had been committed over which they had no jurisdiction. Although I think it is incompetent to us to look into the evidence, and to say in what way they ought to deal with it, I cannot help subscribing to a considerable extent to a remark my Lord has made, that it was in some way trifling with what we may call the real merits of the case; because one cannot fail to perceive that, though we cannot, in my judgment, review their proceedings, they ought to have come to a different conclusion. It is possible in point of law, though I do not suppose it was so in point of fact, that they may have discredited that a rape was committed, and may have found that nothing but an aggravated common assault was committed. It was asked in the course of the argument how it was possible, if the woman's statement could be to any extent believed, there could be an assault of this description, unless with an attempt to commit a rape, or unless it was some other than a common assault? My answer is this: I take it to be perfectly possible, in point of fact, that a man might violently lay hold of a woman and insist on kissing her; that would subject him to the consequences either of an attempt to ravish, an assault with intent to actually rape, or an aggravated assault; and on her resisting he might strike her; that would be an assault, and it is possible in point of fact, that such an assault given in evidence may have satisfied the magistrates that a common assault of an aggravated character was committed, but no statutable assault, no felony was committed or proved. Now, the question is, whether we have jurisdiction to look into it; and on that matter I entertain some doubt, the impression on my mind being, that if they had the charge before them, on which they convicted, whether there was or was not evidence of that charge is a matter which they must determine. They determined there was sufficient evidence for a conviction, and the impression upon my mind is, that we cannot review what they have done. Accordingly, on that ground, I think there was no want of jurisdiction shown, and if the prisoner were brought up he would have to be remanded. I think the rule ought not to be made absolute, because I cannot see that there would be a more solemn discussion upon the return after the expense of bringing the man up than there has been upon the present occasion. I may say that another thing that influences me is this, that if my opinion is not well founded, it is a satisfaction to know that a court of co-ordinate jurisdiction has unanimously expressed an opinion, and I think not an ill-founded one, with respect to the decision of this particular matter. For fear I should be misunderstood—for fear it should be supposed I think the magistrates did right in point of fact—I wish to make this observation. I am not going to censure them—I dare say they thought they were warranted in doing what they did in point of law and expediency; but in my opinion they were wrong. I think they were clearly so. One of the effects of what they have done is to pardon this man, for I believe no further proceedings could be taken against him for the rape.

POLLOCK, C. B.—In my opinion, in point of law, that is so. The statute expressly says no action shall be brought, and no further proceedings of any sort taken in respect of that assault.

BRAMWELL, B.—But be that as it may—whether it has that effect or not, or whether this man can still be tried for the offence of rape, is not the question before us to-day. It is utterly impossible that they

[Ex.]

Re WILLIAM THOMPSON.

[Ex.]

can have credited the case of the prosecutrix without thinking that a rape, or an indecent assault, or an attempt to commit a rape, had been committed—it is utterly impossible they could have done so; because, when one comes to examine into the evidence, the cross-examination of the prosecutrix was not for the purpose of showing that one of the ingredients of rape had not taken place, and that there was not an assault of such a character as to support the statement that penetration had taken place—that there had not been an attempt to commit a rape, or an indecent assault—but the cross-examination was solely directed to show that the thing was done with her consent. I should conceive upon the evidence the only doubt the magistrates had, or ought to have had, was not whether the offence she stated had not been committed in the other particulars, but whether she was a consenting party to what took place or not. If that was so, when they came to decide the case, the first thing they ought to have made up their minds to was, is the defence a true one—or the case a true one? If the case on the part of the prosecutrix is a true one, namely, that she did not consent, they were evidently bound to commit him for trial on the grave charge to which she had sworn, or, at all events, for one of the statutory assaults, if they had any reason for doubting that penetration had taken place. If on the other hand they believed the case of the defendant, that what was done was with the consent of the woman, it is obvious they ought not to have convicted him in the way they have done. The only question really raised by the parties is, whether what took place was with or without the consent of the prosecutrix. And, in my opinion, all they ought to have done, and what in point of law is all they could do, was to determine that question in their own minds; and if they came to a conclusion that it was with her consent, they ought to have dismissed the summons; if it was not, then they ought to have sent him for trial for the offence with which he was charged. That appears to my mind plain. I really cannot understand that there is any doubt about it. I cannot refrain from saying that it is an inexpedient thing that magistrates should take on themselves, from any notion of expediency or otherwise, to say, We will not commit this man for trial for the offence sworn to against him, because he may be guilty of another, or perhaps it may go off on this, that, or the other; or to save expense, or what not. What they ought to do, without reference to the consequences, is to adjudicate on the evidence before them, and if that satisfies them that the offence charged is committed, and no other, they ought to convict, as they must have done in this case; if they are satisfied a different offence is committed, they ought not to have convicted him at all. Although therefore, I am of opinion that the charge was such that they could convict of the offence of which they have convicted, and we cannot reverse what they have done, I also agree with my Lord—I repeat, in order that there may be no mistake about it—that it was clear from this evidence that they ought not in point of fact to have come to the conclusion they have done, but they ought to have disposed of the summons or sent the man for trial. We cannot, however, interfere with their proceedings, and this being my opinion, I think this rule should be discharged.

CHANNELL, B.—I concur in the expression of regret that has fallen from the rest of the court, that there should be a difference of opinion upon this subject, particularly as the liberty of the subject is concerned. After having given the case the best consideration I am able, I concur in the view which my brother Bramwell has just stated, and I think that no rule should be drawn up in the nature of a rule absolute. It seems to me the question is not as put by the Lord Chief Baron and my brother Bramwell, whether the magis-

trates acted wisely or discreetly; that is not at all the question. As that is not the question, I would rather not upon that point express any opinion. The question is, whether the magistrates had jurisdiction or not; if they had jurisdiction, I think we ought not to interfere, and say they have come to an erroneous conclusion. Now I agree as to the necessity of inquiring into the facts in some cases in order to ascertain whether the jurisdiction exists or not; but in this case all the facts are proved which give jurisdiction. But it is said, in course of proving those facts something else came out in the course of the evidence which destroys the jurisdiction. I do not think the magistrates are bound to credit the evidence of witnesses to the full extent; they were at liberty to believe or disbelieve part of the evidence, and if adopting the rest of the evidence the case was left within their jurisdiction, they had a right to exercise that jurisdiction. And this case differs from *Rez v. Bolton*, in which the complainant had himself done something which in terms destroyed the jurisdiction of the magistrates. The magistrates who convicted under the particular statute found the fact to be as admitted, and by admitting the case to be true it took away the jurisdiction. The question then is, what is the jurisdiction that arises under this statute? The information is laid under the 16 & 17 Vict. c. 30, and the objection is not that the magistrates have not found in terms that there was such an aggravation of the assault that it could not be sufficiently punished under the 9 Geo. 4, but that they found the complaint stated in the information to be true, and it is said the complaint stated upon the information is one that took away the jurisdiction of the magistrates. The complaint is that "William Thompson did unlawfully assault and abuse one Susannah Taylor." I think the word unlawfully may be connected with the assault and go to negative any assault of a felonious character. By the use of the word abuse it is said that the jurisdiction of the statute given by the 16 & 17 Vict. is taken away. I confess I cannot come to that conclusion. I am called upon to put, if I can, a construction on the word "abuse." It may be surplusage, or it may mean something. I do not think it can be reasonably treated in the sense that opprobrious epithets were used, and that the assault committed was the more aggravated because it was so accompanied. I think it must be treated as meaning some abuse of the person, which abuse of the person does not amount to more than this—there may have been an assault and some indecency committed with regard to the person of the complainant. I own I am unable to come to the conclusion that the assault is not an aggravated assault within the meaning of the 16 & 17 Vict. c. 30, because it is also an indecent assault; it may be the indecency may be the very aggravation connected with the assault which gave the magistrates jurisdiction, and yet stop short of any statutory charge. If this had been a charge of rape, I agree with the rest of the court that the jurisdiction is entirely gone; but when I say I do so agree, I do not put this case on the ground of any agreement to give the magistrates jurisdiction. I utterly repudiate that; at the same time I think, on reading the affidavit, that was not the agreement come to. The affidavit is drawn up in a very loose way, and the information was framed in a very loose way. It appears to me that the practitioner who framed the information and the affidavit did not rightly understand what he was about. I understand the true meaning of the affidavit to be, that an objection was taken that the magistrates had no jurisdiction—that it was a charge of rape, and that was acquiesced in. The prosecutor went on then only intending to prefer a charge not commensurate with the charge in the information. The 16 & 17 Vict. c. 30, gives the magistrates jurisdiction in cases of an assault,

if it shall appear to be such an aggravated assault that it cannot be properly punished under the 9 Geo. 4. The words are "an assault;" that is the only expression in this statute. In the 9 Geo. 4 there are the words "common" assault used; but there is no such word "common" in this. What is to give the magistrates jurisdiction? Is it that the assault is an assault of an aggravated character? In my opinion the aggravation may consist of indecency, stopping far short of anything like an intent to abuse the person in the sense in which the term is understood. For these reasons it appears to me, if I am to consider the question of jurisdiction only, there is nothing in the materials brought before us that can enable us to say the magistrates have acted illegally and have exceeded their jurisdiction. I distrust my own opinion, as being in opposition to my Lord Chief Baron and my brother Wilde; but my brother Bramwell concurs in it, and I may add that it is some consolation that, though the matter was not fully argued in the Q. B., I find the judges in that court refused the application for a rule nisi.

WILDE, B.—I am of opinion that this rule ought to be made absolute; and I may say I entirely agree with every word that has fallen from the Lord Chief Baron, and if it were not a case of considerable importance in its several bearings, I do not know that I should add anything to what has fallen from him; but seeing that the court is divided in opinion, and seeing the question raised here is one which could not be otherwise than of very general interest, I propose to add a little to what has been already said. Now, the prisoner Wm. Thompson has been convicted before two justices sitting in petty sessions of an aggravated assault, and sentenced to six calendar months' imprisonment. The question is, whether under the circumstances the magistrates had jurisdiction to deal with him in that manner. The first question that arises is, what is their jurisdiction under the Act of Parliament under which alone they had power to deal with this matter, by the 9 Geo. 4, c. 31, and the subsequent statute of the 16 & 17 Vict. c. 30? Now, the 9 Geo. 4, c. 31, enumerates a variety of assaults differing from what may be called common assaults. It enumerates assaults with intent to commit felony; assaults on police officers or revenue officers, and any person acting in aid of officers; assaults with intent to resist capture, or any assault committed in pursuance of a conspiracy. It contains assaults of a peculiar character, for which the court before whom it is tried, if they think fit, may award an imprisonment for a term not exceeding three months. I merely mention that for the purpose of pointing out that what the statute recognised in point of law was what may be called an assault of an aggravated character, which was subject to imprisonment of a more than ordinary character; but no power is given to two magistrates sitting in petty sessions to deal with an intent to commit a felony. And, having mentioned these assaults, the statute goes on in a section further to say this, "And whereas it is expedient that the summary power of punishing persons guilty of common assaults and batteries should be provided under the limitations hereafter contained." It then goes on to confine to justices in petty sessions the power of dealing with common assaults and batteries. And sect. 29 says, in so many words, in case the justices shall find the assault to have been accompanied by any attempt to commit a felony, then they are not to have the jurisdiction given before. Nothing can be plainer than that, under this Act of Parliament, justices sitting in petty sessions have power to determine summarily cases of common assault and batteries; it is not competent for them to determine assaults of a different description. Now the jurisdiction has been altered by the statute that follows, the 16 & 17 Vict. c. 30, and it says, where any person shall be charged before two

justices of the peace sitting in petty sessions with an assault on any female whatever or a male child, and it shall be of such an aggravated nature that it cannot be sufficiently punished under the provisions of the 9 Geo. 4, then they are to have the power, instead of imprisoning for three months, which the 9 Geo. 4 imposes, to imprison for six months. Now I cannot read the section as meaning anything more than this, that where a question arises which would be within the jurisdiction under the 9 Geo. 4—that is to say, where a person is charged before two justices in petty sessions for having committed an assault, and it turns out that the assault, though a common assault, was accompanied with such details of cruelty and violence as not to be sufficiently punished, under the 9 Geo. 4, by three months' imprisonment—they are to have the power to imprison him for six months; and this Act is the Act commonly called the Wife Beating Act, which was introduced in consequence of aggravated assaults of violence and cruelty that were found to exist. Though the statute gives jurisdiction, it is a jurisdiction given to deal with common assaults only, as I read it, and to increase the punishment if the common assault is accompanied by circumstances of an aggravated character. Now that being so, the next point that arises is, what was the matter that was brought before the magistrates on the occasion in question? First, there is the information; and then there is the fact that *Re v. Bolton*, decided in the Q. B., expressly recognises the principle that in order that the Superior Courts may judge whether the magistrates have jurisdiction, they may deal with the facts of the matter on affidavit. Now, as to the information. The charge is of an assault and abuse; and I am certainly not prepared to say that the word "abuse" must generally have meant a charge of violation. If it turned only on the question of the meaning of the information, I should have very serious doubts about the matter, and I should not, as at present advised, be prepared to come to the opinion that it necessarily meant rape. I think it is capable of the meaning that the Lord Chief Baron has pointed out. Wherever it has been used in the statutes it has had reference to sexual connection, and nothing else. But then there is a great deal more than the mere charge in the information. I consider the case of *Re v. Bolton* entitles us to look into the facts and the evidence that has been brought before us; and the magistrates have with great propriety, on the affidavits in answer to this rule, brought the general matter before us. We are now no longer at all in the dark as to how it was and of what it was this man was convicted. It appears to me, without going into the evidence, as my Lord Chief Baron has disposed of that—it appears, when the evidence was laid before the magistrates, there really was evidence of a rape or nothing at all. The assault complained of was preceded by some gross language, which pointed at nothing else than an attempt to violate the person of the complainant; the assault which followed had no connection with anything except an attempt of that character. There was no beating, no violence beyond the violence that belonged to an attempt of the character I have described. That was the nature of the evidence. Now what is the duty of the magistrates? I do not at all mean to deny that, though there may be evidence, and even strong evidence, of one species of offence over which the magistrates have no jurisdiction, still that the magistrates are entitled, if they please, to disbelieve the evidence, and come to a *bona fide* conclusion that a less offence is committed, namely, that with which they are charged to deal by the statute of Geo. 4. I do not think it is competent for the Superior Courts to examine such a decision; the common sense of the matter is, they are to consider the facts, and deal with the case; and if the court were satisfied that the

[EX.]

REG. v. THE JUSTICES OF SUSSEX.

[BAIL.]

magistrates had ignored, in point of fact, the fact of rape, and the intent to commit a rape, and *bona fide* came to the conclusion that all that had happened was a common assault, I should then be of opinion that they had done perfectly right, and that there is no ground whatever for this rule. But it is precisely because I am satisfied that that is not the case, that I think the rule ought to be made absolute. I ground myself in this opinion on the evidence, and after hearing the opinions of my brothers Bramwell and Channell, I agree in the view the Lord Chief Baron has come to. In the opinion of anybody who reads the evidence, it clearly shows a charge of rape. But I do not ground myself on that alone. I look to the affidavit the prosecutrix's attorney has made in this case, and in the affidavit we find a perfect solution to my mind of the matter—showing how the man has been convicted of a common assault, and sentenced to six months' imprisonment, when the woman who is said to have been assaulted has received no violence whatever. It appears an objection was made, when the case came on, that the magistrates had not power to deal with it, it being one of rape; and the attorney says: "After some argument between the attorneys and the justices before mentioned, it was agreed that the case should be taken under the Aggravated Assaults Act." Now I cannot shut my eyes, when such a statement is put to me, to the conclusion that all parties are agreed to deal with this as an aggravated assault. The charge being one of an attempt to commit a rape, they then determined to deal with it as an aggravated assault, withdrew it from the proper jurisdiction, and turned it into a common assault of an aggravated nature. Coming as I do to that conclusion, I think clearly the magistrates had no jurisdiction, and cannot give themselves jurisdiction, by voluntarily shutting their eyes to one part of the charge and adapting it to a charge of some other offence; they cannot give themselves jurisdiction by the prisoner being charged with a less offence. Consent does not give jurisdiction; therefore, I say it is impossible to come to the conclusion that the magistrates have *bona fide* found upon the evidence that it was a common assault and nothing else. The charge being of the nature I have stated, from the passage I have read, it appears that they purposely ignored the rest of the charge, for the purpose of bringing it into their jurisdiction. That seems to me a matter they had no right to do. The man ought to have been tried by a jury for the real offence with which he was charged. I may say, in conclusion, it seems to me, if this practice were to be allowed, there is not an offence against the person, of any description however serious, even up to the crime of murder, that might not be dealt with in the same way before magistrates by withdrawing from the proper tribunal the consideration of the real crime, in order to deal with the supposed crime. That would be a grave evil, and makes it the more necessary that in cases of this sort I should express the reasons by which I have been led to concur with the Lord Chief Baron, the case being heard at great length, that the rule should be made absolute.

The Court being equally divided, the

*Rule was discharged.(a)*

(a) The court being equally divided, this cannot be considered a settled question, and should it again arise, it should be taken before another court. Probably a majority of readers will be inclined to agree with the views of Bramwell and Channell, B.B., that the charge, as it was laid, and ultimately heard and determined, was not of rape, but of assault. The transaction was thus:—An information for an assault was laid; it was then turned into a charge of rape, and that not being, in the opinion of the justices, sustained, the original charge of assault was adjudicated upon, and conviction followed. This may not have been done with all the forms; but such was the substance of the proceeding, and the form of doing it was not in question upon the present

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Thursday, Nov. 22.

(Before CROMPTON, J.)

REG. v. THE JUSTICES OF SUSSEX.

Re AN APPEAL BETWEEN THE PARISH OFFICERS OF COLEMORE (appellants) AND THE PARISH OFFICERS OF FUNTINGTON (respondents).

Poor-law—Appeal—Notice and grounds of appeal—Entering and respiting—Mandamus.

An appellant against an order of removal is entitled under the 11 & 12 Vict. c. 31, s. 9, to fourteen days after receiving the depositions, within which to serve his notice of grounds of appeal, and if at the expiration of such fourteen days there are not fourteen clear days (as provided for by sect. 81 of the 4 & 5 Will. 4, c. 76) for giving his grounds of appeal, though by the practice of the sessions there is time sufficient for giving full notice of appeal, he is not bound to try at such sessions, but must enter and respite his appeal, which appeal the sessions are bound to receive accordingly.

On the 1st Sept. the appellants received a copy of an order of removal. On the 17th they applied for a copy of the depositions, which they received on the 19th. On the 1st Oct. they gave notice that at the next sessions they would commence and enter their appeal (only eight days' notice of appeal being required), but they served no grounds of appeal. On the 15th the sessions took place, at which the appellants applied to enter and respite their appeal, which was refused.

Held, that the sessions were bound to have received and respited the appeal.

This was a rule calling upon the justices of Sussex, and also the churchwardens and overseers of the parish of Funtington, to show cause why a *mandamus* should not issue commanding such justices to receive and enter continuances, and hear the appeal of the churchwardens and overseers of the poor of the parish of Colemore against an order of removal.

It appeared that on the 1st Sept. last an order of removal was received by the parish officers of Colemore from the parish officers of Funtington. On the 17th application was made for a copy of the depositions. These were sent, and received on the 19th of the same month. On the 1st Oct. the parish officers of Colemore sent notice to the parish officers of Funtington that at the ensuing quarter sessions they would commence and enter an appeal against the said order of removal. The quarter sessions commenced on the 16th of the same month of October. No grounds of appeal had been delivered. By the rules of the Sussex sessions eight days' notice of appeal are required. At the sessions the appellants applied to enter and respite their appeal, but this was resisted by the respondents, who urged that the appellants had time and ought to have delivered their grounds of appeal. The sessions being of this opinion, refused to permit the appeal to be entered.

By sect. 88 of the 4 & 5 Will. 4, c. 76, it is enacted that "the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal." By the 11 & 12 Vict. c. 31, s. 9, it is enacted that "no appeal shall be allowed against any order of

motion. At all events, the information on which the whole proceeding was founded, was for an assault only, and surely that could not have been dismissed merely because the complainant at the hearing aggravated it into a rape.

removal if notice of such appeal be not given, as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for as aforesaid by the last-mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal," &c.

J. J. Johnson showed cause, and contended that as the appellants had time for giving full notice of appeal, and did in fact give it, they were bound to have gone to trial, having had also full time for giving fourteen days' notice of the grounds of appeal; that the 11 & 12 Vict. c. 31, s. 9, which gives the appellants fourteen days within which to give notice of appeal, does not apply to the giving of the grounds of appeal, the time for giving which should be calculated from the time when the grounds of removal were served, which, in the present case, would have given them from the 19th Sept. He also contended that upon a proper construction of sect. 81 of the 4 & 5 Will. 4, c. 76, the service of the grounds of appeal would be good if served with the notice of appeal, though this latter might, by the rules of the sessions, be less than fourteen days: (*R. v. Skircoats*, 28 L. J. 284, M. C.; *R. v. The Justices of the West Riding of Yorkshire*, 27 L. J. 269, M. C.)

Manisty, Q.C. and T. W. Saunders contended that the appellants had a right to have their appeal entered and respited; that the fourteen days' notice of grounds of appeal mentioned in sect. 81 of the 4 & 5 Will. 4, c. 76, means fourteen days at all events, irrespective of what may be the required length of notice of appeal (*R. v. The Justices of Suffolk*, 4 Ad. & Ell. 319; *R. v. Draughton*, 8 L. J. 92, M. C.); and that the additional fourteen days given by the 11 & 12 Vict. c. 31, s. 9, for giving notice of appeal after the reception of the depositions, apply as well to the giving of the grounds of appeal, the only object of such additional time being to enable the appellants to ascertain and decide upon whether it is advisable to appeal or not; and that the rule, as to be gathered from the cases, and particularly from *Reg. v. The Justices of the West Riding of Yorkshire*, 1 Ell. Bl. & Ell. 713; 27 L. J. 269, M. C., is, that if at the expiration of such fourteen days there is time to give full notice of appeal, but not full notice of the grounds of appeal, the appellants are only bound to go to the next sessions to enter and respite the appeal.

CROMPTON, J.—I feel that I am bound, by the authorities cited of *R. The Justices of Suffolk* and *R. v. Draughton*, to decide that the grounds of appeal must be delivered at least fourteen days before the first day of the sessions. It has been contended that it is sufficient if the statement of the grounds of appeal is given at the same time as the notice of appeal, and that this is the proper construction of the 4 & 5 Will. 4, c. 76, s. 81; but to decide so would be to overrule the authorities; and as effective notice was not given, I think the appellants were entitled to have had their appeal entered and respited. The rule therefore must be made absolute. *Rule absolute.*

#### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 10.

(Before ERLE, C.J., CROMPTON, J., CHANNELL and BRAMWELL, BB. and HILL, J.)

REG. v. JOSEPH TIMMINS.

*Abduction—Taking away an unmarried girl out of her father's possession—9 Geo. 4, c. 31, s. 20.*

*Upon the trial of an indictment under 9 Geo. 4, c. 31, s. 20, for taking an unmarried girl under sixteen out of the possession of her father, and against his will, it was proved that the prisoner (with whom the girl had previously stayed out for a night) met her by arrangement, and stayed with her away from her father's house for three days, sleeping with her at night; that he took her away without the father's consent in order to gratify his passions, and then allow her to return home, but not with a view of keeping her away from her home permanently: Held, that the evidence justified a conviction under the above enactment.*

Case stated for the opinion of this court by the Common Serjeant of the city of London:—

The prisoner was indicted at the September sessions 1860, holden for the jurisdiction of the Central Criminal Court, under the statute 9 Geo. 4, c. 31, s. 20, "for that he, on the 19th Aug. 1860, at the parish of All Saints Poplar, did take and cause to be taken one Ann Butler, an unmarried girl under the age of sixteen years, to wit, of the age of fourteen years and five months, out of the possession and against the will of Isaac Butler her father, he the said Isaac Butler then and there having the lawful care and charge of her, against the form of the statute, &c. and against the peace," &c.

The statute enacts "that if any person shall unlawfully take, or cause to be taken, any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such person shall be guilty of a misdemeanour."

It was proved on the trial that on the 17th Aug. the prisoner, who is a married man living with his wife, asked the girl Ann Butler if she would mind going out with him on the Sunday, to which she answered "No." He was previously well known to her, and she had on a former occasion stayed out and slept with him for a whole night away from her home.

On Sunday the 19th Aug., in fulfilment of her engagement, she went and met the prisoner near Poplar Church. They went to London together, and spent three days in visiting places of public entertainment, sleeping together at night, and on Wednesday morning, the 22nd Aug., on getting up, the prisoner said to her, "I'll go to work, and you go home." They then separated, and the girl went home.

The father of the girl swore that his daughter was absent without his knowledge and against his will.

In answer to questions which I left to them, the jury found that the father did not consent, and that the prisoner knew he did not consent, that the prisoner took the girl away from him in order to gratify his passions, and then allowed her to return home, but not with a view of keeping her away from her home permanently. Upon this finding I postponed the judgment, in order to have the opinion of the court on the case, and the question for the opinion of the court is, whether, on the facts so found, any offence has been committed under the statute.

The prisoner being unable to procure bail, remains in custody. THOMAS CHAMBERS, Common Serjeant.

No counsel appeared for the prisoner.

*Sleigh* for the prosecution.—It is submitted that the conviction was proper. The 20th section of the 9 Geo. 4, c. 31, is to be read in connection with sects. 19 and 21. Sect. 19 provides for a person, from motives of lust, taking away, or detaining any woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person. And sect. 21 provides for the leading, taking away, decoying, or enticing away or detaining any child under the age of ten years, with intent to deprive the parents or lawful guardians of such child of the possession of such child, or to steal any article about the person of the child. In

sect. 20 the unlawfully taking away any unmarried girl under sixteen years of age, out of the possession and against the will of her parents, is made an offence, and the intent is immaterial. [CROMPTON, J.—Suppose a person takes a girl away from her parent's possession for the purpose of educating her in another religion, does that come within the 20th section? Or if a man make a sign to a girl in her father's cottage, and she comes out and goes away with him for a short time, would that be within the section? Is it not a question of degree?] Under some circumstances the cases put would fall within the meaning of sect. 20, which was passed to protect the sacred rights of parents over unmarried girls under sixteen. Any act by which all care and control on the part of the father is determined is sufficient, according to the judgment in *Reg. v. Mantelov*, 6 Cox. Crim. Cas. 143; 22 L. J. 115, M. C. In *Reg. v. Meadows*, 1 Car. & Kir. 399, where one girl persuaded another under sixteen to leave her home and accompany her to London, it was held not to be a case within the section, otherwise any two school girls playing truant in company might have been indicted respectively each for abducting the other. [CROMPTON, J.—In *Reg. v. Mantelov* the parties went away without any intention of returning.] That was so. If the taking away severs the possession of the parents, that is all the statute seems to contemplate. If the girl was sixteen years old all but one day, and a party takes her out of the possession of her parents, the statute would certainly apply. [BRAMWELL, B.—What is the meaning of "possession of the father?"] Where the act is to sever the possession, so that he no longer has the care and control of his daughter, and is against the will of the father, it falls within the section. It may be that each case must be judged by its own facts, and, if so, here it is submitted the evidence was sufficient to bring the case within the enactment.

ERLE, C.J.—We are of opinion that this conviction ought to be affirmed. The statute was passed for the protection of the parental right and for preventing unmarried girls from being taken out of the possession of their parents against their will. It enacts that if any person shall unlawfully take, or cause to be taken, any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor. It is clear law that any deception or forwardness on the part of the girl in such cases will not prevent the person taking her away from being guilty of the offence created by this enactment. The difficulty in the construction of the statute is, what is meant by taking a girl out of the possession of her father? The taking a girl away might be consistent with the possession of the father, if the girl goes away with the party, intending to return in a short time; but where a person takes a girl away from the possession of the father, and keeps her away against his will for such a length of time as in this case, keeping her away from her home for three nights, and cohabiting with her during that time, we think that the evidence justified the jury in finding that the prisoner took the girl out of the possession of the father and against his will within the meaning of the statute. The prisoner took the girl away from under her father's roof, and placed her in a situation quite inconsistent with the existence of the relation of father and daughter. Our judgment in this case is, that there was evidence which justified the conviction—which we consider to be the point submitted to us—although the prisoner did not intend to keep her away from her home permanently, but when his lust was gratified to cast her from him. We limit our judgment to the facts in this particular case. It may be that a state of facts might arise upon which the offence would be complete in law when the girl passed the threshold of

her father's house, as when she is taken away with the intention of keeping her away permanently. We do not mean to say that a person would be liable to a conviction under this section if it should appear that the taking was intended to be of a temporary nature only, or for the purpose of taking a girl and placing her in some situation not inconsistent with the relation of father and child. It is sufficient for us to say that there was evidence in this case which justified the conviction.

The rest of the Court concurring,

— Conviction affirmed.

#### REG. v. JAMES TONGUE.

*Embezzlement—Clerk or servant—Secretary of money-club—Swing on note of club in his own name—Duty—7 & 8 Geo. 4, c. 29, s. 47.*

The prisoner, the secretary of a money-club, was directed by the club to sue upon a joint promissory note, the property of the club, or get better security, and the note was handed to him by W., the treasurer, who was not a member of the club, and who at the same time desired that his name should not be used in the legal proceedings. The prisoner indorsed W.'s name on the note, employed an attorney, who issued a writ, and in consequence of the action money was paid to the prisoner by one of the joint makers, which the prisoner fraudulently withheld from the club and appropriated.

The duties of the prisoner, according to the rules of the club, were duties cognate to that of receiving money for the club, but that duty was not expressly named in the rules:

Held (Crompton, J. dubitante), that the prisoner had received the money as servant for the use of the club, and that he was properly convicted of embezzlement:

Held, also (affirming Spencer's case, Russ. & Ry. 299), that the employment to receive money on this occasion was sufficient to constitute an employment within the meaning of the 7 & 8 Geo. 4, c. 29, s. 45, though receiving money was not the prisoner's usual employment, and it was the only instance in which he was so employed.

Case reserved by the Recorder of Birmingham for the consideration of the Court of Criminal Appeal:—

At a court of general quarter sessions, held at Birmingham, on the 11th Jan. 1860, James Tongue was charged before me, as appears by the indictment hereto annexed, with embezzlement.

The prisoner pleaded not guilty.

The jury found their verdict against the prisoner.

The facts were these:—The prisoner was secretary to a money-club, held at the house of Joseph Whiles, Johnson's Head Inn, Birmingham. The rules of the club, which were printed, and a copy given to each member, were (as far as they are material to the present case) as follows:—

Rule 2. That payment of one night's instalment shall constitute any person a member, approved of by this society, who may subscribe for one or more shares. Club-night to mean every alternate Monday.

Rule 9. Two of the members shall act as stewards for one quarter, in rotation, as their names appear on the books.

Rule 10. Three members shall be appointed for one quarter to make inquiries as to the sufficiency of the securities proposed, who shall make their report on the following club night. That the said committee shall be exempt from standing as stewards in rotation.

Rule 12. It shall be the duty of the secretary, when any important business requires it, or the society thinks proper, to summon by circular all the members to a special meeting.

Rule 17. That Mr. Tongue (the prisoner) be appointed secretary to this society, who shall receive for

his services a fair remuneration, to be decided by the members, and shall be exempt from paying the refreshment money. He shall make the promissory notes on demand, and shall always be one of the committee. Should he not attend or send a proper person to act for him, he shall forfeit 1s. 6d.

Rule 21. Mr. J. Whiles shall act as trustee, during the pleasure of the society, who shall sign all orders upon the treasurer for payments. All cheques or orders upon the treasurer to be countersigned by the secretary.

Rule 14. All moneys belonging to this society shall be lodged in the district bank, and the proprietor of the house be deputy-treasurer (during the club's pleasure), to take all moneys amounting to ten pounds and upwards to the said bank to be deposited by him thus:—"No. 4. Fifty pounds; society held at Mr. J. Whiles, Johnson's Head Inn, Edmund-street." The bank-book to be laid before the society each club-night.

Rule 23. No alteration shall be made to these articles unless notice thereof be given according to article 12, and such alteration be approved of by a majority of the members then present.

The practice of the club was for the stewards to receive the payments of members, and to pay over such moneys to the deputy-treasurer, J. Whiles, and for Whiles to retain in his hands all the moneys and securities belonging to the club, the notes being pasted in the book called the bond-book, which remained in the custody of Whiles.

In the month of April 1857 a promissory note was made by one Brough as principal, and by Starkey and Adcock as co-sureties, for the sum of 50*l.*, payable to the order of J. Whiles, which said note, the property of the club, was by order of the club taken out of the bond-book and handed to the prisoner by Whiles.

In consequence of doubts as to the solvency of the makers of the note in question, the prisoner was directed by the club then in meeting assembled to sue upon the note so handed to him by Whiles, or to get better security for the money which had been advanced upon it.

At the time when the note was handed to the prisoner, Whiles desired that his name should not be made use of in any legal proceedings.

After receiving the note the prisoner indorsed it with the name of Whiles, and employed an attorney, who issued a writ against the makers of the note, at the suit of the prisoner.

In consequence of the action so brought Adcock, one of the joint makers of the note, paid to the prisoner two several sums of 30*l.* and 10*l.*, the moneys charged in the indictment.

Henry Jenkins and the other parties mentioned in the indictment, except Whiles, were members of the club. Whiles was not a member.

The prisoner, on several occasions after the receipt of the moneys in question, denied such receipt, and alleged in answer to inquiries made, that he had not received the money on the note, but had obtained a better security from Brough.

It was proved that the prisoner had received these several moneys. The prisoner, after the receipt of the moneys in question, returned the note to Whiles as unpaid, and the note was repasted in the bond-book.

I put the following questions to the jury:—

1. Did the prisoner receive the moneys in question?
2. Ought he to have paid them over to the club?
3. Did he withhold them from the club fraudulently?

The jury specially found each of such questions against the prisoner, and also found him guilty generally.

The court having grave doubts of the validity of a conviction on the evidence above set forth, respited judgment and discharged the prisoner upon bail.

The questions are—

1. Was the prisoner clerk or servant within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 47? or, was he a person employed for the purpose of receiving the money in question? or was he a person employed in the capacity of a clerk or servant?

2. Was the money in question received by the prisoner by virtue of his employment or in his capacity of clerk or servant?

3. Was the money in question received by the prisoner for or in the name, or on the account of his master or masters? M. D. HILL, Recorder.

*Gibbons* for the prisoner.—The conviction was wrong. On the face of the note it appears that it was indorsed to the prisoner, and the legal effect of the indorsement was to pass the property in the note to the prisoner. And this the club intended to do, so as to enable him to sue upon it. He could only sue upon the note as attorney or as the holder. Not being qualified to sue as attorney, he could sue only as principal and holder of the note. As holder, he was legally the owner, and clothed with all the legal accessories to ownership. The club had divested themselves of all legal proprietorship in the note, and only retained an equitable right to it, which a court of law can take no notice of. In respect of the note and suing upon it, the prisoner was not the servant of the club within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47. He was the only person who could have taken money out of court, or controlled the action, or entered satisfaction on the roll. [HILL, J.—Was not Whiles' indorsement necessary to make him owner? The prisoner wrote Whiles' name upon the note.] There was a delivery of the note to him by Whiles, and that must be taken to have been for the purpose of passing the property in the note to him. If he had indorsed Whiles' name fraudulently, it would have been a forgery. It is not disputed that the prisoner had the authority of Whiles to sue upon it. Then, having employed an attorney to bring the action, the prisoner became liable for the costs, and that gave him a property in the note till the costs were paid. If the prisoner had given a release in the action, instead of receiving the money, he could not have been made liable in any way: (*Reg. v. Harris*, 1 Den. C. C. 344.) The most that the prisoner did was to make an improper use of his position as secretary.

*O'Brien* for the prosecution.—It is an assumption not warranted in law, that the property in the note passed to the prisoner when it was handed over to him. The prisoner was the servant of the club; he was appointed by a rule of the club and received a salary. *Hall's* case, 1 Moo. C. C. 474, shows that the prisoner as secretary held the note as the servant of the club. The club and the prisoner stood and acted in the relation of master and servant in this transaction. The club directed him to sue upon the note, or get better security, and when they asked him about the receipt, the prisoner denied the receipt of the money, and said that he had got better security. If the note had been indorsed with the authority of the club in order that the note might be sued on, it would still have been the property of the club, and he would have held it as their servant. If it was indorsed without their authority, the prisoner could not by that fraudulent indorsement acquire any property in the note. The prisoner had no right to employ an attorney to sue for himself, but only for the club. The note was in his possession as servant of the club, and that was the possession of the club, and no property passed to him in the note.

*Gibbons* in reply.

ERLE, C. J.—I am of opinion that the conviction ought to be affirmed. The first question is, whether the prisoner received the money in the character of a clerk or servant. He was secretary to the club, and hired at a salary; and his duties are stated with some

detail in the case sent to us. It does not appear to be one of his specified duties to receive money; but he had several duties to perform cognate to the receiving of money, viz., to make applications for interest or instalments due, and for better security or part payment. If the ordinary duties of a person in the employ of another are proximately connected with the receiving of money, the receipt of money for his employer, and appropriation of it to his own use, would make him liable to the charge of embezzlement. It was so laid down in *Spencer's case*, Rusa. & Ry. 299. And it is sufficient if there was a specific employment to receive money on one occasion only. The case seems to me, therefore, to fall within the statute as far as the prisoner's employment as a servant is concerned. Then was he within the statute as far as relates to the receipt of the money? Had he a right to the repayment of the loan, and to hold the money as collateral security for the costs? If this had been a mere loan, and the prisoner had been sent to apply for the money, or for better security, I think there would have been no doubt that the receipt would have been for the use of the club. The strength of Mr. Gibbons' argument was, that the prisoner had a cause of action on the promissory note. Now what passed between the club and the secretary had not the effect of passing the absolute property in the note to him as against the club; that gave only a limited authority, i. e. to sue upon it. As between him and the club, there is nothing to show that they authorised him to receive the money, and become the absolute owner of the note; and I take the finding of the jury to have affirmed the question put to us, "Was the money received by the prisoner for or in the name, or on the account, of his master or masters?" The jury have found that the prisoner had no lien on the money in the capacity of plaintiff, or as making himself liable for the costs of the action. The conduct of the prisoner is clear; he was acting fraudulently, for when asked about it he declared on several occasions that he had not received the money on the note.

CROMPTON, J.—I must own that I am in the same position as the recorder who has sent this case to us, in entertaining some doubt as to the conviction. The prisoner must be made out to be in the capacity of a clerk or servant. In the present case it is not contended that by his general employment he was authorised to receive money. The cases have gone to a considerable length on this point, and it has been held that if a prisoner received money as a clerk or servant on one particular occasion, that would do. My brother Erle has, I think, used the right expression, that the receipt of the money must be upon a duty cognate to his general duties. My doubt is, whether the money was received by virtue of any of the duties for which the prisoner was employed. There being a discussion about the payment of the note, it was handed over to the prisoner, and Whiles desired that his name should not be made use of in any legal proceedings upon it. The prisoner then indorsed the note with the name of Whiles. It would be too much to say that by indorsing Whiles' name he was guilty of forgery; and I think that here we ought to take the note as properly indorsed to the prisoner. The prisoner then employed an attorney to sue for him upon the note. My doubt is whether he was a clerk, or servant, or agent when he was suing in his own name upon the note. Can we consider him as the mere machinery used by the club? The transaction was one *per se*, and not of every-day occurrence, and the law of embezzlement is not to be extended to cases not cognate to the general employment as clerk or servant. This one particular circumstance of suing on the note makes it desirable to throw that duty on the prisoner which he accepted. I also have some doubt whether the prisoner can be said to

have received the money for the use of the club. Being the party in the suit, I should have thought that he received it for himself, to hand over the balance after deducting the costs of the action.

BRAMWELL, B.—I think the conviction should be affirmed. The first point is, whether the prisoner received this money as a clerk or servant, or by virtue of an employment in the nature of a clerk or servant. Suppose a man hired for a definite service as clerk or servant, and employed to receive rent, it is extremely improbable that he received as clerk or servant. If in this case there was any finding or evidence of a definite set of duties, of which the one in question was not one, I should share the doubt of my brother Crompton. But I doubt, under the circumstances, whether that can be conceded to be so. The prisoner was appointed secretary to the club, and I do not find anywhere any specification of his duties. The office of secretary may comprise many miscellaneous duties. I see nothing inconsistent with his duties when he was told by the club to receive the money as their servant. I think that there was evidence that he was so employed, and that that fact is concluded by the finding of the jury. I cannot think that he received the money for himself, or that the law proceedings make any difference. The bringing of the action was mere machinery to obtain the money, and the money when received was on account of his employers. He sued that he might receive the money for his masters, and if he made himself liable for any costs, of which I see no evidence at all, he had no right to employ the attorney and incur them. I therefore think that the prisoner was made out to be the servant of the prosecutors, and that he received the money for them, and that he must be held to have embezzled it.

CHANNELL, B.—I also think that the conviction must be affirmed. Did the prisoner stand in the relation of clerk or secretary to the club? It may be that the office of secretary does not necessarily carry with it the duty of receiving money for the club; but here it is found that the prisoner was employed by the club to sue upon the note, or get better security; and *Spencer's case* is an authority to show that a duty to receive money in a single instance is sufficient. The suit was mere machinery for obtaining the money for the club.

HILL, J.—I am of the same opinion.

*Conviction affirmed. (a)*

## COURT OF ARCHES.

Wednesday, Nov. 28.

(Before Dr. LUSHINGTON.)

ATTENBOROUGH v. PAGE.

*Church-rate.*

*A vestry was held for the purpose of making a church-rate. An estimate was produced; objections were made to some of the items, which were rejected by a majority of the ratepayers present. A poll was demanded, and taken on the following day, when there appeared to be 117 votes for the rate and twenty-five against it.*

*The payment, however, was resisted by the appellant on the ground that the rate was made on the assessment for the poor-rate, which was not a just and equal rate. Proof of inequality of rating having been produced, it was*

*Held, that a church-rate acquired no validity by being made according to the assessments for the poor-rates, and that the rate in question being upon the evidence unequal, it was bad and could not be enforced.*

*Dr. Deane, Q.C. and Dr. Spinks for the appellant. Dr. Travis, Q.C. and Dr. Sealey for the respondent.*

*The facts are sufficiently stated in the head note and judgment.*

*(a) It is not, therefore, now necessary to prove that the prisoner received the money in his usual employment.*



ARCHES.]

REG. v. GOSSE AND CARTER.

[Q. B.]

Dr. LUSHINGTON.—A church-rate acquired no validity by being in conformity with the poor-rate. The statute which directs the mode in which a poor-rate shall be made is silent as to a church-rate. A poor-rate being laid upon nearly the same properties as a church rate, and almost always for a much larger amount, the acquiescence of a parish in such a poor-rate furnished presumptive evidence that the rate had been justly and equitably made, and consequently that a church-rate made on the same basis was a just and equal assessment. A poor-rate may be illegal and void by the provisions of the statute, and yet a church-rate made on the same assessment may be valid. This requires some explanation. The statute enacts that a poor-rate shall be made according to the full rateable value, and declares that if not so made such poor-rates shall be null and void. There is no statute to govern church-rates. If a church-rate be just and equal, as upon a moiety of the rental throughout the parish, it would be valid, though a poor-rate so made would be by the statute invalid. Acquiescence in a poor-rate furnishes a presumption in favour of a church-rate made on the same basis, and so it does also for another reason, because the presumption is that the law has been complied with, and the law requires an equal assessment; but the presumption may be rebutted by evidence. A statute is not, as we all know, always obeyed, and in the case of poor-rates very often violated. It is averred that the assessment is unequal and unjust. If the assessment be substantially unequal, it must be unjust and illegal. That is the issue the court has to try. I have used the expression "substantially unjust" because perfect equality is utterly unattainable, and the law requires no such impossibility. If there is a substantial inequality, it matters not what the cause of such inequality may be—whether the omission of property that ought to be rated, or the underrating some and overrating others. The court is bound to express its opinion upon the validity of the rate, and it cannot pronounce a rate to be valid which from any cause is substantially unequal. The issue is not whether Mr. Attenborough is correctly rated with regard to the annual value of the property he occupies, but whether also the other parishioners are adequately rated. (He then reviewed the pleadings, and the evidence adduced on both sides, as to the value of the properties on which the rate was made.) The oral testimony was very conflicting, and it was by the documentary evidence alone that he could be guided in his decision. The poor-rate assessment on the basis of which the church-rate of 1857 was made, appeared to have been made about twelve or eighteen years before that time, and modified according to the altered value of the properties assessed. It was admitted that in 1859 a poor-rate was made, and a church-rate was made unanimously on the basis of that assessment. He then, after contrasting the value of the properties as assessed for the church-rate in 1857 and in 1859, said the rates so greatly differed that it would be absurd to suppose that the difference altogether arose from anything that took place between those years. It clearly appeared from a comparison of the two assessments that the assessment of 1859 had not only altered the ratings of 1857, but had also altered them in widely different proportions; hence it followed that the assessment of 1859 being based on the poor-rate, and confirmed, and therefore being just and equal, it was impossible that the assessment of 1857 could have been correct. The question remaining is, whether the assessment of 1857 is so unequal as to be substantially unjust, and void the rate. It is a question of degree. This question cannot depend upon the merely nominal amount of difference to any individual, for that would be to make the validity of a church-rate depend upon whether the rate was large or small—whether the

parishioner was a large or small occupier. It is manifest that the justice of a rate cannot depend on such considerations. The errors must be substantial, and, if substantial, then justice points out imperatively the course which must be taken. As to the state of the law, I may observe that the Legislature has afforded every facility for the poor-rate being made upon an equitable principle. The statute directs upon what basis and according to what rules poor-rates shall be made. The most ample opportunity is given to persons overrated to obtain redress, and the means of collecting the rates are certain and speedy. Church-rates have existed from time immemorial, but the circumstances of the country have changed, and since the 53 Geo. 3, as to the collection of the rates where the validity is not disputed, not one statute has been passed facilitating the making a rate, allowing a just opportunity to individuals to complain and obtain redress for overrating, or affording any remedy for any just demand, save the cumbrous and obsolete proceedings of the Ecclesiastical Court. It is my opinion that, if church-rates are to be maintained, the means ought to be afforded of doing justice. There ought to be a rule on which the assessment should be founded, means to collect that assessment, and an expeditious and cheap mode of recovering the rate. In this case I am compelled to say that I cannot pronounce for the rate, as it is founded on an erroneous and unequal basis, not consistent with justice; but I do not consider this a case in which I can give costs. *Judgment accordingly.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HICKETLEY, Esqrs., Barristers-at-Law.

Monday, Nov. 19.

REG. v. GOSSE AND CARTER (Justices of Surrey).

*Certiorari—Nuisances Removal Act 1855—18 & 19 Vict. c. 121, ss. 7, 22—Order of justices for payment of expenses for works out of highway-rate.*

*The power given to justices by sect. 7 of the Nuisances Removal Act 1855, to make orders for the payment of expenses incurred by the local authority in executing the Act is not to be resorted to until the means given by the 22nd section of the Act for defraying expenses for structural works have been exhausted. The 39th section of the Act, taking away the writ of certiorari, is not applicable when the justices have acted without jurisdiction, and contrary to the Act.*

*Grith* showed cause against a rule for a *certiorari* to bring up an order of Mr. Gosse and Mr. Carter, two of the justices of Surrey, in the Epsom division, made on the 16th May last, directing the surveyor of highways of Ewell to pay over 502*l.* 4*s.* 3*d.* out of the highway-rates to the local board constituted at Ewell under the Nuisances Removal Act 1855, for England, for sewerage and structural works done by such board, and which they claimed under the 7th section of the said Act to have paid them out of the highway-rates.

The affidavit of the applicant stated that he was a landowner and ratepayer of the parish of Ewell, in the county of Surrey. A committee in the parish was constituted in 1856 or 1857 under the Nuisances Removal Act for England 1855, of which James Josh. Blake was chairman, and soon after they commenced to make a large drain or sewer. These works were done by order of the chairman of the committee, without any magistrates' order or any order of two justices directing payment thereof, and no assessment had been made on the houses of parties benefited by the drain. The committee had expended on this work between 500*l.* and 600*l.* Such drain only benefited the proprietors whose lands adjoined the same, and did not benefit the applicant. The chairman of the Nuisances Committee had given orders to Mr. Harde, one of the

G. B.]

LEGG v. PARDOE.

[C. B.]

surveyors of highways, and who was also one of the committee, to pay a sum of 502*l.* 4*s.* 3*d.* on account of the structural works, and Mr. Hards had paid, at various times, the said sum out of the money in his hands collected from the highway-rates. The said surveyor had attended before the justices of Surrey to pass the accounts of the surveyor of highways or waywardens, and on the 11th April last the applicant, Mr. Hobman, attended as a ratepayer, and objected to the passing of such accounts. On that occasion Mr. Hards stated that about 300*l.* had been expended on highway and about 500*l.* on sanitary improvements, ordered by the said Nuisances Removal Committee, but it appeared that there had been no order of justices. And it further appeared that the said sum had been discharged out of the highway-rates without any order of justices, and the justices struck out of the surveyors' accounts the said sum of 502*l.* 4*s.* 3*d.*

On the 16th May Mr. Blake, the chairman of the Nuisances Removal Committee, applied to the magistrates then present for an order on the surveyor of highways, and this order was then made. The first question to be considered is, whether this is such a charge as the committee have power to impose; and if that be so, then it is said that there was a means provided for payment which was to be exhausted before the highway-rate could be resorted to. The Nuisances Removal Act, 18 & 19 Vict. c. 121, s. 7, provides for the defraying expenses of executing the Act; and the question is, whether it was intended that the highway-rate should be resorted to till other means were exhausted. The committee was duly appointed, and the surveyor of highways constituted one of the committee; and they in truth have everything in their own control, and there was no necessity to go to the justices to make this order, in which case it will be merely useless, which is no ground for quashing it; the only object of making the highway overseer one of the committee is to give the overseers a command over money required for contemplated improvements. The question is, whether the benefit derived is a public benefit or not. [COCKBURN, C.J.—A person contributing to the highway-rate may receive no benefit from the sewerage.] The question of its being a general or a special charge is for the committee; the justices made this order on the application of the committee, and they are the proper persons to inquire whether the order was proper, and if so, they had power to make it. If their order is merely ministerial, they are bound to make it for any amount for which it is asked. The writ of *certiorari* is taken away by the 39th section.

*Badeley contra.*—An order of this sort cannot legally be made by the justices when no resort has been had to the fund primarily provided by the Act of Parliament. The principle of the Act is this, that persons creating nuisances shall pay for their removal; and where considerable structural works are carried out, the persons benefited thereby are to be assessed to contribute to the expense of such works. The 22nd section provides how the means of payment are to be obtained for such works, and to such means the committee is bound first to resort; and it is the duty of the justices, before making such an order as this, first to ascertain that the primary means pointed out by the Act have been exhausted. The section referred to limits the rate to be made to 1*s.* in the pound; and only when that is exhausted can the highway-rate be resorted to. (He was stopped by the court.)

COCKBURN, C.J.—I think it is clear, looking at these affidavits, that this improvement was within the 22nd section of the Act, and that it follows that the fund pointed out by that section is the one primarily liable to meet the expenditure. It is not necessary to say whether the highway-rate is to be resorted to as an auxiliary rate; it is enough to say that the primary

MAG. CAS.

fund is liable. Then it is said that the 39th section takes away our jurisdiction; but I do not think that objection can avail. That section says that no order shall be quashed or set aside for want of form, nor shall any order or other proceeding done in relation to the execution of the Act be removed by *certiorari*; but that only relates to matters as to which justices have jurisdiction. Here it cannot be said that the justices have power to make an order directly contrary to the Act of Parliament, and therefore this order cannot be a proceeding within the 39th section. I think the order is bad, and that the rule should be absolute.

HILL and BLACKBURN, JJ. concurred.

*Rule absolute for certiorari to issue; order to be quashed on the return thereof. (a)*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, ESQs.,  
Barriers-at-Law.

Nov. 14 and 22.

LEGG (appellant) v. PARDOE (respondent).

*Appeal from justices under 20 & 21 Vict. c. 43—Game Act, 1 & 2 Will. 4, c. 32—Trespass in pursuit of game—Claim of title ousting jurisdiction.*

*Where an information was laid against defendant for trespassing in pursuit of game, contrary to 1 & 2 Will. 4, c. 32, s. 30, and the defendant set up a right to shoot, but offered no evidence in support of his claim, the justices dismissed the information, on the ground that a question of right was thus raised, on which they had no power to adjudicate. On appeal under 20 & 21 Vict. c. 43:*

*Held, that, as the justices believed there was a bonâ fide question of title in question, they came to a proper conclusion.*

This was a case stated for the opinion of the court, under the 2nd section of 20 & 21 Vict. c. 43. At a petty sessions holden at Bridport, in and for the division of Bridport, in the county of Dorset, on the 26th Sept. 1859, before three justices of the peace in and for the said county, an information preferred by John Legg, hereinafter called the respondent, under sect. 30 of the statute 1 & 2 Will. 4, c. 32, charging "for that he the said respondent, on the 12th Sept. then inst., at Hook, in the said county, did commit a trespass by entering and being in the daytime on land in the occupation of the said appellant in search or pursuit of game or rabbits, contrary to the statute in that case made and provided," was heard and determined by the said justices, and upon such hearing they dismissed the information.

At the hearing of the aforesaid information, it was proved on the part of the informant, the appellant in this appeal, that he resided at Hook, in the said county, that he rented a field called Ragg's-close, parcel of the manor of Hook, with other lands there, of M. James Mintern; that the game and rabbits on such lands were not in any way reserved, and that his landlord, who himself was a lessee of the said lands, gave him a right over the same; that no one had any right to enter or be on any such lands in search or pursuit of game or rabbits without his (the appellant's) leave; that on the 12th Sept. last the respondent did enter and was on Ragg's-close for that purpose, without the leave of the appellant. On the part of the defendant, the respondent in this appeal, it was not denied that he was on Ragg's-close for the purpose aforesaid, but evidence was given that he was there by permission of the Rev. Paulet Mildmay Compton, who stated he had made a parol arrangement with Lord Sandwich for the

(a) It is important to note the decision incidentally made in this case, that *certiorari* is still a remedy, where justices have acted without jurisdiction. It had been much questioned whether it was not entirely taken away by sect. 39.

shooting at Hook, and that he therefore claimed the right. Not the least evidence was offered to show that Lord Sandwich had any right or claim to the shooting over the lands in the appellant's occupation, or that the landlord, Mr. Mintern, could not give the game and rabbits to the appellant. No evidence was given that the respondent had any game certificate or other licence to sport.

It was contended on behalf of the respondent, that the justices had no right to adjudicate on the charge, for that the respondent acted under a supposition that he had a right to do the act complained of, and that the act not being wilful and malicious, their jurisdiction was ousted under 7 & 8 Geo. 4, c. 30, s. 24. The justices being of opinion that the respondent in committing the said trespass on the said close did so in pursuance of the permission of the said P. M. Compton, who he believed was entitled to the right of sporting thereon, gave their determination against the appellant in the manner before mentioned, conceiving that there was a question of right between the parties, which they, as justices, had no power to adjudicate on. The questions of law arising out of the above statement therefore were the following: First, were the justices empowered in law, and ought they to have convicted the respondent in respect of the said trespass? Secondly, was their jurisdiction taken away, and were they empowered to make the order against the appellant dismissing the information; or were there no circumstances or evidence before them depriving them of their right to adjudicate, and ought they to have exercised jurisdiction and to have convicted the respondent?

*Kingdon* for the appellant.—The justices have decided erroneously upon the points reserved by the case. The 1 & 2 Will. 4, c. 32, s. 30, recites that "after the commencement of this Act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist, for protecting the same from trespassers," &c. It is then enacted that "if any person whatsoever shall commit any trespass by entering or being in the daytime upon any land in search or pursuit of game, &c., such person shall, on conviction thereof, before a justice of the peace, forfeit and pay such sum of money not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of conviction. Provided always, that any person charged with such trespass shall be at liberty to prove by way of defence any matter which could have been a defence to an action at law for such trespass," &c. The general rule that where property or title is in question the jurisdiction of justices of the peace to hear and determine in a summary manner is ousted, does not apply in the present case. The Act empowers the justices to decide the whole matter. [ERLE, C.J.—The point was considered in *Reg. v. Cridland*, 7 E. & B. 853.] The question is, whether a claim of title is sufficient to oust the jurisdiction of the justices. In the case mentioned Erle, J. says: "I strongly incline to the opinion that the true meaning of the statute is, that the justices ought to try whether the defendant entertained an honest belief that he had a title; and if he had such belief he ought not to be convicted; I think that in a criminal statute trespass means an intended trespass." (He referred to *Morden v. Porter*, 7 C. B., N.S., 641.) The principle, however, is laid down in *Calcraft v. Gibbs*, 5 Term Rep. 19. That was an action for penalties under game laws, for shooting and having no right; and courts have always held that questions of title could not then be entered into. Kenyon, C.J. saying, that where a party has even a colourable title only to a manor, a penal action is not a mode of proceeding by which they will investigate it. "But here nothing of the sort is even pretended; for it is admitted on the part of the defendant, that the plaintiff

was the lord of the manor. . . . But it has been said that the servant acted *bona fide*, and therefore had not incurred the penalty of the statute. The servant, indeed, chose to trust to what his master told him on the subject; but as the master had no right, or even colour of title, it is no justification to the servant." The Act of Will. 4 is no doubt directed against ordinary poachers; and here the party is not such a person. It appears from the case, however, that the magistrates came to their determination on the proviso of the 24th section of 7 & 8 Geo. 4, c. 30 (the Malicious Injuries Act): "Provided always that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of this Act." The information not being laid under that statute, but under the late Act of Will. 4, it was manifestly an error to decide under the Act of Geo. 4. The next question is, was there any claim of title, supposing that to be sufficient, to oust the jurisdiction of the magistrates? It is submitted there was not. The case states that the respondent was shooting by permission of the Rev. P. M. Compton, who stated in evidence that he had made a parcel arrangement with Lord Sandwich, but no proof was offered that Lord Sandwich had any right whatever. If this is a sufficient claim of title, any poacher may come forward with a like story. It is not enough to state before the justices, "I have a title;" but the justices must see that there is at least a colourable title. *Reg. v. Burnaby*, 2 Ld. Raym. 900, cited by Erle, J. in *Cridland's* case, confirms this view. Holt, C.J. agreed that without doubt, if the defendant had but a colour of title, the justices had no jurisdiction in the cause. [BYLES, J.—Do you contend that under the 30th section it is not a crime? WILLIAMS, J.—The 6th section says that the party is liable to an action for trespass by him committed in search or pursuit of game.] The 46th section allows civil actions, where no criminal proceedings have been taken under the provisions of the Act. The 37th and 38th sections contains provisions in regard to penalties. The 12th section makes the tenant liable to a penalty for killing the game, where the right is in the landlord. [WILLIAMS, J.—Suppose the tenant is ignorant of the clause in his lease forbidding the killing of game; how then?] It is submitted that the rule still holds good. Then the party summoned under this Act is bound to show a defence which would have been a good defence to an action at law for the trespass, except that the leave and licence of the occupiers shall not be a defence where the right is in the landlord. The object of this Act is to enable the justices to hear and decide the whole question, as appears from the recital of the 30th section. This is made clearer by the 33th section, which shows who are not included within the Act. [BYLES, J.—Suppose one shooting accidentally allows shot to go over a neighbour's property? Even then the party would be liable, as may be inferred from *Reg. v. Pratt*, 4 E. & B. 860. But even if it had been shown that Lord Sandwich had a title, it would be no answer, as the 11th section provides that the party authorised to shoot shall have a game certificate; and here no evidence was given of such a certificate, which the 42nd section shows it was the duty of the defendant to prove, and not of the prosecutor to deny. As to innocence of intention, he referred to *Reg. v. Woodrow*, 15 M. & W. 404. [ERLE, C.J.—I have always thought that in proceedings under the excise laws, no innocence of intention avails. BYLES, J. cited *Hearns v. Garton*, 28 L. J., M. C., where dangerous goods had been sent by railway, with-

C. B.]

BRADSHAW v. VAUGHTON.

[C. B.]

out giving notice of their character. *Mens rea* held necessary to conviction.]

*Karslake* for the respondent—It is contended on the other side that the justices were bound to enter into the question of respondent's title to shoot, by virtue of the provisions in the 30th section of the 1 & 2 Will. 4, c. 32, although it is admitted that in all other cases the allegation of a *bona fide* right is sufficient to oust the jurisdiction of magistrates. Here the respondent believed he had a right to shoot. [ERLE, C.J.—Mere belief of a right where there is no foundation of one, will not do. Mr. Compton no doubt thought he had a right, when there was not the shadow of a right.] The justices heard the reference to Lord Sandwich, whom they might know to be the lord of the manor. Campbell, C.J., in *Reg. v. Cridland*, says: "Though no evidence of title was actually offered, it was quite clear that a *bona fide* claim of title was set up, and when such a claim is set up, it seems to me that justices have no longer jurisdiction to proceed to a summary conviction." [ERLE, C.J.—There it was known, and no evidence was necessary.]

The question is, whether there is a *bona fide* claim of title, and that depends on the evidence of the clergyman, who stated that he had made a parol arrangement with Lord Sandwich for the right of shooting. The respondent, therefore, having obtained the permission of Mr. Compton to shoot, had an honest belief that he had the right to shoot accordingly. To show that the ordinary rule as to colour of title ousting jurisdiction does not apply, reference is made to the words of the 30th section of the Act under which the information is laid, that any person "shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass, save and except," &c. But this proviso is disposed of in the judgment of *Reg. v. Cridland*. Coleridge, J. says that "it may be that a defendant might, by virtue of this provision, compel justices to try a question of title; but it by no means follows that justices, of their own inclination and against the will of a defendant, may determine on his title to estates. If they are not so compelled the ordinary rule must prevail." Next, this is a criminal proceeding: (*Cattel v. Ireson*, 1 E.L.B. & El. 91: 27 L. J. 167, M.C.) It lies on the other side to show guilty knowledge. The case of *Reg. v. Pratt* has been mentioned, and it is noticed in the judgment of *Morden v. Porter*. It is, no doubt, true that the statement by the defendant in that case, as to his ignorance of the law, usually gives no excuse; but here a *bona fide* claim is set up. And it is submitted that a claim of title has been made sufficient to oust the jurisdiction of the justices. [ERLE, C.J.—The notion that imprisonment and hard labour may possibly ensue on disobedience to a statute, has often caused that statute to be held a criminal one, but I am not disposed to assent to it entirely.]

*Kingdon* in reply.—Before this statute there was no statute against trespassing in pursuit of game in the daytime. The 7 & 8 Vict. c. 30, s. 24, punishes malicious trespass, but it contains a provision as to the party trespassing acting under a fair and reasonable supposition that he had a right to do the act complained of, and also as to a trespass in pursuit of game, which is to be dealt with as formerly the practice. Then comes the 1 & 2 Will. 4, c. 32, which, in the 30th section, recites that it is just and reasonable to provide some more summary means than now by law exist. This Act abolishes a distinction that formerly existed; the later Act makes it a trespass *simpliciter*, and it need not be malicious. The justices carefully avoid saying that the defendant had a right, for they state that he set up a right from a person who was only supposed to have authority to grant the right. It is for the other side to show that the jurisdiction is ousted.

*Curr. adv. vult.*

Nov. 22.—ERLE, C.J. delivered the judgment of the court.—As we understand the statement of facts in this case, the justices dismissed the summons because, in their judgment, the question of title was raised *bona fide*, and because, under the words of the 30th section of the statute 1 & 2 Will. 4, c. 32, the point was not for their determination, conceiving that there was a question of right between the parties which they had no power to adjudicate on, on this ground we affirm their decision. If the question of title was *bona fide* raised, they took the right course in dismissing the complaint according to *Reg. v. Cridland*, 7 E. & B.; and *Morden v. Porter*, 7 C.B., N.S. The facts tending to raise the question of title are extremely scanty, and the case would have been more satisfactory if some further evidence of the title supposed to be in question had been given, so as to ascertain whether Lord Sandwich claimed in respect of the land, or of the manor, or of any other right, and whether there was a colour for the claim; still, it is a matter which the justices had to determine, and we cannot say they were wrong. If the justices wished to raise the question whether the defendant ought to have been discharged because he believed he had a right to enter on the land, and so had no intention to trespass, we have not so understood the case.

*Judgment for respondent. (a)*

Nov. 19 and 20.

BRADSHAW v. VAUGHTON.

*A certificate given under 9 Geo. 4, c. 3, ss. 27, 28, upon the withdrawal of a charge by the complainant, is a bar to an action.*

*The plaintiff having been assaulted by the defendant, laid an information before a magistrate, who granted a summons and fixed the hearing of the complaint for a certain day; before, however, the day arrived, the plaintiff gave notice to the defendant that he should withdraw the charge. On the day appointed for the hearing the defendant appeared before the magistrate and claimed a certificate under the Act, which was given:*

*Held, that this certificate was a bar to an action afterwards brought for the assault.*

This was an action tried on the 11th Aug. last, at the County Court of Shropshire, Madeley, brought by the plaintiff, who was a minor, and who sought to recover damages for an assault alleged to have been committed upon him by the defendant on the 13th June last.

Two defences were relied upon: first, a justification on the facts; and, secondly, a certificate of magistrates of dismissal under 9 Geo. 4, c. 31, ss. 27, 28. In support of the second ground of defence the following facts were proved on the part of the defendant:—

"On the 18th June last the plaintiff went before a magistrate for the county of Salop, and on oath preferred an information against the defendant, of which the following is a copy. (Here the information is set out.)

The summons was accordingly issued by the magistrate to the defendant, requiring him to appear at the

(a) The question whether, in any particular instance the claim of title ousts jurisdiction is extremely difficult for justices to determine, and this case does not help them out of the difficulty. It does not suffice that such a claim be set up, the justices must be satisfied that it is offered *bona fide*, though they are not to inquire if it be a good claim, for that would be to try the title itself. The question they should ask themselves is this: "Is the claim of title raised *bona fide*, or only as a pretence to escape jurisdiction?" And this they may try by inquiring into the nature of the claim, for the purpose of satisfying themselves if it has a real foundation. But they should not go beyond this. If satisfied that a claim really exists, they are bound to dismiss the complaint

C. B.]

BRADSHAW v. VAUGHTON.

[C. B.]

public office, at Shiffnal, on the 5th July last, to answer the information and summons served on him on the 30th June, and on the 3rd July a notice was served on the defendant, of which the following is a copy:—

"To Mr. Thomas Vaughton.

"I hereby give you notice, that the summons issued against you on the complaint of Charles Bradshaw is withdrawn, and that you need not attend at the petty sessions to be held at Shiffnal, on Friday the 6th of July 1860. Dated, &c.

"THOMAS BRADSHAW, the father and next friend of Charles Bradshaw."

Charles Bradshaw was a boy of ten years of age, and his father acted for him in the matter.

Notwithstanding this notice, the defendant attended the petty sessions in obedience to the summons with his attorney, and requested the plaintiff might be called to support his complaint.

The plaintiff was called, but did not appear in person or by attorney.

The defendant's attorney then requested the magistrates to grant the defendant a certificate of dismissal, under 9 Geo. 4, c. 31, ss. 27, 28, on the ground that the offence had not been proved; stating that he believed it was the intention of the plaintiff to bring an action against the defendant for the assault. The magistrates objected to grant a certificate of dismissal on that ground, as the case had not been heard; but, at the earnest request of the defendant's attorney, granted the following certificate stating the facts, to enable the defendant to raise the question as to the effect of such certificate, if it should become necessary for him to do so:—

"County of Salop, to wit.—Be it remembered that on the 18th day of June 1860 complaint was made before J. L., one of her Majesty's justices of the peace in and for the said county of Salop, by Charles Bradshaw, of the parish of Albrighton, in the county of Salop, for that, on the 13th day of June 1860, at the parish of Boninghall, in the county of Salop, Thomas Vaughton, of Little Whiston, gentleman, did unlawfully assault, beat and ill-treat the said C. B., and the said justice thereon issued his summons to the said T. V., requiring him to appear before such two or more of her Majesty's justices of the peace for the said county of Salop as should be present at the petty sessions to be held at the public office in Shiffnal, in the said county, on Friday, the 6th day of July 1860 to answer the said complaint, and the said summons so issued by the said justice was duly served on the said T. V. on the 20th day of June last, requiring him to appear on the day last above mentioned to answer such complaint. And whereas, after the issuing and service of the said summons, to wit, on the 3rd day of July 1860, T. B., the father of the above-named C. B., did cause a notice to be served upon Thomas Vaughton, of which the following is a copy:—[Here the notice as given above is set out.]

"And now at this day, to wit, on the 6th day of July 1860, the said Thomas Vaughton appeared before us, the undersigned justices present at the said petty sessions; but the said C. B., although duly called, did not appear, whereupon the said T. V. claimed to have the said complaint dismissed, and we do therefore dismiss the same. (Signed) "U. C. "G. W."

No notice was given by the defendant to the plaintiff of his intention to attend the petty sessions and apply for a certificate, nor was any application made by the plaintiff to the magistrate to withdraw the summons, but notice was given by the plaintiff to the magistrates' clerk to the said petty sessions that he had withdrawn the summons and given notice to the defendant to that effect.

In charging the jury the judge told them that, in his opinion, as a matter of law, the certificate above set out, and relied on by the defendant, was no bar to the

action; and that if they thought that the plaintiff had, upon the facts furnished as to the assault, made out a case to their satisfaction for damages, they ought to give him such fair and reasonable damages as they thought fit.

The jury found a verdict for 25*l.* and the defendant gave notice of appeal.

The question, therefore, for the opinion of the court is, whether or not the said certificate operated as a bar to the plaintiff's right of action by virtue of the statute.

*Scotland*, for the appellant, cited *Tunncliffe v. Todd*, 5 C. B. 530; *Reg. v. Robinson*, 12 Ad. & Ell 672; *Coatlar v. Hetherington*, 5 Jur. N. S. 985: as to costs, *R. v. Stamper*, 1 Q. B. 119.)

*Phipson* for the respondent.—There was no hearing in this case—a hearing means when the whole case is heard, not one side only.

*Scotland* in reply.

*Cur. adv. vult.*

*Nov. 20.*—*ERLE*, C.J. now delivered judgment.—In this case, which was argued yesterday by Mr. Scotland, the material facts of this appeal are, that the plaintiff laid an information for an assault under the statute of Geo. 4, and took out a summons requiring defendant to attend before the justices at petty sessions, which was served on him; the plaintiff afterwards, and before the day of hearing, by his agent, gave notice to the defendant not to attend, and to the magistrates' clerk that he should not attend; that on the day, the defendant attended and claimed to have the information dismissed, and a certificate of dismissal granted, although the plaintiff was absent; the magistrates granted the certificate showing these facts, and the question is, whether it bars this action for the same assault? The statute authorises the magistrates to give a certificate, if on the hearing they deem the charge not proved; and at first it seemed difficult to say that they had heard the matter at all. But we were pressed with the case of *Tunncliffe v. Todd*, 5 C. B. 553, where this court lays down, as principles, that the information is the commencement of a criminal proceeding analogous to an indictment, and the summons is the act of the magistrates on the behalf of the public; that the party who begins the criminal information cannot withdraw from it leaving it pending; but, on the contrary, that the party charged has the right to force it on to a conclusion; and that if at the time for concluding the case the informant offers no evidence in support of the charge, it ought to be dismissed, and such dismissal is the result. In that case the informant attended at the return of the summons, and when it was called on the defendant pleaded not guilty, and was ready with his witnesses; and then the informant said he should withdraw from the case and bring an action; and thereupon the magistrates chose to certify. In the argument of the case it is said that the hearing begins when the plea is pleaded and issue is joined; and we have had to consider whether we could distinguish the present case on the ground that the informant did not attend, though a formal plea was not taken, and so no issue joined. After consideration, it seems to us the principles of the judgment above mentioned do not authorise us to rely on this distinction. It was held that the informant cannot withdraw, and the defendant has a right to a decision, and that if the informant says he withdraws, the case is heard, and the information dismissed, and the power to certify is given, if the magistrates, in their discretion, choose to grant it. Here, although the informant was not present to express orally he withdrew, his writing was to that effect; and if he absent himself with an intention of withdrawal, his act ought to leave to the defendant all the rights which arise on any withdrawing of the charge. In *Rez v. Stamper*, a case under the Bastardy Act then in force, it was decided that an application duly entered with the clerk of the court, entitled the

C. B.]

HARRIS v. JENNS.

[C. B.]

putative father, when the case was called on, to claim a dismissal, and that such a dismissal was a hearing entitling him to costs, although the applicant did not attend to support the application; and a certificate was granted. We feel bound by these cases to hold that it barred the action, and our judgment is therefore for the appellant.

*Judgment for the appellant. (a)*

Attorney for the respondent, *Smallwood*.

*Friday, Nov. 9.*

HARRIS (appellant) v. JENNS (respondent).

*Lords' Day Observance Act—11 & 12 Vict. c. 49, ss. 1 and 4—"Fermented or distilled liquors"—Made wines.*

*A retailer of British or made wines, compounded of sweets and alcohol, is liable to conviction under 11 & 12 Vict. c. 49, for selling such articles to others than bona fide travellers, during the hours of morning service on Sunday.*

*By stat. 11 & 12 Vict. c. 49, s. 1, no licensed victualler or person licensed to sell beer by retail, to be drunk either on or off the premises, or "other person," shall open his house for the sale of wine, beer, "or other fermented liquors," or sell the same, on Sunday, before half-past twelve p.m., except for refreshment for travellers. By sect. 4, no person shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, before half-past twelve p.m., except as refreshment for travellers.*

*The appellant, who is a retailer of made or British wines, sold to respondent, not being then a traveller, on Sunday, at 11.30 a.m., a half-pint of made wine, called "port wine, which contained one ounce of alcohol in four ounces of the mixture, and which a professional chemist, who was examined, declared to be a fermented liquor." The magistrates convicted him under the statute, and inflicted a penalty, holding that, whether he was within the 1st section or not, he was clearly within the 4th section:*

*Held, that the conviction was right, the words "other person" in the 4th section comprehending all persons other than those specified in the first section.*

*The 17 & 18 Vict. c. 79, does not repeal the 11 & 12 Vict. c. 49, as appears to have been held by two of the judges in Reg. v. Whiteley, 3 H. & N. 143. Per Byles, J.: There is some mistake in the report of that law.*

This was a case stated by way of appeal from the decision of magistrates, under 20 & 21 Vict. c. 43, for the opinion of this court.

By stat. 11 & 12 Vict. c. 49, s. 1, "No licensed victualler or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or other person, shall open his house for the sale of wine, spirits, beer, or other fermented or distilled liquors, or sell the same, on Sunday, before half-past twelve p.m., except for refreshment for travellers."

By sect. 4, "No person shall open any house or place of public resort for the sale of fermented or distilled liquors, or sell therein such liquors, before the hour of half-past twelve p.m., except as refreshment for travellers."

On Saturday, 28th April, the appellant Cleopas Harris was charged before us the undersigned justices of the peace for the borough of Birmingham, with having, on Sunday the 15th April, before half-past twelve p.m., to wit, at half-past eleven a.m., unlawfully sold to one George Jenns (the respondent) a certain quantity of fermented liquor, to wit, one half-pint of "made wine," in a certain house and place of public resort, situate, &c., the said George Jenns not being then a traveller, &c.

The evidence was, that on the day and at the hour named in the summons the said George Jenns was at the shop of the appellant, who is a retailer of made or British wines, that he asked appellant, who was serving customers in the shop, for half a pint of port wine, and that he thereupon received from him, and paid for, the liquor produced before us; that there were above twenty persons in the shop when he went there, that the shop was open, and people going in and coming out.

The liquor was analysed by a professional chemist, who stated that he had by distillation extracted from four ounces of it nearly one ounce of alcoholic spirit, and that he therefore considered it a fermented liquor; that it would doubtless be possible to compound a mixture of sugar and water, and colouring and other matters, which, with the addition of alcohol, should resemble in taste and appearance the liquid produced, and yet not have in itself undergone fermentation, and that the alcohol which had been added might again be extracted by distillation, but that in his opinion the liquid which had been sold as wine was a fermented liquor.

It was contended on the part of the appellant, first, that he did not come within the meaning of either the 1st or 4th sections of the above recited Act; and secondly, that there was not sufficient evidence that the liquor sold by him was really wine or a fermented liquor.

We are of opinion, that even supposing he did not come within the description of an "other person" within the 1st section, he clearly was within the words and meaning of the 4th section, and as to the second objection, we found as a fact, in doing which we considered ourselves justified by the scientific evidence produced, as well as by the representation of the appellant himself at the time of sale, that the liquor was wine, and therefore a fermented liquor, and we convicted him of the offence charged, and inflicted a penalty accordingly, whereupon the appellant being dissatisfied with our determination, has applied to us to state and sign a case for the opinion of the Court of C. P.

*Phipson* for the appellant.—The question raised before the magistrates lies in a narrow compass: it was, whether a seller of made wines by retail is liable to be convicted for selling half a pint of made wine called "port wine" at half-past eleven o'clock on Sunday morning; and this depends on the question, whether such liquor is a fermented or distilled liquor within the meaning of the statute. It is submitted that the words "no person" in the statute apply to licensed victuallers only. The appellant then is not within the 1st section of the Act, because he is not a licensed victualler. The magistrates held, that whether he is or is not within that section, he is within the 4th section, and therefore convicted him. It is true that a chemist who made analysis of the liquor, found more than half an ounce of alcohol in it, and swore it was a "fermented liquor;" nevertheless, as it is compounded of alcohol and sweets, it is contended that it is not a fermented liquor. [EARL,

(a) It had been long a matter of doubt in magistrates' courts whether a certificate of dismissal could be claimed, although the charge had not been heard, some magistrates refusing, and some granting it. This case has settled the question in the affirmative; and it does this by establishing a principle which may be of much wider application, and which therefore it would be as well for magistrates to bear in mind, viz., that the information is the commencement of a proceeding in the nature of an indictment, which, once laid, the complainant cannot withdraw, and the party charged has consequently a right to a formal acquittal, and the consequences of an acquittal both in costs and certificate.

C. B.]

REG. v. GUELDER.

[C. CAR R.]

C.J.—It appears to have contained one-fourth of alcohol; it must therefore have been very strong, for sherry has but one-seventh of alcohol. BYLES, J.—Your client insists it is made wine only.] Yes. [ERLE, C.J.—An expert and skilled chemist stated that it was fermented liquor, and appellant being present said nothing.] The statute was only intended to apply to excisable liquors. [ERLE, C.J.—The main object of the statute was to enforce the observance of the Lord's day; and whether appellant was within the 1st section or not is immaterial, for he was clearly within the 4th section.] Yes; but I shall show that was wrong, and that the words "no person" apply only to licensed victuallers and persons licensed to sell fermented or distilled liquors. There is a doubt whether this statute is in force at all. Bramwell, B. has expressed an opinion that the 17 & 18 Vict. c. 79, repeals the 11 & 12 Vict. c. 49, under which this conviction was made: (*Reg. v. Whiteley*, 3 H. & N. 143.) [ERLE, C.J.—Construing it by the context, it is impossible the learned baron can have meant to say what he is reported to have said. It was an oral, not a written judgment.] I think there is some mistake as to what the learned baron meant; but, as he is reported to have said that the later repealed the earlier statute, I thought it my duty to mention it. The only statute now in force is the 18 & 19 Vict. c. 118.

No counsel appeared for the respondent.

ERLE, C.J.—I am of opinion that the magistrates decided right. The statute prohibits persons having an excise licence, and persons having a beer licence, and other persons, selling fermented liquors during the hours of morning service. This party is found by the magistrates to have sold fermented liquors during morning service, namely, port wine, which was proved before them to be a fermented liquor, containing a quantity of alcohol; it was therefore a strongly operative liquor towards producing intoxication, and he sold it during divine service. Then is he a person other than those licensed? He says the statute only intended to comprise other persons having licences. I am also clear that the Legislature did not, as I conceive, intend to limit the very wide enactment that all other persons besides those having licences shall not sell. I see no sign that they intended so to limit it, and therefore I am of opinion that the appellant was properly convicted.

BYLES, J.—I am of the same opinion. The words "other person" comprehend all the rest of the world except those that are mentioned in the preceding section. The expression is universal, and therefore with that exception, the persons not falling within the exception fall within the general enactment. There is another reason. It is clear on his own showing this mixture was either fermented or distilled, and a scientific witness is called to prove that in his judgment it is not distilled, but fermented; that was a question for them. With respect to the statute being repealed, I think it right to say, our attention having been called to the 17 & 18 Vict. c. 79, and the 18 & 19 Vict. c. 118, it seems there must have been some misreport of the decision of those learned judges; but nothing has been brought before the court to show that there is any other legislation now in course of operation, with respect to the profanation of the Sabbath during morning service, except the 11 & 12 Vict. c. 49, the other two referring to a totally different matter.

KEATING, J.—I am of the same opinion. I think the conviction was right.

*Judgment for respondent.(a)*

(a) It should be observed that, according to the opinion of the C. B., the recent statute does not repeal the earlier one, as was supposed to be decided by *Reg. v. Whiteley*. It would be as well to make a note of this in the text-book used by the clerk or justice.

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-law.

Saturday, Nov. 10.

(Before ERLE, C.J., CROMPTON, J., BRAMWELL and CHANNELL, BB., and HILL, J.)

REG. v. GUELDER.

*Embezzlement—Assistant overseer—Sums received for rates—Fraudulently obtaining overseers' vouchers—Sums properly entered in the assistant overseer's books.*

*It was the assistant overseer's duty to collect the rates, and upon receipt to pay them into a bank to the account of the overseers, and then to obtain the overseers' receipts for sums so paid to their account; it was his duty also to enter the rates, when received by him, in a book. At the audit the accounts so entered by him were contrasted with the receipts given to him by the overseers. Just previous to an audit, the assistant overseer fraudulently obtained from the overseers receipts for sums by stating that he had paid them into the bank to the overseers' account, when in truth he had not, having previously misappropriated them. He produced the receipts to the auditor, and deceived him as to his having handed the moneys over to the overseers:*

*Held, that he was properly convicted of embezzlement, and that the fact of entering the sums when received in his book did not alter the character of the offence.*  
Case reserved for the opinion of this court by Wilde, B., at the last assizes for the county of York:—

Charles Guelder was tried before me, and found guilty on two counts charging him with embezzlement.

For the purposes of this case the conviction of Charles Guelder is to be deemed and taken to be a good conviction, unless the facts about to be stated do not in law constitute the crime of embezzlement.

The prisoner was assistant overseer of the township of Bradfield, and such servant as stated in the indictment.

It was the prisoner's duty, as such servant, to collect the rates from the ratepayers of the township.

The course was, for the prisoner, on receiving any rates, to pay them into a neighbouring bank to the account of the overseers, and then to obtain from the overseers, or one of them, a receipt in a printed form signed by such overseer for such sum so paid to their account.

The prisoner also kept a book in which it was his duty to enter from time to time the various sums received by him.

At the audit, which took place half-yearly, the accounts thus entered as received by the prisoner were contrasted with the receipts given to him by the overseers.

He charged himself by the book, and discharged himself again by the overseers' receipts.

The above being the course of business, the prisoner in the month of May in the present year, on the day of , and just previous to the audit for the half-year, went to two of the overseers, and obtained from them several receipts for various sums stated in the indictment.

He obtained these receipts fraudulently by stating that he had paid the said sums into the bank to the overseers' account, which in truth he had not. He had, in fact, previously appropriated the said sums to his own purposes, and he obtained the receipts with the view of deceiving the auditor as to his having handed the moneys over to the overseers. He produced the receipts at the audit, and was successful.

But he had duly and properly entered the said sums when received in the aforesaid book, and had thus openly charged himself with the receipt of them.

It was contended that having thus charged himself with the receipt of the money he could not be guilty of embezzlement.

Q. B.]

LOOME v. BAILEY.

[Q. B.]

The prisoner was convicted and sentenced, but I reserved for the consideration of this court the following question: could the prisoner, on the above facts, be lawfully convicted of the crime of embezzlement.

JAMES WILDE.

No counsel appeared to argue this case on the prisoner's behalf.

Heard, for the prosecution, was stopped by the court.

ERLE, C.J.—I am of opinion that this conviction ought to be affirmed. It is perfectly clear that the money was embezzled; and that the offence was committed with one of the ordinary concomitants of fraud, fraudulent accounting. The question submitted to us is, whether the prisoner is entitled to be acquitted because he made a true and correct entry of the sums when received in his book. I think not, for those entries may probably have been made with forethought and a view to this defence. I therefore see no reason for doubting the propriety of this conviction.

CROMPTON, J.—I am of the same opinion. The crime of embezzlement was complete when the prisoner appropriated the money. What took place afterwards could not alter the character of the offence. His entering in the book the sums he had received after the embezzlement had taken place could not purge the prisoner's guilt in any way.

The rest of the Court concurred.

*Conviction affirmed.*(a)

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HASTLEY, Esqrs., Barristers-at-Law.

Wednesday, Nov. 28.

LOOME (appellant) v. BAILEY (respondent).

Game—Dealer selling live game within the prohibited season—1 & 2 Will. 4, c. 32, s. 4.

The 1 & 2 Will. 4, c. 32, s. 4, "if any person licensed to deal in game shall buy or sell, or knowingly have in his house, shop, &c. any bird of game after the expiration of ten days from the respective days on which it shall become unlawful to kill or take such birds of game," applies to live as well as dead game.

Case stated by Mr. Bingham, a metropolitan stipendiary justice, on a refusal to convict:—

"John Bailey, of No. 113, Mount-street, Grosvenor-square, in the county of Middlesex, was summoned before me, for that he on the 29th day of March 1860, being then and there licensed to deal in game according to the statute 1 & 2 Will. 4, c. 32, s. 19, did then and there unlawfully sell certain birds of game, to wit three pheasants, on the day last aforesaid, being after the expiration of ten days from the 1st of February 1860, contrary to the form of the statute 1 & 2 Will. 4, c. 32, s. 4, whereby and by force of the statute the said John Bailey hath forfeited a sum not exceeding 5*l.* for the said offence.

"It was proved that on the 26th day of March 1860, the defendant was a person licensed to deal in game under the provisions of the Act 1 & 2 Will. 4, c. 32, s. 19; and that the witness in the case called at the shop of the defendant and asked to purchase some live pheasants; that the defendant asked the witness if he required wild pheasants, and that upon his

replying 'yes,' the defendant said he should have to send to Norfolk for them, and the witness must call on the Thursday following, the 29th of March. That the witness went to the shop of the defendant on the 29th (Thursday) of March, and again saw the defendant, who gave him the pheasants, which he said were wild, and thereupon the witness paid the defendant 2*l.* 5*s.*, taking away the birds.

"Upon these facts the counsel for the defendant submitted that sect. 4 of the 1 & 2 Will. 4, c. 32, did not apply to *live* birds of game; that it contemplated birds of game which were *dead* only. I was of opinion that sect. 4 of the 1 & 2 Will. 4, c. 32, did only apply to birds of game which were *dead*, and dismissed the summons."

*Hawkins* (Orridge with him).—The only question is, whether or not a person licensed to deal in game may, after the time limited by the Act of Parliament for killing game, sell, in the way of his trade, live pheasants? The 3rd section of the 1 & 2 Will. 4, c. 32, enacts that, "if any person whatsoever shall kill, or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game on a Sunday or Christmas-day, such person shall, on conviction thereof before two justices of the peace," pay a specified penalty; and "if any person whatsoever shall kill or take any partridge between the 1st day of February and the 1st day of September in any year, or any pheasant between the 1st day of February and the 1st day of October in any year, he shall pay a penalty on conviction." The 17th and 18th sections authorize the justices to grant licences; and persons who have obtained a licence may purchase game from other persons licensed to kill it. The section on which the case depends is the 4th: "If any person licensed to deal in game by virtue of this Act, as hereinafter mentioned, shall buy or sell, or knowingly have in his house, shop, stall, or possession, or control any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control any bird of game (except birds of game kept in a mew or breeding-place) after the expiration of forty days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, every such person shall on conviction" pay a penalty specified by the Act. The conviction sought to be obtained in this case was founded upon the first part of the section, and, when the effect of that section is considered, the case comes precisely within the mischief contemplated by the Legislature, because the defendant was clearly licensed to deal in game. The 26th March was clearly beyond the ten days, and there was no doubt of the fact that the defendant, being licensed to deal in game, after the expiration of the ten days allowed by the Act did sell three wild pheasants, which, according to the evidence, he sent to Norfolk for. Without reference to any authority upon the subject as to whether the Act of Parliament related to live pheasants or not, according to the ordinary construction of the words of the Act itself, a "bird of game" would include a live as well as a dead pheasant. Suppose, before the recent statute, an indictment had been framed for "stealing one tame pheasant," that would have been construed to mean a live tame pheasant. In Archbold on Criminal Proceedings there were several cases supporting that proposition with reference to the stealing of ducks. It is clear that the object of the Legislature was not only to prevent the killing and destruction of game during the periods limited by the Act, but also to prevent the disturbance of birds of game in their wild state during the period when they ought to be left alone for breed-

(a) The fact that the prisoner had duly entered in his account the money he had embezzled has been hitherto held to entitle him to an acquittal, and many unquestionable thieves thus escaped. The Court of Appeal has now decided in accordance with common sense, that the question is not whether the receipt was acknowledged, but whether the money was fraudulently appropriated by the prisoner. But an accounting may be fairly argued as an argument to support the probability of a mistake rather than a fraud.



Q. B.]

LOOME v. BAILEY.

[Q. B.]

ing purposes; and the mischief contemplated by the Act would hardly be provided for if the court were to hold that "birds of game" were to be limited to dead birds. If so, that would be to open the door to the most extensive robberies upon those who had preserves in the various counties, and would be a great encouragement to poachers; and it might then be contended that if a man took a bird of game alive, he would be entitled to escape by saying, "I have killed it." The meaning of the section is made still more clear by reference to that part of it which relates to the buying and selling, or knowingly having in possession or control, birds of game by licensed dealers. What is there in the Act of Parliament to limit the meaning of the words "bird of game?" Clearly nothing. In *Rees v. Marsh*, 2 B. & C. 720, where an information was laid under the statute of the 5 Anne, c. 14, s. 2, against a carrier for having game in his possession, he was held to be brought within the statute, which made it an offence to be possessed of game "unless sent by a qualified person," and there the general term used was "game."

HULL, J.—Applying both to live and dead game?

HACKINS.—He was fined for every head of game. Also, in *Helps v. Glenister*, 8 Barn. & C. 553, there was a conviction under the 28 Geo. 3, which prohibited the buying of pheasants in all cases. It was held that live pheasants came within the meaning of the term "pheasants" used in the Act. As to the case of *Porritt v. Baker*, relied upon by the defendant, that really decided nothing upon the point before the court.

BLACKBURN, J.—In *Porritt v. Baker* the decision was merely this: that, there being a sale before the limited period, a subsequent delivery was not legal.

HACKINS.—The contract was made during the limited lawful period. If the Act applies only to dead game, and if a person may have in his possession or control birds of game alive within the limited period, the consequence will be that a dealer, supposing it should happen that on the 31st Aug. in any year he has in his possession 500 live partridges, which he says he does not feel called upon to account for, may, on the 1st Sept., kill them; and the effect beyond all doubt would be this, that it would hold out an encouragement to poachers to net as much as they could before the 1st Sept., and put them in the hands of a licensed dealer to feed; and then any person could say to the dealer on the 31st Aug., "The Act applies only to dead and not to live birds. I have 500 partridges; if you purchase them you can kill them to-morrow, and escape the penalty." However, if the Act were to be construed as the defendant contends it ought to be, this consequence would follow, that though a person not licensed to deal in game might not have in his possession any birds except those kept in a mew or breeding place, a person licensed to deal in game might have live birds whether kept in a mew or breeding place or not.

LUSH (J. J. Powell with him).—It cannot be contended that this case was not within the literal meaning of the words of the 4th section. The question is whether, looking at the object and intention of the Act, the words of the section are not to have a limited meaning, so as to be confined to dead game. And for this purpose it is necessary to consider the spirit of the Act, by reference to the decisions upon previous Game Acts, which throw some light upon the matter. In *Simpson v. Unwin*, 3 B. & Ald. 134, under the 2 Geo. 3, c. 19, which statute enacted "that no person shall, under any pretence whatsoever, have in his possession or control, or take, kill, destroy, sell, buy, or have in his possession any partridge between the 12th of February and the 1st of September," and if he did he was to be liable to a penalty. The defendant had a partridge on the 9th Feb. that was

killed before the 1st, and the court held in that case he might keep the bird until it was fit for food. It is not the literal meaning alone that is to be taken, but the intention of the Legislature is to be considered. In the case of *Bridger v. Richardson*, 2 M. & S. 568, under the statute 3 Jac. 1 (a case relating to the taking of the spawn of fish), it was decided that the taking for destruction was alone prohibited by the statute. The object of the game laws was undoubtedly to prohibit the taking with intent to destroy, and so to preserve game. The meaning of "taking" is, taking with intent to destroy. If you put the other construction upon it, you will prevent a landowner taking his own pheasants.

BLACKBURN, J.—In close time; and I think that was the object of the Act. I think it was expressly intended to do that.

LUSH.—That is the very question. Many landowners may desire to increase their breed, or to change their breed.

WIGHTMAN, J.—They may do all this in season.

LUSH.—Not during the time of their being killed. The 3rd section would import a taking for the purpose of destruction.

WIGHTMAN, J.—They may be taken in a net for a very different purpose.

BLACKBURN, J.—The language is very superfluous in that case, if the "taking" only applies to taking in order to kill. The man who would take would kill, and you would catch him under the first words.

LUSH.—No; a man may take on a Sunday, and kill on the Monday. The association of the words "take" or "kill" in the Act of Parliament shows that that meaning is to be given—taking for the purpose of killing. The using of a gun, a dog, or a net, would point to the purpose of destruction. The word "take" is necessary to cover a transaction of this kind. If any person used "any dog for the purpose of killing game on a Sunday," that would be within the clause.

WIGHTMAN, J.—I doubt whether the Legislature meant the Act to apply to the case of a man catching his game by his own hand.

LUSH.—They do not contemplate the destruction of game, but the taking for the purpose of destruction. If the 4th section of the Act meant that no person licensed to deal in game shall buy or sell any bird of game after the expiration of ten days, it would be undoubtedly incompetent for any landowner who wanted to improve and increase his breed of pheasants to employ the agency of a licensed dealer in game.

HULL, J.—According to Parke, B.'s judgment in the case of *Porritt v. Baker*, a licensed dealer might supply live game, provided he caused them to be delivered out of a mew or breeding-place, and upon a contract made during the season.

LUSH.—His Lordship expressed an opinion that a licensed dealer, if he had them in his possession, might sell them afterwards.

WIGHTMAN, J.—He seems to consider they should be out of a mew.

LUSH.—In his judgment, he says, "a dealer may contract to deliver at any time" birds which he has obtained "during the season."

BLACKBURN, J.—That expression is against you. He has carefully put it, that he may, "during the season, make a contract to deliver out of a mew." That is not expressly a decision that you cannot make a contract after the season. It is not an authority for you.

WIGHTMAN, J.—Do not the words "out of a mew or breeding-place" militate against your view of the statute? What effect do you give to those words "except birds of game kept in a mew?" Surely that contemplates the sale of live birds.

LUSH.—That belongs to the second branch of the section, and applies to persons who are not dealers in game.

Q. B.]

Ex parte LIEUTENANT ALLEN.

[Q. B.]

BLACKBURN, J.—By the 4th section a dealer is prohibited having in his possession or control any bird of game after the expiration of ten days from the day on which it is lawful, &c. Then as to an unauthorised person, it is "except birds of game kept in a mew or breeding-place." I confess I should have thought the meaning was this—that inasmuch as licensed dealers were so extremely likely to encourage poaching, we say positively, between certain days mentioned in this Act, a licensed dealer shall not have a bird of game under any pretence, alive or dead, but an unlicensed person may have a bird in a mew or breeding-place.

Lush.—The words of the statute need not have a literal meaning put upon them, but the spirit of the Act must be looked at.

WIGHTMAN, J.—I certainly entertain no doubt upon this question. It appears to me only to turn on the meaning to be given to the words "bird of game." Now, that is to have the same meaning throughout the whole of the section; and whatever doubt there may have been thrown on the question, that exception in the middle of the section, "except birds of game kept in a mew or breeding-place," can be only applicable to live birds; and it shows that the Legislature, in this section, contemplated both live and dead birds. On that short ground it appears to me that no reasonable doubt can exist in this case. And with respect to the case in the Ex. (*Porritt v. Baker*), I do not see that it amounts to any decision on the point now before us.

HILL, J.—I am of the same opinion.

BLACKBURN, J.—I am of the same opinion.

WIGHTMAN, J.—The case must go back, to be reheard upon the evidence. (a)

Nov. 23 and 24.

Ex parte LIEUTENANT ALLEN.

Court-martial—Offence of a civil nature—Place of imprisonment abroad—Changing same—Mutiny Act—Articles of war—20 § 21 Vict. c. 13.

The Mutiny Act 1857, s. 38, enacts, that the place of imprisonment of persons under sentence of general courts-martial shall be appointed by the officer commanding the district. Sect. 40, that every governor, gaoler, &c. of any gaol in any part of her Majesty's dominions shall receive into his custody any military offender under sentence by a court-martial upon an order in writing from the officer commanding the corps to which the offender belongs. Sect. 41 authorises the officer commanding the district to change the place of imprisonment.

Lieutenant in her Majesty's service was convicted of manslaughter by a court-martial in India, and sentenced to four years' imprisonment, and ordered by the officer commanding the corps to be imprisoned in a place in India, and he afterwards ordered A.'s removal to England to undergo the remainder of his imprisonment. When in England A. was subsequently lodged in the Queen's Prison under a warrant from the Horse Guards, signed by the Adjutant-General:

Held, that the keeper of the Queen's Prison was not justified in detaining A. under that warrant, and that he was entitled to his discharge.

Rule nisi calling upon the governor of the Queen's Prison to show cause why a writ of *habeas corpus* should not issue to bring up the body of William

Henry Craven Allen, a lieutenant in the 82nd Foot, in order to his discharge, upon the ground that he was detained in illegal custody under the sentence of a court-martial.

The main facts of the case had been laid before the court in the applicant's affidavit, and it had been agreed on both sides that the argument should be taken upon the present rule, and if the judgment of the court should be that his custody was illegal, Lieutenant Allen should be at once discharged.

On the 28th Feb. 1859 Lieutenant Allen was tried by court-martial at Shahjehanpore, more than 120 miles from Fort William, for the wilful murder of one Bidassce. The court-martial acquitted him of the crime of murder, but found him guilty of manslaughter, and sentenced him to four years' imprisonment, without hard labour. The sentence was confirmed by the Commander-in-Chief, who appointed Agra Fort as the place of his imprisonment. He was accordingly confined at Agra till the 20th Nov. 1859, when he was removed to Fort William, at Calcutta, whence he was brought to England, and arrived on the 20th June last. He was at first taken to Chatham, and on the 28th June to the prison at Milbank, where he was treated as a convict, and subjected to penal servitude. Remonstrances were made, and he was sent from Milbank to Weedon, a prison which was used for the custody of common soldiers, and there treated as a common soldier.

On the 16th July he was removed to Newgate, and on the 24th July to the Queen's Prison, where he was now being treated as a person whose sentence was one of imprisonment only. He was there detained under an order signed on the 28th July 1860, by the Adjutant-General, in execution of the sentence pronounced by the court-martial in India.

The Solicitor-General and Welsby showed cause.—The only question now was, whether Lieutenant Allen, being in custody in the Queen's Prison under a sentence of court-martial, was in lawful custody. The offence with which Lieutenant Allen was charged was a non-military offence and one committed against the ordinary criminal law of the country; but, owing to the distance at which his regiment was stationed from Calcutta, it was necessary to have recourse to the provision which had been made by the 131st of the Articles of War for the trial of offences committed by officers and common soldiers by court-martial. Those articles were made by her Majesty, under the authority of the Mutiny Act of 1857 (20 Vict. c. 13, s. 1); and it was by a court-martial so constituted that Lieutenant Allen was convicted and sentenced to four years' imprisonment. It was said that there was no power to imprison him beyond the Indian territories; but he (the Solicitor-General) contended that on a writ of *habeas corpus* the court would not consider the propriety of the place of punishment, but only whether he was under a penal sentence and in legal custody. The 38th section of the Mutiny Act of 1857 enacted, "That the place of imprisonment under the sentences of general courts-martial shall be appointed by the officer commanding the district, garrison, island, or colony, and under the sentence of any other court-martial, shall be appointed by the officer confirming the proceedings of such court-martial, and in default of such appointment, then the place of imprisonment should be appointed by the officer commanding the regiment or corps to which the offender belongs or is attached." Under that section the Fort of Agra was appointed as the place of Lieutenant Allen's imprisonment, but there was nothing to show that that was to be the sole place. It might be impossible that he could be imprisoned there. The 40th section enacts that "every governor, provost-marshal, gaoler, or keeper of any public prison, or of any gaol or house of correction in any part of her Majesty's dominions, shall receive into his custody any military offender under sentence of imprisonment by a court-

(a) As a consequence of this decision, a game dealer must not buy, keep, or sell live game, except during the shooting season. It was notoriously the practice with many of them to buy a lot of live game and kill them on the evening before the proper day, so that the birds might appear in the shop window at the earliest period in the morning, before any birds could possibly have been shot and sent to them from the country.

Q. B.]

Ex parte LIEUTENANT ALLEN.

[Q. B.]

martial, upon delivering to him an order in writing in that behalf from the officer commanding the regiment or corps to which the offender belongs or is attached, which order shall specify the period of imprisonment which the offender is to undergo, and the day and hour of the day on which he is to be released." &c. [HILL, J.—Under what statute is Lieutenant Allen now in custody in England?] It ought to be shown on the other side that the custody is unlawful.

COCKBURN, C.J.—It is stated, on the part of Lieut. Allen, that he is in illegal custody when it is shown that he is not in the custody pointed out by the Act. Where it is said that he shall be confined in such a place, the words "and in no other" must be implied. The sentence was that he should be imprisoned at Agra, and he is now found in prison in England. His Lordship asked whether Lord Clyde, who had given the order for the imprisonment at Agra, had given the order for his removal.

The *Solicitor-General* said he was unable to state that he had done so. The only statement on the subject was contained in the letter of the officer to Lieut. Allen, saying that "instructions had been received" to remove him to this country.

HILL, J.—It is very important to know whether those instructions had been given by Lord Clyde, and referred to the 41st section, which enacted that "in the case of a prisoner undergoing imprisonment in any public prison other than the military prison set apart by the authority under this Act, or in any gaol or house of correction in any part of her Majesty's dominions, it shall be lawful for the officer who confirmed the proceedings of the court, or for the officer commanding the district, garrison, island, or colony, to give, as often as occasion may arise, an order in writing directing that the prisoner be discharged, or be delivered over to military custody, whether for the purpose of being removed to some other prison or place, there to undergo the remainder or any part of his sentence, or for the purpose of being brought before a court-martial as a witness, or for trial."

COCKBURN, C.J.—Power was given to Lord Clyde by that section to change the place of imprisonment, and it was very important to know whether he had done so.

*Welsby* on the same side.—The designation of the place of confinement is no part of the sentence of the court. That is a mere direction, and is independent of the sentence. This is the sentence of a competent court. The order of Lord Clyde is the order of an independent officer: (*The Canadian Prisoners* case, 5 M. & W. 32.)

*Shee, Serjt. (J. Brown with him)* was stopped by the court.

COCKBURN, C. J.—Upon this state of facts I entertain no doubt that the imprisonment in England is illegal, and that Lieutenant Allen is entitled to his discharge. The court may regret that, in the case of a serious offence of which he has been found guilty, a mistake should have occurred in carrying out the sentence passed upon him, so as to entitle him to be liberated before the sentence has been completed. It is, however, the duty of the court to see whether the imprisonment is justifiable in point of law, and the conclusion to which we have come is that it was not. He was tried for an offence cognisable only by a civil tribunal, except by virtue of the Mutiny Act, and the Articles of War incorporated with it. But the powers given by the Mutiny Act to a court-martial to try civil offences are limited. The Act does not confer on the court-martial power to declare where the sentence shall be carried into effect; and after a court-martial has found the accused guilty it is for the officer commanding the district to appoint the place of his imprisonment. In this case the commanding officer appointed Agra; but it is now found that the

prisoner, instead of undergoing his imprisonment in accordance with his sentence, is in prison in this country. That is not in accordance with the sentence passed by the judges, by authority of the Act of Parliament. The court has therefore to inquire whether the change in the place of imprisonment has been made by a person authorised to do it under any Act of Parliament. The only power under the Mutiny Act and Articles of War to change his place of imprisonment is given by the 41st section, which enables the commanding officer, the officer appointed by the 38th section to appoint the place of his imprisonment, by order in writing, to change it. In the present case there is nothing to show that Lord Clyde, who appointed the place of his imprisonment at Agra, has done anything under the 41st section to change the place of his imprisonment; and therefore, his sentence being that he should be imprisoned at Agra, and being in prison in this country, the court thinks he is entitled to be discharged. If before to-morrow the *Solicitor-General* upon inquiry shall be led to entertain that there is a reasonable belief that there was any order in existence to change the place of his imprisonment, the court will pause before ordering the discharge of the prisoner, and will give an opportunity for the parties before the court being heard, otherwise the prisoner will be discharged.

HILL and BLACKBURN, JJ. concurred.

On the following day the *Solicitor-General* produced an affidavit which made it probable that Lord Clyde had ordered Lieutenant Allen to be removed to England to undergo the remainder of his sentence, but the warrant to the keeper of the Queen's prison was upon an order issued from the Horse Guards, signed by the Adjutant-General.

*Shee, Serjt. (J. Brown with him)* was then called upon to support the rule.—This offence does not fall within sect. 41. He was tried by a court-martial for an offence not of a military character, at a place within the jurisdiction of the Supreme Court of Judicature at Bengal. There is no authority for trying him for this offence by a court martial. Then, Lord Clyde having once exercised his discretion and ordered the imprisonment to be at Agra, he had no power change it. The statute applies only to military prisons, and to persons in custody for military offences. The fort of Agra is not a public prison within the meaning of the Act. Sects. 40 and 41 of the Mutiny Act were referred to, and sect. 147 of the Articles of War.

COCKBURN, C.J.—I think, assuming all the facts now suggested on the new affidavit, that the result would be that this rule must be made absolute. It is not necessary to determine the preliminary question whether this case falls within sect. 41. Even if it does, it is clear that the provisions of the Act have not been complied with, and, as the case stands, there is no legal warrant by which the keeper of the Queen's Prison can hold Lieut. Allen. Sects. 40 and 41 seem somewhat at variance. The one section makes the order of the officer commanding the regiment to which the offender belongs necessary as a condition to the gaoler's receiving a prisoner into custody, and the other makes the order of the officer commanding the district necessary as the condition of the offender's being taken from one gaol to another. Even then it might be a question whether the order of the officer commanding the regiment was not necessary. However that may be, there was no order in writing under which the keeper of the Queen's Prison was authorised to receive Lieut. Allen. All that Lord Clyde did in the first instance was to order the defendant to be imprisoned at Agra, and I will assume that he afterwards made an order directing him to be sent to this country; but is there any order to the keeper of the Queen's Prison from Lord Clyde, or the officer commanding the regiment to which Lieut. Allen belonged? That omission seems

Q. B.]

Ex parte BARFORD.

[Q. B.]

to have been attempted to be supplied by an order of the Adjutant-General as representing the Commander-in-Chief. It follows, therefore, that the custody in the Queen's Prison is unlawful, because there is no proper warrant. In the *Canadian Prisoners* case, the prisoners were liable to be tried for high treason, and the court, therefore, would not set them free.

HILL, J.—The only order of Lord Clyde is for the purpose of the offender being removed to England, there to undergo the remainder of his sentence. The prisoner being found in England in the custody of the keeper of the Queen's Prison, what is the authority under which he remains there? The only warrant is from the Horse Guards. There is nothing in the Act which authorises such an order, and there is therefore no legal warrant.

BLACKBURN, J.—In the *Canadian Prisoners* case there was nothing to prevent the prisoners from being tried for high treason in this country, and for that reason they were not discharged, and the court was authorised to detain them for that purpose by the common law. Here Lieutenant Allen has been tried and imprisoned at Agra, and he was sent to England to undergo the remainder of his sentence, and he is detained in the Queen's Prison. That is not a detention at common law; it is necessary to show some statutory authority authorising his detention there. For the reasons already stated, I am of opinion that the case is not brought within any statutory provision. *Rule absolute.*

Friday, Nov. 23.

Ex parte BARFORD.

Parent and child—Father's right to custody—Child under sixteen—*Habeas corpus.*

A father, if there be no disqualifying cause, has a right to the custody of a female child up to the age of sixteen, although she be unwilling to live under his care and control.

In this case the court had granted writs of *habeas corpus* directed to John Howse and Rachael Hopkins to bring up the body of Charlotte Barford, a young lady aged fifteen years, in order to her being delivered up to her father, who obtained the writs. The young lady was this day produced on return to the writs, and the question was then raised as to whether she was of an age to exercise a discretion as to whether she would return home to her father, or whether the father had not an absolute right to have his child delivered up to him by the order of the court.

Steele, on the part of the father, moved that the young lady now in court should be delivered up to her father, and read an affidavit in which the father stated all the circumstances under which his daughter had been withdrawn from his roof, and taken to London by Howse, and sent about to various places after the writ of *habeas corpus* was granted. The affidavit concluded with a statement that the applicant had always treated his daughter with the greatest kindness, and that his object was to save his daughter from the improper hands and society into which she had fallen.

D. Seymour said he had not had an opportunity of answering the affidavit; and as to the motion made that the girl should be delivered up, he submitted she was quite of age to speak for herself.

Cockburn, C.J. then directed that the girl should be taken into his private room, and said the counsel on both sides might accompany her if they wished.

The parties then all withdrew, and were absent from the court for some time. Upon their lordship's return,

Cockburn, C.J. said he wished to hear counsel upon the question of law, whether the father was entitled to have the child delivered up to him.

Steele then referred to the repealed statute, 4 & 5 Phil. & M. c. 8, which enacted that "Nobody shall take away any maid or woman child unmarried, being within the age of sixteen years, out

of or from the possession, custody, or governance, and against the will of the father of such maid or woman child, or of such persons to whom the father of such maid or woman child by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give, or grant the order, keeping, education, and governance of such maid or woman child." That statute was in substance re-enacted by the 20th section of the 9 Geo. 4, c. 31, now in force, which enacted that, "If any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen, out of the possession, and against the will of the father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or both, as the court shall award." The learned counsel contended that this statute assumed and recognised the right of the father to have the custody of his daughter up to sixteen years of age; but he went further, and contended that, under the 12 Car. 2, c. 24, the father had the right to the custody of his children until they were of the full age of twenty-one years. The words of the statute were, "That where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child, or children, whether born at the time of the decease of the father or at that time *en ventre de sa mere*, or whether such father be within the age of twenty-one years or of full age, by his deed executed in his lifetime, or by his last will and testament in writing, in the presence of two or more credible witnesses, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession, or remainder, other than Popish recusants," &c. He also referred to the case of *R. v. Greenhill*, 4 Ad. & Ell. 624.)

Cockburn, C.J. said the difficulty was in fixing the age at which the child was too young to exercise a choice.

HILL, J. said the law was now settled that, though the girl was a consenting party, and left her father of her own free will, she had no mind or will of her own that could infringe on her father's parental right. His Lordship referred to the case of *Reg. v. Mantelov*.

Cockburn, C.J. said the court had examined the person herself, and she had had every opportunity of explaining; but the result of the examination was that she could not suggest any misconduct on the part of her father which would justify her in leaving his house.

HILL, J. said the question was, whether, if the girl chose to set her father's authority at defiance, she could do so?

Seymour said he appeared for Howse, and also for Miss Hopkins, and that, if he had the opportunity, he thought he could answer the father's affidavit, and show that his was not the proper custody.

Cockburn, C.J. said that ought to have been done on the return to the writ, and he should be very reluctant to give an opportunity of stating in an affidavit charges which the girl herself when examined had not preferred.

Seymour referred to the authorities, and contended that the girl was old enough to exercise her choice, and that the court would not control her.

Blackburn, J. referred to *Rutcliffe's* case, 3 Co. 39 a, and Fraser's note thereon.

Cockburn, C.J. also referred to the recent case of *Reg. v. Timmins*, 3 L. T. Rep. N. S. 337, and, after consulting with the other judges, said no case had been made out on the part of those who resisted the ap-

C. B.]

BULMER v. NORRIS—ACLAND &amp; LEWIS.

[C. B.]

plication to the court that the child should be delivered up to the care of her father. It was for them to show that, though entitled in point of law to the custody of the child, the father ought not, in regard to the interests of the child, to have that custody. The question was, therefore, a simple question of law, whether the father was entitled to the custody of the child, she being fifteen years of age, when that daughter, without any adequate or justifying cause, desired to withdraw herself from his parental care and control, for, unhappily, it was not to be disguised that the unfortunate girl was, he feared, influenced by evil counsels and evil examples, and was desirous, without adequate motive, to withdraw herself from the care and affectionate control of her father, and cast herself on those by whom she was likely to be misled to, perhaps, her eventual destruction, and if the court could save her from what her folly would lead her into, they would rejoice. The cases go to this length, that, though the father is entitled to the custody of his child up to twenty-one years of age, the courts will not interfere summarily, by writ of *habeas corpus*, to withdraw the child from the custody in which she happens to be, if the child has arrived at the age of discretion at which she can exercise a choice. The question is, what was the age at which the child attained that discretion? He (Cockburn, C.J.) wholly repudiated, as fraught with the most dangerous consequences, the doctrine that mental intellectual precocity would give it the right, if the child had not arrived at the age of discretion which the law recognised, for that very precocity might be the thing of all others to lead a young girl into misery and danger. The court must lay down a general rule as to the age when the minor might be left to freedom of choice. The Legislature had thrown light on this subject, by which the court might be safely guided. The age of sixteen had been pointed out as the age up to which the consent of a female child should not justify her withdrawal from the father's roof without its being considered a misdemeanor. We may therefore safely act upon the rule that the age of sixteen is that up to which a female child ought to be subject to parental control. Up to that period no encouragement was afforded by the law, any more than by public opinion, to induce a young woman to withdraw herself from the parental control. In the present case there was nothing to justify that withdrawal, and the result was, that the court would order that the girl be delivered up to her father. His Lordship would also add, that if the persons who had done their best to baffle the exertions of this court had been indicted under the statute 9 Geo. 4, c. 31, no one could doubt that they would have been liable to be convicted of the offence. How, then, could the court allow the girl to remain in their custody? The order, therefore, would be that she should be restored to her father; but his Lordship warned the parties to take care for the future, lest they should bring themselves within the law. His Lordship concluded by observing that the court had not come to this conclusion without great consideration, nor without consulting with the judges of the other courts, all of whom were unanimous in opinion with the judges of this court.

The rest of the COURT concurred.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MATD, Esqrs  
Barristers-at-Law.

#### REGISTRATION APPEALS.

Thursday, Nov. 13.

BULMER (appellant) v. NORRIS (respondent).

ACLAND (appellant) v. LEWIS (respondent).

County vote—Qualification—Right of member of corporation aggregate to vote in respect of shares—

Joint-stock company—19 & 20 Vict. c. 47—20 & 21 Vict. c. 14.

Members of a corporation aggregate having a perpetual succession and a common seal, under the Joint-Stock Companies Acts 1856 and 1857, with power to hold lands, are not entitled to vote at elections in respect of the shares they hold in the company.

The claimant was a shareholder in a joint-stock company, incorporated under 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14, having power to hold lands, and holding a freehold mill and premises, and had 40s. a-year in respect of shares arising out of the said freehold premises:

Held, that he was not entitled to vote, for that, as a shareholder, he had no freehold estate, legal or equitable, in the land held by the company; but only a right to participate in the profits made by the company.

Case.—At a court held at Otley, in the West Riding of the county of York, before me, one of the revising barristers for the said riding, Thomas Brown claimed to vote in respect of certain freehold mill and premises situate in the township of Yeadon, in the polling district of Otley aforesaid, in the said riding, in the following form:—

Name	Abode.	Nature of Qualification, &c.	Where Situate, &c.
Brown, Thomas.	West Hall, Yeadon.	Share in Freehold mill and tenements.	Albert Mill.

The freehold premises in respect of which the said Thomas Brown claimed to vote were the property of a joint-stock company incorporated under the provisions of the Joint-Stock Companies Acts 1856 and 1857.

The claimant was a shareholder in the said company, and had forty shillings a year in respect of his shares arising out of the said freehold premises.

On the part of the respondent it was contended, that members of a corporation aggregate, or of any association of persons incorporated, having a perpetual succession and a common seal, with power to hold lands under the provisions of the Joint-Stock Companies Acts 1856 and 1857, are necessarily incapacitated from voting at elections, and that the name of the said Thomas Brown must therefore be expunged.

Being of the same opinion I disallowed the claim, and the said James Edward Norris, who appeared on behalf of the objector, consented to be named respondent in this appeal.

Verdict for the appellant.—Two questions arise in this case: the first is, whether members of a corporation aggregate have a right to vote in respect of the corporation property; secondly, if so, have shareholders in the present case such an interest in the realty held by the corporation as to give them a right to vote. I content for the affirmative on both points. The statutes referred to in the case are the 19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14 (the Joint-Stock Companies Acts). Sect. 7 of 19 & 20 Vict. c. 47, provides the form of memorandum of association, and sect. 13 shows the effect of registration, and provides that, upon the memorandum of association being registered, the registrar is to certify that the company is incorporated, and, in case of a limited company, that the company is limited. The subscribers of the memorandum, together with such other persons as may from time to time become shareholders, shall thereupon become a body corporate, by the name, &c., having a perpetual succession and a common seal, with power to hold lands, but with such pecuniary liability as is thereafter mentioned. It is not denied that the general proposition is that which has been acted upon by the revising barrister in the present case, but here it is not applicable. At common law there was a general right of the free-

C. B.]

BULMER v. NORRIS—ACLAND v. LEWIS.

[C. B.]

bolder to vote, and such rights must be maintained unless taken away by express enactment of the Legislature. The foundation of the decision of the revising barrister is to be found, no doubt, in three resolutions in the House of Commons in 1624: (House of Com. Jour. 398.) But it will not be denied that these have been in some instances departed from, as, for example, in the case of corporations sole, such as rectors, or parsons and vicars: (Dalton on Law of Sheriff; *Middlesex Election case*, 2 Peckwell, 113.) There have been decisions of the House of Commons, but none of this court, on such a question as this. It is laid down in Rogers on Elections, 136, that corporations sole vote. The author proceeds to say, "It is difficult to understand the principle upon which individuals who are members of corporations aggregate are disabled from voting in respect of the interest they possess as members of a corporate body:" (Elliott, 16, 17 and 18.) But though there has been no case where a decision has been given on this point, there are cases where the question has been discussed. *Reg. v. Robson*, 1 K. & G. 141, will be cited as an authority in their favour by the other side, but in reality it is not so, for the ground of the decision there was that the Fellows had not a 40s. holding between them: (*Heath v. Haynes*, 1 K. & G. 99; *Simpson v. Wilkinson*, 14 L. J. 49, C. P.; *Baxter v. Brown*, 7 M. & G. 198.) This case is not distinguishable from what that case would have been if the company had been registered under 7 & 8 Vict. c. 110. The resolutions of the House of Commons have been much shaken and damaged, and the third absolutely negated, by subsequent Acts of Parliament and subsequent decisions. For this reason the appeal should be allowed.

*Manisty*, Q.C. for the respondent.—It has been conceded by my learned friend that the general proposition is against him, and he has not succeeded in showing that the case does not come within it. The court is here called on to depart from first principles, which it will not do. It is contended that the separate entity of the shareholders is merged in the body corporate which they became, with all the incidents thereto belonging. In Grant on Corporations, pp. 53-55, are admirably collected and clearly stated all the characteristics and incidents of bodies corporate: "A corporation is in fact an abstraction of law, having no existence or power of action but what the law gives it," &c. Also "a corporation is something of an abstract nature, having a metaphysical existence only, and therefore not tangible, visible, or the object of the senses." The shareholders of a joint-stock company are not directly interested in the land it may hold, they are only interested in the property by enjoyment of the profits. They have no individual seisin divided or undivided. There is no resulting trust—there is no conveyance, and the shares in it pass by simple transfer. Look at railway companies which hold land, and see what inconvenience it would lead to if the court should hold that a right to vote was incident to the holding of shares; you must in such event ascertain the value which the shareholder held in the land occupied by the company in each county; the complication and difficulty would be immense and insuperable. Sect. 15 of 19 & 20 Vict. c. 47, enacts that shares in registered companies "shall be personal estate, and not of the nature of real estate." In *Bligh v. Brent*, 2 Y. & Coll. 268, Ex. Eq., the court held that real property held for the purposes of a trading company is in equity to be deemed of the nature of personal estate, although the company is a corporation. On that case we rely. The shareholders of a public company are a vast shifting mass, and have no interest in the property beyond the enjoyment of its profits; and if the court should hold otherwise, the consequence would be to create vast inconvenience. The judgment of the court should therefore be for the respondent.

*West* in reply.—My learned friend has laid down

no first principle which will deprive the shareholders of their right to vote. As to the inconvenience anticipated in working out the law if shareholders should be held entitled to vote, that cannot arise, for the shareholder must be possessed of his right on the 31st Jan. in the year for which he claims. *Cur. adv. vult.*

*Nov. 26.*—KEATING, J.—In this case Thomas Bulmer claimed to vote for the West Riding of the county of York, in respect of a qualification described as a share in a freehold mill and tenement. The revising barrister found that it was a share in a joint-stock company incorporated under the Joint-Stock Companies Acts 1856 and 1857, and paying 40s. a year in respect of his share arising out of a share in respect of certain freehold premises. It was objected that the shares in a company incorporated under the provisions of the Joint-Stock Companies Act did not confer on the holder the right to vote in respect of the land of the corporation, and the revising barrister decided against the claim. We think he was right. The Joint-Stock Companies Act of the 19 & 20 Vict. c. 47, s. 13, provides that on incorporation of a company being certified by the registrar, the shareholders shall be a body corporate by a name described in the memorandum of association, having a perpetual succession and common seal, with power to hold land, but with such peculiar liability on the part of the shareholders as is hereinafter mentioned; and by the 15th section it is enacted that the shares so issued shall be personal estate, and not be in the nature of real estate, it being thus provided that the land shall be held by the corporation, and the shares shall be personal property, and not in the nature of real property. We are of opinion that a shareholder, as such, can have no freehold estate, legal or equitable, in land so held by the corporation; it is rather confined to his proportionate share of the profits of the company. This opinion, which seems to us so entirely consistent with the legal constitution of the corporation, as to the distinction between a corporate body and its individual members, is fully sustained by the authorities on the subject. In *Bligh v. Brent*, 2 Y. & C. 294, it was clearly laid down that in a joint-stock company, incorporated by Act of Parliament, the shareholders are entitled to no direct interest in the land held by the corporation; but no part of the realty is held in trust for them, and all that they are entitled to is, that the property held by the corporation shall create profits in which they have a right to participate, according to the number of their shares. This case was recognised, and the principle of this decision acted upon, in the case *Hilton v. Giraud*, 1 De G. & Sm. 187, and has never been dissented from in any of the subsequent cases. The decision under the Mortmain Acts also proceeds on similar principles. See the case of *Sparling v. Parker*, 9 Beav. 450; and *Walker v. Milne*, 11 Beav. 518. In *Myers v. Perigal*, 11 C. B. 90, this court held that shares in a banking company where the real estate vested in trustees, and the shareholders were entitled to profits only, were not within the Mortmain Act; and that decision was acted upon by Lord St. Leonards and reported in 2 De G. M. & G. 599. In *Watson v. Spratley*, 10 Exch. 222, a question arose whether shares in a mine conducted by a joint-stock company on the cost-book principle were an interest in land, and although the court were divided as to whether the opinion of the jury should have been taken on the facts of the case, yet all the judges agreed that the distinction above referred to as between the corporation and its members, and a joint-stock company incorporated by Act of Parliament, with respect to land held by the corporation, was well established. We were pressed during the argument by the case of *Baxter v. Brown*, 7 M. & G. 198, where partnership property, including

C. B.]

ALEXANDER v. WORMAN.

[Ex.]

land, was conveyed to the use of trustees, and the deed of partnership provided that they should stand seised and possessed thereof, and interested therein, on trust for the benefit of themselves and their partners in the joint concern, as part of the partnership, and the joint stock-in-trade. There can be little doubt that the partners who are not trustees, would still take an interest in the land; but it was insisted that as it was by the same deed provided that the property including land should be deemed and considered as in the nature of personal estate, and not real estate—that the partners had not such an interest as entitled them to vote under any of the statutes which conferred the right upon them. This court held that they were so entitled, notwithstanding the clause in the partnership deed above referred to, which, as a voluntary agreement under a partnership *inter se*, might regulate the mode of enjoyment, but could not change the nature and quality of the estate. The Lord Chief Justice, in giving judgment, carefully distinguishes that case from one in which a corporation is established by Act of Parliament, that the shares shall be considered personalty, and not in the nature of real estate. In that latter case there can be no real interest in the several shareholders so as to entitle them to vote. The resolution of the House of Commons in 1624, cited in argument before us, cannot confer on the party the right of voting conferred by the statute; but in this case it appears, so far as it is applied to a corporation aggregate, to be a sound principle of law, and the fact that members of such corporation have not been in the habit of voting in respect of land held by a corporate body is strong to show that the opinion we express is that which has been long entertained. The judgment, therefore, will be affirmed.

*Judgment for respondent.*

ACLAND (appellant) v. LEWIS (respondent).  
*County vote—Qualification—Corporation aggregate.*

This was likewise a consolidated appeal. It came before the court from the decision of the revising barrister for the eastern division of the county of Kent. All that is material of the case is given in the judgment, and as the decision followed that of the case reported above, it is needless to state the facts and arguments.

G. Deaman argued for the appellant, *Macnamara* Cur. adv. vult.

KRATING, J.—This was a consolidated appeal against the decision of the revising barrister for the eastern division of the county of Kent. It appears that one Thomas Acland, with a number of other persons, a list of whom was handed to the court, claimed to have their names added to the list of voters as members of a corporation called the company of Free Fishers and Dredgers of Whitstable, in the county of Kent. The revising barrister disallowed the claim so made, and we think he was right in so doing. The corporation, of which the claimants were members, was created by an Act of the 33 Geo. 3, c. 42, which, after reciting that a certain company called the Whitstable Company of Dredgers, had, from time out of mind, held and carried on, under certain regulations, a certain oyster fishery as tenants of the lords of the manor, on payment of the rent, and that it was desirable that the company should be allowed to purchase the whole of the said manor, but that they were disabled from so doing on account of the debts, whether they were a corporation in law, or whether they were under the Statute of Mortmain, proceeded to enact, that the corporation should be incorporated by the name of the Company of Free Fishers and Dredgers of Whitstable, in the county of Kent, with perpetual succession under the common seal, and the corporation should exercise all the powers of the old company, and have power to purchase, take and enjoy the manors and royalty

when purchased, and the power, when purchased, to sell and mortgage the same, and under certain regulations to borrow money, to be secured by bond under the common seal of the corporation. In pursuance of the powers thus given, part of the said manor and royalty was, soon after the passing of the Act, purchased by and duly conveyed to, the corporation, their successors and assigns, to the only proper use and behoof of the corporation, their successors and assigns. That appears to us to be clearly the effect of the Act of Parliament, and the conveyance in pursuance thereof was to vest the property in the corporation, and the members individually had no seisin legally or equitably of the land so held, nor of any freehold interest, so as to enable them to vote under the Act of Henry VI., or any of the more recent statutes. The legal estate was undoubtedly in the corporation, and although the profits realised by the corporation were divisible among the members rateably, yet it appears to us, looking at the Act of Parliament, and the finding of the revising barrister, that the right of the individual members was confined to a share in the profits when ascertained by a deduction of the expenses, and did not extend to a legal or equitable interest in the land itself. The case, therefore, comes within the principle of the division in *Balmer v. Norris*, and the authorities there cited, and therefore the decision of the revising barrister will be confirmed. *Judgment for respondent.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY, and S. McCULLOCH, Esqrs., Barristers-at-Law.

Friday, July 6.

ALEXANDER v. WORMAN.

*Building society—Surveyor—Payment out of funds—10 Geo. 4, c. 56, s. 21.*

*The plaintiff was the surveyor of a building society, the object of which was to advance money to its members to enable them to buy or build houses, but not itself to buy nor build. By one of the rules of the society, the surveyor was to look only to the funds of the society for his compensation. By resolutions at general meetings, at which the defendant, as one of the directors, was present, the plaintiff was directed to prepare plans, &c., for houses which the society was building, the compensation being a percentage upon the outlay. Upon the society becoming insolvent, the plaintiff sued the defendant, as one of the directors, for this percentage:*

*Held (Bramwell, B. dissentiente), that the plaintiff was bound by the rules of the society to seek his compensation from the funds of the society solely.*

This was a case tried at Croydon, before Blackburn J., at the summer assizes 1859. The facts of the case are sufficiently stated in the judgment.

At the trial the learned judge directed a nonsuit, with leave to the plaintiff to move to enter a verdict. The plaintiff accordingly obtained a rule nisi.

Hawkins, Q.C. (*Leferre* with him) now showed cause.

Larry, Serjt. (*Laxton* with him) supported the rule.

Cur. adv. vult.

July 6.—MARTIN, B.—In this case I am sorry to say there is a difference of opinion between the judges. The Lord Chief Baron, my brother Channell and myself, are of opinion that the rule ought to be discharged, and my brother Bramwell is of opinion that it should be made absolute. I will read my own judgment, in which the Lord Chief Baron and my brother Channell concur, because the facts are there stated. The plaintiff in this case was the surveyor to a building society. He was an officer named in the rules, and by one of them his compensation was to be paid out of the funds of the society. The object of the society was to advance money to its members to enable them to buy or

[Ex.]

ALEXANDER F. WORMAN.

[Ex.]

build houses. The directors, of whom the defendant was one, leased a piece of land upon which they proposed to build. At one of the regular meetings of the society, the plaintiff was directed to prepare plans, &c., and a resolution was entered in a book of the society to this effect. At another meeting a resolution was made and duly entered that the compensation to the plaintiff should be 3*l.* per cent. on the outlay, for which percentage the action was brought. The plaintiff made the plans and superintended the building for some time, but ultimately the society became insolvent. The plaintiff made several applications for payment, but always to the secretary, and until the society was broken up he made no demand upon the defendant or any other of the directors that they should pay him out of their own funds. By a section in one of the Acts of Parliament regulating such societies, the surveyor is to be deemed to have notice of the rules. These being the circumstances of the case, the Lord Chief Baron, my brother Channell and myself think this rule ought to be discharged. The question is much more one of fact than of law; and the reasons for our judgment are these. We think the onus of proof in this, as in every other case for work and labour, is upon the plaintiff, and that he is bound to satisfy the jury, either, first, that the defendant contracted to pay, by which we mean that he understood that he himself, or that he in conjunction with the other directors, was to pay the plaintiff for his labour, and such a contract might have been proved in an infinite variety of ways; but we think it clear upon the evidence in this case that the defendant thought he was dealing with an officer of the society, and not with a surveyor whom he was to pay out of his own private funds, either solely or in conjunction with others. By the rule the surveyor was to be paid out of the funds of the society, and although the building of houses was not within the object of the society as stated in the rules, it seems to us that both the plaintiff and the defendant and his co-directors acted as if it was; and in our opinion the plaintiff failed to prove that the defendant contracted to pay him in the sense above mentioned. But, secondly, we quite agree that if the defendant had so conducted himself as reasonably to create in the plaintiff's mind the belief that he was to be paid by the defendant for his labour—it is quite immaterial whether the defendant himself understood that he was to pay. To create a liability of the kind, however, it is of the very essence of it to establish that the plaintiff himself understood and believed that he was to be paid by the defendant. But the evidence satisfies us that he had no such belief, and that until the society was broken up he looked to the funds of the society for payment and not to the defendant or his co-directors at all. We think it a mistake to suppose that in societies of this kind the surveyor or secretary, or the officer, do work and labour upon the same terms as professional men of their class ordinarily do. They generally have a much greater interest in these societies than the directors, and in the great majority of cases are the individuals who get them up, and at whose request the directors consent to accept the office, and take upon themselves the liabilities and duties of their situation; and it is to us very clear that such officers discharge duties and perform services with the understanding on all hands that they are to be remunerated out of the funds, and that if the funds fail the officer must remain unpaid.

BRAMWELL, B.—There are, it appears to me, three questions in this case. First, did the plaintiff enter into any contract; secondly, if he did, was it with the defendant? thirdly, if so, what was it? Now, the plaintiff is an architect; he was ordered to do work in the way of his profession, and he did it; presumably, therefore, he is to be paid for it, which involves the existence of some contract with some one.

But it is said, "No; he trusted the society which was interested in the work (a building society), or their funds." But I know no way in which a society, not a corporation, and not having an officer to be sued for it, can be got at or sued, nor how its funds can be reached, except by a contract with one or two individuals, upon which the individual or individuals is or are absolutely or contingently liable. Now this society is not a corporation, and has no public officer. There is no pretence for saying that an action can be maintained under sect. 21 of the 10 Geo. 4, c. 56, which obviously relates to the property of the society, and not to contracts which its members may think fit to enter into. Of course it was competent for the plaintiff to agree to do this work gratis, or without any legal claim to remuneration; but I see no evidence that he did so, and that will be the result, and would be the result whatever might be the state of the funds of the society, if he can in no event maintain an action against an individual. It is a mistake to say the defendant is not liable because he did not intend to be so. The question is, what his conduct reasonably gave the plaintiff to understand; and I see nothing to prevent the plaintiff entertaining an ordinary and very reasonable belief that if he was ordered to do work in the way of his profession, and did it, he was to be paid for it. On the contrary the evidence is express that he was, nor is it material that the reports and bills are addressed to the building society. Sending in a bill to a rifle corps would not show that the creditor had performed the impossibility of trusting a non-existing legal abstraction. Then, if the plaintiff made some contract with some one or more persons, was the defendant the person or one of the persons he contracted with? It is obvious he was. Whatever would point to any member of the society as being liable would point to the defendant. He was a member of the society. He was a director, and he gave the order, and had a personal interest under his covenants as lessee of the land in the doing of the work. If any reason can be given to show that he was not a contracting party, it can be given with at least equal strength to show no one else was. It is to my mind a demonstration that some contract was made, and made with the defendant, by which in some way, in some event, absolutely or conditionally, the plaintiff could enforce a reward for the work he had performed. It remains to consider what that contract was. *Prima facie*, it is the ordinary one, namely, that the work done, he should be paid for it the agreed price, or a *quantum meruit*; and it is for the defendant to show that it is not so here. The defendant then relies on the following matters. As I have mentioned, this was a building society; the defendant a director; as such he gave the order. The plaintiff was appointed surveyor, and accepted the office. By the 10 Geo. 4, c. 56, s. 8, which by the 6 & 7 Will. 4, c. 32, regulates these societies, all officers are deemed to have notice of the rules of the society, and by one of the rules the surveyor is to be paid out of the funds. Then there being no funds, the plaintiff is not to be paid. Now I think the first answer to this is that given by my brother Parry, namely, that this rule is a rule not affecting the surveyor, but a rule of the members authorising such an application of the funds. However, it may be otherwise. But there is another answer. This work was not done by the plaintiff as surveyor; not done by him as an officer of the society. The society had no authority to build; that is clear, and has been decided. The surveyor's business is that which his name indicates; he is to survey those buildings which are to be the security of the society, a work which is wholly different from that of an architect, making drawings, plans, elevations and specifications. It could not be done by him as their officer, if they could not as a society do that on which they employed him. Therefore the rule does not apply



V.C. W.]

HOLDEN v. WEEKES.

[V.C. W.]

to this work. The ordering of it was *ultra vires*, and if the plaintiff sought to enforce a claim on the society, or funds of the society, supposing by some contrivance he could do so, he might be met by this objection. But it is said, he must be taken to do this work on the same terms as he worked as surveyor, and if he had actual notice of the rule that might be; but he had not. The statute only means that he shall be deemed, as such officer, to have notice; and it seems to me that to hold he is bound by the rule would be to hold that he had supplied bricks for the building. I cannot but think, therefore, that this is the common case of work ordered by the defendant of the plaintiff in the way of his profession, and done by him, and that, therefore, he is entitled to be paid for it. In fact, it is the case of *Braithwaite v. Skofield*, 9 B. & C. 401, only stronger. It is true that case was before the 6 & 7 Will. 4, c. 32, but what difference does that statute make? it neither gives a right nor takes one away. The opinions expressed in *Burton v. Tunnahill*, 5 E. & Bl. 797, are to the same effect. I think, therefore, the rule should be made absolute.

Rule discharged.

### V. C. WOOD'S COURT.

Reported by W. H. BAKER, Esq., Barrister-at-Law.

Nov. 7, 9 and 23.

HOLDEN v. WEEKES.

*Incumbent of living—Glebe lands—Right to open for mines and minerals—Consent by patron and ordinary—Necessity of.*

*By an agreement in writing, not under seal, between the patron and incumbent of a living, to open beds of gypsum and alabaster under the glebe lands, it was provided that one-third of the net proceeds should be laid out in buildings upon the glebe as should be mutually agreed upon; the other two-thirds to be received by the rector for his own use.*

*This agreement had been acted upon for ten years. It had not, however, been directly sanctioned by the ordinary, the bishop.*

*On bill filed by the owner of the living to restrain the rector from further committing waste on the glebe, and for an account of past workings:*

*Held, that the owner was not entitled to the account: Held, also, that inquiries would be directed by the court to ascertain what would be the necessary steps to be taken to enable the incumbent to carry on the workings, and for a proper appropriation of the proceeds.*

This was a bill filed by the owner of the advowson and patron of the rectory of Ashton-upon-Trent, in Derbyshire, to restrain the defendant, the rector and his sub-lessee, from working mines of gypsum and alabaster under the glebe lands of the rectory, and to set aside as null and void an agreement of the 25th March 1851 purporting to convey a licence to the defendant the rector to work such mines, on the ground of its not having been sanctioned by the patron the bishop, and on other grounds.

The agreement in question, after reciting that it had been agreed between the parties that the mines should be opened by the rector, contained a provision that one-third of the sale of the produce was to be laid out and invested by the rector towards the erection of necessary buildings upon the glebe land, and subject to such outlay any surplus was to be applied as the rector and patron should mutually agree upon, or be invested, and the interest thereof paid to the rector for his own benefit. The remaining two-thirds were to be received by the defendant the rector, so long as he continued such, for his own absolute use and benefit.

It was alleged by the bill that the agreement had been signed by the plaintiff at the instance and on the representations of the defendant, and with his having

had the opportunity of obtaining legal advice upon its provisions.

It, however, appeared by the defendant's answer that this was not so, as a case had been laid before Dr. Addams, who had averred that such an agreement was legal, with the concurrence of the patron of the living. It was also stated that the Bishop of Litchfield, as patron, was applied to, and that a reply was received from him to the effect that he should leave the matter to be arranged between the parties themselves.

This agreement had been acted upon by the parties from its date (nearly ten years) up to May 1860, and the plaintiff having been then advised that the concurrence and consent of the ordinary or of the Ecclesiastical Commissioners was necessary, now sought by his bill to set the agreement aside, and for an account of the profits which had accrued from the sale of the produce of the mines during the agreement.

Wm. James, Q.C. and Druce, for the plaintiff, contended that the questions were whether the patron had any right to restrain waste; and secondly, whether, if he had, such right had not been taken away from him by the agreement. The licence given by this agreement to open and work minerals, for which the consent of the ordinary or the Ecclesiastical Commissioners was necessary, was invalid, where such consent had not been, as in the present case, obtained: (*Knight v. Maseley*, 1 Amb. 185; *Duke of Marlborough v. St. John*, 5 De G. & Sm. 174; *Barton v. Phillips*, lately before the Lords Justices, not yet reported). This was no more than a parol licence. There was no contract that the patron was only entitled to restrain such act of waste. The licence was granted in ignorance of its illegality, which was, in fact, a fraud on the rights of the church: (*Bishop of Hereford v. Storey*, Cro. Eliz. 185; *Bramall v. Collins*, 7 Q. B. Rep. 952.) They also cited *Ca. Litt. 44 b*; 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57.

Little (Rolt, Q.C. with him), for the defendant the incumbent, urged that the agreement was valid to all intents and purposes, and the plaintiff must be held to be bound by its provisions. It was a clearly legal transaction: (*Co. Litt. 341 a and b*.) That it had been communicated to the ordinary, the bishop, who had not objected, and his assent must therefore be assumed; this, in fact, might be now obtained. After allowing the licence to be acted upon for ten years, and considerable outlay upon it, if there had been a mistake as to the strict law, it was one in which both parties had participated. It was clear, therefore, he was entitled to no account. He also cited *The Earl of Rutland's case*, 1 Lev. 107; *Co. Litt. 45 b*; 4 Bac. Abr. 760; *Pullen v. Ready*, 2 Atk. 587; *Duke of Devonshire v. Elym*, 14 Beav. 530. In the cases cited on the other side, the patron had not assented to the contemplated Act.

Daniel, Q.C. and Hetherington, for the sub-lessee Pegg, supported the defendant's the incumbent's title. James in reply.

The VICE-CHANCELLOR took time to consider his judgment, and on Nov. 23 said:—That any working of minerals under the glebe of an incumbency must be sanctioned by the bishop as ordinary. The bill prayed that a certain agreement of March 1851 might be set aside as null and void, to obtain an account of past workings under the agreement, and for an injunction to restrain the incumbent and his sub-lessee from further working. He had early in the argument come to the determination that the working of these mines was illegal, and the question was, whether or not such working could be made lawful by the concurrence of the ordinary. Any working of this kind must at least be sanctioned by the ordinary. He (the V.C.) had not been able to satisfy himself whether even that sanction had been sufficient. As to authorities upon the power of an incumbent to open mines, there

Q. B.]

REG. v. LEATHAM.

[Q. B.]

was no decision on the point. The case of the *Duke of Marlborough v. St. John* had been cited, and he should have been extremely glad to have had the assistance of a decision of so able a judge as Sir James Parker, V.C. But that cause had not any material bearing upon the present question. There the acts sought to be ascertained were with respect to felling timber beyond what was necessary for repairs. This passage occurred in the judgment in that case. [The V. C. read the judgment.] His Honour then referred to the *Dean and Chapter of Worcester's* case, 6 Rep. 37 a, and to the *Earl of Rutland's* case, and said that, looking through the subsequent cases, thus much appeared to be established, first, that the incumbent could not open mines without the concurrence of the ordinary and patron; secondly, that the patron was the proper person to institute a suit to restrain such working. A MS. report of *Bartlett v. Phillips* (ante), had been handed to his Honour, and he said that it appeared from this report that Knight Bruce, L.J. had guarded himself very carefully in his expressions—but clearly indicated that he had not made up his mind that consent might not be given by the patron and ordinary. The question now was, what was proper to be done to make the suit available for effecting what was necessary in justice to all parties. As to the relief prayed, the patron had no right to come to the court for an account of past profits; his only right was to the injunction. No agreement would be made as to the agreement being null and void. The decree would be:—Declare that the workings of the mines in question by the defendant Weekes and his lessee, in pursuance of the agreement of the 25th March 1851, were not lawful, but the court being of opinion that the working of the mines, &c., if duly authorised, will be of benefit to the rectory, direct an inquiry as to what steps are necessary and proper to carry out such working. Direct that the agreement between the defendants Weekes and Pegg be delivered—and an account of the working of Pegg pursuant to his undertaking (with all just allowances); and declare that what shall be found due from Pegg on taking such account ought to be laid out for the permanent benefit of the rectory, subject to any future direction.

*The cause was afterwards spoken to on the merits, but the judgment, in substance, remained as above.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTFORD, Esqrs., Barristers-at-Law.

Tuesday, Nov. 6.

REG. v. LEATHAM.

*Corrupt Practices Prevention Act—Bribery—Limitation of proceedings—Evidence.*

The 17 & 18 Vict. c. 102, s. 14 (the *Corrupt Practices Prevention Act*) enacts that no person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action, or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this Act shall be committed, and unless such person shall be summoned or otherwise served with a writ or process within the same space of time.

Quare, whether this section applies to an information for a misdemeanor, and not for a penalty or forfeiture.

The defendant was indicted in the first count of an indictment for having paid a sum of money to A., with the intent that it should be expended in bribery at an election, and he was indicted in the others with having bribed different voters, when he was found guilty upon all the counts. The evidence was that he paid the money to W., who paid it to A.,

[MAG. CAS.]

with the intent as stated in the first count, and that A., and not the defendant, personally bribed the different electors:

Held, that this was ground only for an application to the court at the trial that the prosecutor should be compelled to elect upon which of the charges he would proceed, that of having advanced money for the purpose of bribery, or for each distinct act of bribery committed by the agent, he being liable as a principal to be found guilty of the misdemeanor.

Information, dated 22nd May 1860, states:—Be it remembered that Sir Richard Bethell, Knight, Attorney-General of our Sovereign Lady the Queen, who for our said Lady the Queen prosecutes in this behalf in his proper person, comes into the court of our said Lady the Queen, before the Queen herself at Westminster, on the 22nd May in this same term, and for our said Lady the Queen gives the court here to understand and be informed that heretofore, to wit, on the 29th April 1859, at the borough of Wakefield, in the county of York, a certain election was duly had and held for the electing of a Burgess to serve in this present Parliament for the said borough of Wakefield, and that before and at the time of the committing of the several offences hereinafter mentioned, William Henry Leatham was a candidate to be elected and returned at the said election as a Burgess so to serve in Parliament for the said borough of Wakefield. And the said Attorney-General for our said Lady the Queen further gives the court here to understand and be informed, that heretofore and before the said election was so had and held as aforesaid, to wit, on the 26th April in the year aforesaid, the said William H. Leatham, so then being such candidate as aforesaid, unlawfully, wilfully and corruptly did advance and pay to one Thomas Field Gilbert certain money, to wit, the sum of 2000*l.*, with the intent that such money or some part thereof should be expended in bribery at the said election, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second count.—And the said Attorney-General for our said Lady the Queen further gives the said court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully and corruptly did give and cause to be given to Samuel Croft, he the said Samuel Croft then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, the sum of 30*l.*, in order thereby to induce the said Samuel Croft to vote at the said election for him the said W. H. Leatham, to be thereat elected and returned a Burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the said court here to understand and be informed, that the said W. H. Leatham, in manner and by the means last aforesaid, unlawfully, wilfully and corruptly did bribe the said Samuel Croft, so then being such person entitled to vote at the said election as aforesaid, to give his vote at the said election for him the said W. H. Leatham, to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Third count.—And the said Attorney-General for our said Lady the Queen further gives the said court here to understand and be informed, that heretofore and before the said election in the first count of this

Q. B.]

REG. v. LEATHAM.

[Q. B.]

information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully and corruptly did give and cause to be given to John Burton, Rhodes, he the said John Burton Rhodes then being a person entitled to vote at the election for the said borough of Wakefield, certain money, to wit, the sum of 40*l.*, in order thereby to induce the said J. B. Rhodes to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a Burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the said court here to understand and be informed, that the said W. H. Leatham, in manner and by the means last aforesaid, unlawfully, wilfully and corruptly did bribe the said J. B. Rhodes, so then being such person entitled to vote at the said election aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fourth count.—And the said Attorney-General for our said Lady the Queen further gives the said court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully and corruptly did give and cause to be given, to wit, by one Robert Sharpley on his behalf, to John Firman Tower, he then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, the sum of 40*l.*, in order thereby to induce the said J. F. Tower to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a Burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the court here to understand and be informed, that the said W. H. Leatham, in manner and by means last aforesaid, unlawfully, wilfully and corruptly did bribe the said J. F. Tower, so then being such person entitled to vote at the said election as aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Fifth count.—And the said Attorney-General for our said Lady the Queen further gives the said court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully and corruptly did give and cause to be given to George Wainwright, he the said G. Wainwright then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, 20*l.*, in order thereby to induce the said G. Wainwright to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a Burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the court here to understand and be informed, that the said W. H. Leatham, in manner and

by the means last aforesaid, unlawfully, wilfully and corruptly did bribe the said G. Wainwright, so then being such person entitled to vote at the said election aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, against the peace of our said Lady the Queen, her crown and dignity.

Sixth count.—And the said Attorney-General for our said Lady the Queen further gives the said court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as therein mentioned, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as therein mentioned, unlawfully, wilfully and corruptly did give and cause to be given, to wit, by one Wm. Woodhead on his behalf, to Wm. Cheeseborough, he the said W. Cheeseborough then being a person entitled to vote at the said election for the said borough of Wakefield, certain money, to wit, the sum of 35*l.*, in order thereby to induce the said W. Cheeseborough to vote at the said election for him the said W. H. Leatham to be thereat elected and returned a Burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the said Attorney-General for our said Lady the Queen gives the said court here to understand and be informed, that the said W. H. Leatham, in manner and by the means last aforesaid, unlawfully, wilfully and corruptly did bribe the said W. Cheeseborough, so then being such person entitled to vote at the said election as aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Seventh count.—And the said Attorney-General for our said Lady the Queen further gives the said court here to understand and be informed, that heretofore and before the said election in the first count of this information mentioned was so had and held as aforesaid, to wit, on the day and year last aforesaid, the said W. H. Leatham, so then being such candidate as in the said first count mentioned, unlawfully, wilfully and corruptly did give and cause to be given to Charles Clarkson, he the said Charles Clarkson then being a person entitled to vote at the said election, certain money, to wit, the sum of 30*l.*, in order thereby to induce the said C. Clarkson to give his vote at the said election for him the said W. H. Leatham to be thereat elected and returned a Burgess to serve in Parliament for the said borough of Wakefield as aforesaid; and so the Attorney-General for our said Lady the Queen gives the said court here to understand and be informed, that the said W. H. Leatham, in manner and by the means aforesaid, unlawfully, wilfully and corruptly did bribe the said C. Clarkson so then being such person entitled to vote at the said election as aforesaid, to give his vote at the said election for him the said W. H. Leatham to be so thereat elected and returned as aforesaid, in contempt of our said Lady the Queen and her laws, to the evil example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity. And therefore the said Attorney-General of our said Lady the Queen prays the consideration of the said court here in the premises, and that due process of law may be awarded against him the said W. H. Leatham in his behalf to make him answer to our said

Q. B.]

REG. v. LEATHAM.

[Q. B.]

Lady the Queen touching and concerning the premises aforesaid.

RICHARD BETHELL.

Plea, not guilty. Issue thereon.

The indictment was tried at York summer assizes 1860, before Martin, B., and a verdict found for the Crown.

Sir F. Kelly (*Edward James, Mellish and Quain* with him) moved for a new trial on the ground of misdirection.—First, under the 17 & 18 Vict. c. 102, s. 14, the prosecution should have been commenced within one year of the offence being committed. Here the information was filed on the 22nd May 1859, and the latest of the offences charged was committed on the 26th April 1858. This information therefore was not filed in time. Secondly, the defendant was not liable to be convicted both upon the first count and the several other counts. The only act the defendant was proved to have done was, that he gave 2000*l.* to Wainwright for the purposes of the election. Wainwright employed Gilbert, who was the agent who bribed the several persons mentioned in the second, third, fourth, fifth and sixth counts of the indictment. There is no instance of a person having been convicted of two offences created by the same section of a statute for one act only done by him. There was no evidence of any specific authority to Wainwright to bribe at all, still less to put money into the hands of Gilbert or Sharpley for that purpose. Thirdly, there was no evidence of the defendant having bribed the voters himself, as charged in the second, third, fourth, fifth, sixth and seventh counts of the indictment. Fourthly, the giving of the money to Wainwright was not the giving of it to Gilbert, as charged in the first count. Fifthly, inadmissible evidence was received. Certain letters which passed between Wainwright and Leatham were put in evidence compulsorily before the commission to inquire into corrupt practices at the Wakefield election under the 15 & 16 Vict. c. 57, s. 8. These letters are now exempted from being admitted as evidence for any purpose whatever: (sect. 9.)

*Cur. adv. vult.*

COCKBURN, C.J.—In this case the Attorney-General, on the 22nd May last, filed an information against the defendant, charging him, in the first count, with having, on the 26th April 1859, paid to one Thomas Field Gilbert money with intent that it should be applied in bribery at an election for a member of Parliament for Wakefield. There were several other counts, in which the defendant was charged with actual bribery of several persons who were respectively named in those counts. The defendant was found guilty generally. Sir F. Kelly, on behalf of the defendant, on the first day of term, took several objections to the proceedings. The first objection was that the prosecution was out of time, as the offence in each count was laid, and by the evidence was committed, if at all, more than a year before the filing the information and issuing the process upon it. The second ground of objection, as we understood it, was, that as the defendant was found guilty upon the first count, he ought not to have been found guilty upon the other counts, it appearing that there was but one act, namely, that of paying money by him to an agent, so that the actual bribery was by the agent without communication with the defendant as to the individuals whom he was said to have bribed; and that if the present proceedings were good, a man might be prosecuted, convicted and punished more than once for what was, in fact, but one act actually done by him. The third ground of objection was, that the case for the prosecution being that the defendant had employed subordinate agents by whom the bribes were given, the defendant could not be found guilty of having bribed the voters himself. The fourth ground of objection was, that the defendant was stated in the first count to have paid money to one Gilbert, whereas the evidence was that he had paid it to one Wainwright, who had

afterwards paid it to Gilbert but without any direction or interference by the defendant. The fifth ground of objection was, that a document produced compulsorily upon the inquiry of the commissioners under the 15 & 16 Vict. c. 57, was received in evidence against the defendant at the trial. With respect to the first of these objections, if it be one, it appears upon the record and may be taken advantage of in arrest of judgment or writ of error, and it is therefore unnecessary for the court to interfere on motion. But we are strongly disposed to think that the objection is untenable, and that the limitation applies only to proceedings for penalties or forfeitures given by the statute. The words are, "No person shall be liable to any penalty or forfeiture hereby enacted or imposed unless some prosecution, action, or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this Act shall be committed, and unless such person shall be summoned or otherwise served with a writ or process within the same space of time." The present is not a proceeding for a penalty or forfeiture, but it is an information for a misdemeanor, and is, it seems to us, not within the terms of the 14th section of the 17 & 18 Vict. c. 102. This view becomes strongly confirmed when it is borne in mind that the Act we are considering refers specifically to process applicable only to civil proceedings, and not to an indictment for misdemeanor. With respect to the second objection it appears to us that it is now too late to make it, and that, if available at all, it would only be by application at the trial that the prosecutor should be compelled to elect upon which of the charges laid in the information he would proceed. Upon the face of the information each count contains a charge of a separate offence, and, in point of law, there is no objection to any number of misdemeanors, nor even of felonies, being charged in separate counts in one indictment, provided the judgment be the same for each. There is no doubt that a man by one and the same act may commit two or more several and distinct offences. A man wrongfully intending to kill A. fires a gun at him, but misses him, and kills, without intending it, B. and C. There is but one act, but he would be liable to be indicted three times: for the homicide of E., for that of C., and for shooting at A. with intent to kill him. By the 17 & 18 Vict. c. 102, s. 2, art. 5, paying money to any person with intent that such person should use it to bribe electors, is declared to be equivalent to bribery, and, as such, a misdemeanor, though no person was actually bribed; and by article first the giving money to an elector to induce him to vote is declared to be bribery, and as such a misdemeanor. But the offences are not the same, though it may be said that they arise from one and the same act. If, however, they were in law the same, a conviction or acquittal upon a charge founded upon the fifth article might, with proper averments, be pleaded to another indictment founded upon the first; and if, as in the present case, both charges were included in one indictment, the court before whom the case was tried might, in its discretion, put the prosecutor to his election upon the application of the defendant; but, as no such application was made in the present case, we do not see upon what ground we can interfere. With respect to the third objection, we are of opinion that if a man employs an agent to corrupt voters, and that agent in carrying such general instructions into effect employs subordinate agents within the scope of the authority received from the principal, such principal, with reference to the express terms of this statute, as well as upon general principles of law, will be guilty of a misdemeanor as a principal in the transaction. The fourth ground of objection appears to be a serious one, and upon that we think there should be a rule. With respect to the fifth objection, we are strongly disposed to think that the proviso to the 5th section of the

15 & 16 Vict. c. 57, only applies to "statements" properly so called, made by any person in answer to questions put to him, and not to documents produced by such persons. As, however, this is a point not free from doubt, and of general importance, we think there should be a rule as to that. We think, therefore, that there should be a rule upon the fourth and fifth objections, and none upon the first, second and third.

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 10.

(Before ERLE, C.J., CROMPTON, J., BRAMWELL and CHANNELL, BB. and HILL, J.)

REG. v. JAMES CRAWSHAW.

*Lotteries—Evidence of keeping—Indictment—Verdict accompanied with a recommendation—Ignorance of law.*

*By the 10 & 11 Will. 3, c. 17, s. 1, lotteries are declared common and public nuisances. Sect. 2, which came into operation on a subsequent day, rendered persons keeping lotteries liable to a penalty to be sued for by information or action. The 42 Geo. 3, c. 119, contained similar enactments:*

*Held, that the keeping a lottery was an indictable offence.*

*The defendant kept an eating-house, and sold tickets for what was called "The Great Eastern Money Club," in respect of which prizes were drawn, and the holders of the tickets whose numbers were drawn for prizes received the same; and the defendant delivered out the prizes to such ticket-holders:*

*Held, that this evidence was sufficient to support a conviction against the defendant of keeping a lottery, but not sufficient to support a charge of keeping a house for betting upon horse-racing, under the 16 & 17 Vict. c. 119.*

*The jury returned a verdict of guilty, but recommended the prisoner to mercy, on the ground that perhaps he did not know that he was acting contrary to law:*

*Held, that the conviction was not invalidated by the addition to the verdict.*

Case reserved for the opinion of this court by the chairman at the general quarter sessions of the peace for the county of Lancaster, holden by adjournment at Salford, in the said county, on the 27th, 28th and 29th days of Aug. 1860.

James Crawshaw was tried on the following indictment:—

County of Lancaster, to wit.—The jurors for our Lady the Queen, upon their oath present, that J. Crawshaw, on the 28th July 1860, and on divers other days and times between that day and the taking of this inquisition, at the borough of Ashton-under-Lyne, in the county of Lancaster, unlawfully did set up, keep and maintain a certain lottery, to wit, a little-go, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting and residing, and to the evil example of all others in the like case offending, and against the form of the statutes in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid do further present, that the said J. Crawshaw on the said 28th July 1860, and on divers other days and times between that day and the taking of this inquisition, at the borough of Ashton-under-Lyne aforesaid, unlawfully did set up, conduct and maintain a certain lottery not authorised by Parliament, in which said lottery prizes were awarded to the subscribers thereto, for whom certain numbers were drawn, to the great damage and common nuisance of all the liege subjects of our Lady the Queen there in-

habiting and being, and to the evil example of all others in like case offending, and against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Crawshaw, on the said 28th July 1860, and on divers other days and times between that day and the taking of this inquisition, at the borough of Ashton-under-Lyne aforesaid, did unlawfully open, keep and use a certain room in a certain house, to wit, a house in Old-street, in the said borough, which said room and house were then occupied by him the said J. Crawshaw for the purpose of money being received by the said J. Crawshaw, then being the occupier of such room as aforesaid, as the consideration for securing the paying by some other persons, to wit, the Great Eastern Money Club, of money on the event of a certain horse-race, to the great damage and common nuisance of all the liege subjects of our Lady the Queen there inhabiting, being, residing, and passing, to the evil example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Crawshaw, on the said 28th July 1860, did unlawfully open, keep and use a certain room in a certain house, to wit, a house in Old-street, in the said borough, which said room and house were then occupied by him the said J. Crawshaw for the purpose of money being received by the said J. Crawshaw, then being the occupier of such room as aforesaid, as the consideration for an undertaking by him the said J. Crawshaw to pay money on the contingency of horse-races, to the great damage and common nuisance of all the liege subjects of our Lady the Queen there inhabiting, being, residing and passing, to the evil example of all others in like case offending, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Fifth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Crawshaw, on the said 28th July 1860, and on divers other days and times between that day and the taking of this inquisition, did unlawfully set up, keep, maintain and conduct a lottery not authorised by Parliament, to the common nuisance of all the liege subjects of our Lady the Queen, and to the evil example of all others in like case offending, contrary to the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The first witness who was called was John Preston. His evidence was as follows:—I am a police constable of the parish of Ashton-under-Lyne. I know the defendant; he lives in Old-street, Ashton-under-Lyne, and keeps an eating-house there. On the 28th July last I saw in his window a placard—a large one. After seeing it I went into the house; his wife was there, and the defendant was in the shop-place also. I said "I want a horse-ticket." I was not in uniform. His wife gave me one out of a drawer. I paid sixpence for it. I asked her "When and where do they draw?" She said, "It will be drawn on Monday night, where I do not know; it is not drawn regularly at the same place." I then came away. Defendant was present at the time. On Monday the 30th July I went again; defendant and his wife were in. I bought another horse-ticket. The defendant's wife served me from the same drawer. I paid sixpence for it. I asked when and where it would be drawn. Defendant's wife said, "To-night; but I do not know where." I purchased the same day a list. This is it (the list is annexed, marked B). I paid a half-penny for it. I examined it to look whether my ticket

C. CAS. R.]

REG. V. JAMES CRAWSHAW.

[C. CAS. R.]

purchased on the first occasion was a prize. In consequence of what I saw there, I went the next morning, Tuesday the 31st, to the defendant's house, and took with me the first ticket I had bought. I gave it to the defendant, and said there is a prize for this, and gave it to him. He went into the kitchen, as if to look whether it was so, and returned and gave me 4s. 10d. I asked him why he did not give me the 5s. He only laughed. My other ticket was not a prize. I afterwards gave it to chief constable Dalgleish. This is it (this ticket is annexed, marked A). Both the tickets were for the same drawing.

Cross-examined.—I went to defendant's by direction of my superintendent. I went alone. I can't say whether defendant knew me. I had then been a police constable at Ashton-under-Lyne but a few weeks. The first time I went was at half-past four p.m. on the Saturday. I saw no one there the first time but defendant and his wife.

The next witness called was William Chadwick, whose evidence was as follows:—I am an inspector of police at Ashton-under-Lyme. On Thursday the 2nd Aug. last I apprehended the prisoner under a warrant. I went to his place and found there four placards stuck up in the window (the four placards are annexed and marked respectively with the letters C, D, E, F). I asked defendant to hand me what tickets he had, and his wife handed me from a drawer in the counter these tickets now produced. (The tickets taken from the drawer and now produced in court purported to be tickets in two different money clubs, White South Union Weekly Money Club, and the Great Eastern Money Club. These tickets were not each on separate pieces of paper, but a number printed in succession on the same slip of paper, but so as to be easily separated one from the other. There were seventy-six in all produced, fifty-six in the first above-mentioned, and twenty in the last above-mentioned club. A few tickets of each are annexed, marked respectively with the letters H and I.)

This, with some formal evidence, closed the case for the prosecution.

The counsel for the defendant contended that the first, second and fifth counts of the indictment were bad in substance; that an indictment did not lie, either under the statute 10 & 11 Will. 3, c. 17, or under the statute 42 Geo. 3, c. 119; that in the case of both these statutes an offender could not be proceeded against under the 1st section taken by itself, but must be proceeded against, if at all, under the 2nd and 3rd sections.

They also contended that the third and fourth counts of the indictment were bad in substance; that the statute 16 & 17 Vict. c. 119, did not apply at all to the case; that there was no proof of the defendant's house being a betting-house within the meaning of that statute; that there was no proof of the event or contingency here being such a one as is provided for in that statute.

The Court overruled these objections.

The counsel for the defence then submitted that there was no evidence for the jury in support of the first, second and fifth counts.

The Court decided that there was.

The counsel for the defendant then addressed the jury, who found the defendant guilty on each count of the indictment, but recommended him to mercy, on the ground "that perhaps he did not know he was acting contrary to law."

The counsel for the defendant submitted that this was a verdict for the defendant.

The Court ruled otherwise, but allowed the defendant to go out on bail until the next Hilary sessions, and now submit the case for the opinion of this court, as to whether the objections taken by the counsel for the defendant, or any and which of them, are well-founded and ought to prevail.

E. OVENS,

Chairman of the above Court of Quarter Sessions.

[MAG. CAS.]

*Copy of Exhibit A.*

A. The Great Eastern Money Club.

Four thousand prints at sixpence each.

The 23rd ballot will take place on Monday, July 30th, 1860.

*Copy of Exhibit B.*

No. 1787. B. Ashton-under-Lyne. 7.

Great Eastern Money Club.

4000 shares issued.

The 23rd ballot published on Monday the 30th July, 1860.

First prize, 33, 10l.; second, 2267, 5l.; third, 1830, 2l. 10s.

Then followed a series of numbers for prizes of 10s. and 5s. each.

*Copy of Exhibit C.*

The Great Eastern Weekly Ballot.

4000 shares or more.

The meetings take place every Monday evening.

Shares:—First prize, 10l.; second ditto, 5l.; third ditto, 2l. 10s.

The remainder divided into shares of 10s. each.

Shares 6d. each.—May be had here.

*Copy of Exhibit D.*

White's Race Club for the Radcliffe Cup.

3000 shares at 1s. each.

To be drawn on Saturday, Aug. 11, 1860.

First prize, 10l.; second ditto, 5l.; third ditto, 2l. Starters and non-starters, 1l. each.

Remainder in 10s. prizes.

Tickets 1s. each.—Sold here.

*Copy of Exhibit E.*

White's South Union Weekly Money Club.

2000 subscribers at 6d. each.

First prize, 10l.; second ditto, 5l.; third ditto, 2l.

5 at one pound each; 21 at ten shillings each;

60 at five shillings each.

Distributed every Tuesday evening at Eight o'clock.

Tickets 6d. each.—Sold here.

*Copy of Exhibit F.*

North-Western Weekly Money Club.

Published every Wednesday evening at Seven o'clock.

Tickets 6d. each.—May be had here.

*Copy of one of the Exhibits H.*

1908. White's South Union Money Club.

[No. 48.]

2000 subscribers at 6d. each.

First prize, 10l.; second ditto, 5l.; third ditto, 2l.

Five at one pound each; sixty at five shillings each.

To be drawn Aug. 7th, 1860, at 8 p.m.

*Copy of one of the Exhibits I.*

No. 481. The Great Eastern Money Club. 1

Four thousand prints at 6d. each.

The 24th ballot will take place on Monday, Aug. 6th, 1860.

Dr. Wheeler (Kays with him) for the prisoner.—This is not an indictable offence under either of the statutes, 10 & 11 Will. 3, c. 17, s. 1, or the 42 Geo. 3, c. 119. If an offence has been committed against those statutes the remedy is by proceedings according to the statutes. Though the 1st section of 10 & 11 Will. 3 contains a prohibition, and, under ordinary circumstances an indictment would lie for an infringement of it, yet in the second section the remedy is provided, and that is the proper course of proceeding. The 2nd section enacts, that from and after the 29th Dec. 1699 these offences shall be punishable by a penalty, to be recovered by information, bill, plaint, or action at law. The 1st section came into operation at an earlier date than the second one, and therefore, if the 1st section gave a separate and independent remedy, the result would be that, under the 1st sec-

tion, an offender was liable to an indictment and a severer penalty than he would be under sect. 2. It is submitted that these are not cumulative provisions, and that the statute which creates the offence also provides the remedy. Moreover, there would have been no object in the 2nd section, if a remedy by indictment had been provided by the 1st. The reason for postponing the operation of sect. 2 was probably that the 1st section created the prohibition, and it was desirable to grant time by way of warning the public before making the penalty attach.

ERLE, C.J.—Is not sect. 2 a power to common informers to sue for penalties?

CROMPTON, J.—How does this point arise? Is this a proceeding in arrest of judgment?

Wheeler.—The objection was taken in the ordinary way at the close of the case for the prosecution.

ERLE, C.J.—We will treat this case as a motion in arrest of judgment.

Wheeler.—The object then was to give warning that a lottery was a common and public nuisance. Before the passing of the statute of 10 & 11 Will. 3, lotteries were common all over England. The same argument applies to the counts framed upon the 42 Geo. 3, c. 119, the 1st section of which enacts that from and after the passing of that Act, lotteries and little-goes shall be deemed a public nuisance, and in the same manner as the statute of Will. 3, the 2nd section enacts that from the 1st July 1802 persons keeping lottery offices shall be liable to a penalty, and be deemed rogues and vagabonds.

CROMPTON, J.—Blackstone ranks lotteries among common nuisances, though he does not say so in so many words.

Wheeler.—The 1st section speaks of the thing as a nuisance, and the 2nd deals with the persons practising it. The cases of *Rez v. Gregory*, 5 B. & Ad. 555, and *Rez v. Harris*, 4 T. R. 205, and *Dwarris* on Statutes were then cited as to the construction of sections like these. Secondly, supposing this to have been an indictable offence, there was no evidence for the jury on which they were justified in finding the defendant guilty. There ought to be evidence of a lottery or a determination by lot brought home to the defendant. There was no evidence that the place was a place, or the game a game, within the mischief of the Act, or to connect the defendant with the distribution of prizes. An agency should have been proved against the defendant. The distribution of prizes may have been in some other manner than by lot. The third and fourth counts are not made out. There was no proof that this was a betting-house within the Act 16 & 17 Vict. c. 119. There must be evidence of a lottery to make an offence; but what evidence is there of the defendant's setting up, keeping and maintaining a lottery? The case of *Ryder v. Wood*, 29 L. J. 1, M. C., was then cited.

No counsel appeared to argue on behalf of the prosecution.

ERLE, C.J.—We have considered this case, and are of opinion that the evidence bearing on the counts relating to horse-racing was not sufficient to support those counts. With respect to the counts on the Lottery Acts, we are of opinion that there was evidence for the jury which justified them in coming to the conclusion they did. This was virtually the purchase of a ticket in a lottery, in the expectation of drawing a prize. The defendant was concerned both in selling the ticket and delivering out the prizes to the purchaser, and the jury were well justified in inferring that he was intimately connected with the lottery. The objection that there was no evidence to support those counts therefore fails. We have looked at the verdict of the jury recommending the defendant to mercy, as perhaps he was not acquainted with the law, and we are, nevertheless, of opinion that the conviction is valid.

Ignorance of the statute is no excuse for the violation of its provisions. That ground does not annul the verdict. The great point in Mr. Wheeler's argument is really one in arrest of judgment. The defendant was indicted for a misdemeanor supposed to have been created by the 10 & 11 Will. 3, which in the 1st section declares that the keeping of a lottery shall be a common and public nuisance, and in the 2nd section prohibits all persons from keeping lotteries, under a penalty of 500*l.*, at the suit of a common informer, or if not so prosecuted, makes them liable as vagrants or rogues; and the second part of the Act came into operation at a different time to the first. It was contended that that was a declaration that it was not intended that the first enactment should be the subject of an indictment, and that the proper remedy was under the 2nd section, and therefore that this indictment could not be sustained. We have attended to that argument, but we find a principle to have prevailed for a long time, that where the Legislature declares a thing to be a common and public nuisance, the person who does the act renders himself liable to an indictment. I take the case of *Rez v. Gregory* to be an application of that principle by a court of very great authority. That principle is an answer to the objection. We therefore hold that those counts which are framed on the Lottery Acts are not bad in point of law. The result will be, that the conviction will be affirmed on these counts.

The rest of the Court concurring.

*Conviction affirmed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Saturday, Nov. 24.

COBBETT v. WHEELER AND ANOTHER.

*Ejectment—Turnpike—Mortgage of tolls—Costs of nonsuit—Liability to.*

*Plaintiff, as personal representative of a deceased mortgagee of turnpike tolls, sued the lessees of the tolls as tenants in possession of the toll-house, to recover possession of them. A trustee was let in to defend as landlord, and at the trial the plaintiff was nonsuited. Defendants afterwards signed judgment and arrested the plaintiff for the costs of the nonsuit:*

*Held, that the plaintiff was liable for such costs under the stat. of 4 Jac. 1, c. 3.*

Ejectment by the plaintiff as the personal representative of a mortgagee of the tolls of a turnpike-road, in the county of Hants, to recover the toll-gates. The action was brought against the defendants as the tenants in possession, being the lessees of the tolls. Subsequently one of the turnpike trustees named Jenkins was admitted to defend as landlord, under the C. L. P. A., 15 & 16 Vict. c. 76, s. 172.

The action was tried at the spring assizes 1856, for the county of Hampshire, before Crowder, J., when the plaintiff, failing to give sufficient evidence of the existence of the mortgage, was nonsuited.

Subsequently the defendants signed judgment, and took the plaintiff in execution for the costs of the nonsuit.

On a former day in this term the plaintiff obtained a rule nisi to set aside the judgment, so far as related to costs, on the ground that the statute of 4 Jac. 1, c. 3, giving defendants costs in cases of nonsuit, did not apply to the case of the defendants, who are sued under the General Turnpike Act in respect of matters relating to the trust.

*Lush and Thring* showed cause.—On the part of the plaintiff it is said that no costs are payable in case of a plaintiff suing turnpike trustees. [HILL, J.—It was said that the defendants, as trustees, were not liable to

Q. B.]

SIBBET v. AINSLEY.

[Q. B.]

costs, and that therefore the plaintiff was not.] The case of *Wormwell v. Hailstone*, 6 Bing. 658, which was cited for that proposition, was a case where the trustees of a turnpike-road were sued in the name of the defendant their clerk, according to the 3 Geo. 4, c. 126, s. 74, which enacts that the trustees may sue and be sued in the name of their clerk, and it was held that the property of the clerk was not liable to be taken in execution to satisfy the judgment. That was so held upon a proviso in sect. 74 in these words:—"Provided always, that every trustee, commissioner, clerk or clerks, shall be reimbursed and paid out of moneys belonging to the turnpike-road for which he or they shall act, all such charges, costs and expenses as he or they shall be put unto or become chargeable with, or liable to by reason of his or their being so made plaintiff or plaintiffs, defendant or defendants." The present case is distinguishable. This action is brought against the lessees of the tolls, and necessarily so, because they are the tenants in possession; and if the trustees had not come in to defend, there could be no doubt but that the defendants would be entitled to their costs. Then why are they to be deprived of them, because it happens that another person is let in to defend? But sects. 186 and 187 of the C. L. P. A. 1852, seem to provide for the defendant's costs in ejectment in such a case as this. This case, however, is certainly not within that of *Wormwell v. Hailstone*. Then, as to the statute of 4 Jac. 1, c. 3, it is submitted that this case falls within it, and that the defendants are entitled to their costs of nonsuit in pursuance of it. The provision in the statute of Jac. 1 is, that if any person shall commence or sue in any court of record, or in any other court, any action, bill, or plaint of trespass, or *ejectione firmæ*, or any other action whatsoever, wherein the plaintiff or defendant might have costs (in case judgment should be given for him), and the plaintiff is nonsuited, or the defendant has a verdict, the defendant is to be entitled to his costs. This statute only defines the class of actions in which defendants shall be entitled to their costs, and does not limit that right in the way contended for by the plaintiff.

The plaintiff in person supported the rule.

COCKBURN, C.J.—I am of opinion this rule ought to be discharged. Several questions arise: first, whether the case is within the statute 4 Jac. 1, c. 3, which gives costs to a defendant on the nonsuit of the plaintiff? Whether the words "any other action wherein the plaintiff or the defendant might have his costs in case judgment should be given for him" apply only to the class of actions immediately before referred to, or only serve to define another class of actions to which the statute of Henry the Eighth is extended. It is a grave question whether Mr. Lush's construction of the statute is not the right one; but I will assume that Mr. Cobbett's argument is right. Then arises the question upon sect. 74 of the General Turnpike Act. Does that give immunity for costs to the defendants? Mr. Cobbett relies on the case of *Wormwell v. Hailstone*. If it were necessary to decide this case on the words of the proviso at the end of sect. 74, I should consider it incumbent to reconsider the case of *Wormwell v. Hailstone*. I own it appears to me that the effect of the proviso is not to divest the adverse party of his right to look to the other party, whoever he may be, for his costs, but merely to give that party, when the costs have been paid, an indefeasible right to compensation for them out of the funds of the turnpike trust. I will assume, however, that the effect of the proviso is to compel the plaintiff suing a person who defends on behalf of the trustees to resort to the trust-funds to recover his costs. Still, to bring the case within the statute of James, the condition is, that the action must be one wherein the plaintiff or defendant might have costs in case judgment is given for him. That brings us to the question, whether the plaintiff in this case, if suc-

cessful, might have had his costs. Turning to sect. 48 of the General Turnpike Act, it is clear that Mr. Cobbett, if he had been successful, would have been entitled to his costs, and he would have been entitled to sign judgment and take out execution for his costs; and the trustees must have satisfied them before he would have been bound to give up possession of the toll-houses. There is another serious difficulty in the way of the plaintiff; that is, in this case there are two other defendants necessarily made defendants—the lessees of the tolls, who were entitled to have execution for their costs. They would have been liable to Mr. Cobbett in costs if he had succeeded, and therefore, on the other hand, they are entitled to execution for their costs, he having failed. This rule must be discharged.

HILL, J.—I am of the same opinion. Assuming Mr. Cobbett's argument on the statute of James to be right, still the ground of his motion wholly fails, for if he had succeeded he would have been entitled to sign judgment for recovering possession of the toll-gates, and also for his costs of suit; and therefore the defendants are entitled to the costs of the nonsuit.

Rule discharged.

Wednesday, Nov. 28.

SIBBET (appellant) v. AINSLEY (respondent).

*Father neglecting to maintain child—Paternity denied—Evidence—5 Geo. 4, c. 83, s. 3.*

*A. was summoned before justices, under 5 Geo. 4, c. 83, s. 3, for wilfully refusing to maintain his child. He and his wife had lived separate for about three years before the birth of the child in question, though in the same town: she led a disreputable and profligate life, and he always avoided her, and she had been seen as a prostitute in company with several men, and the child was born in a gaol. The justices dismissed the summons, holding that the legal presumption that the husband was the father of the child was rebutted by this evidence:*

*Held, that the justices came to a right conclusion.*

Case stated under the 20 & 21 Vict. c. 43.

The respondent was charged before a justice of the peace at the petty sessions, Newcastle-upon-Tyne (11th May, 1860), by the overseer of the chapelry of St. John in that town, with neglecting to support his child, which became chargeable to the said chapelry. The justice dismissed the summons, and stated the following case for the opinion of this court:—

At the hearing of the information it was admitted that the respondent had been duly married to his present wife Sarah; that three years ago they had separated, and that since such separation the respondent had resided in Newcastle-upon-Tyne, and it was proved to my satisfaction that they had not since lived together; that the child in question was the child of the wife of the respondent; that it was born in Durham Gaol on the 23rd Aug. last, that on the 20th April last it became and still is chargeable to the parish or parochial chapelry of St. John; that the respondent is able to work and maintain himself and his family; and that since the separation of the respondent and his wife she had lived in Newcastle, except for short periods of time. It was proved by the evidence of four police officers, that during the last two years the wife of the respondent had led a very disreputable and profligate life; that during that period she had been seen frequently at all hours of the night in company with men other than her husband, alone in passages, lanes, and retired places, and that she had been seen in brothels. (Two specific instances of adultery were then stated as proved.)

That on another occasion within the last two years she was found one night in a passage alone with a man, not her husband, by a police officer, other than the last two mentioned, and was taken out of it by him and sent away. It was also proved before me, that the



Q. B.]

Ex parte ANDERSON.

[Q. B.]

respondent has been perfectly well aware of the sort of life his wife has been leading during the last two years. That in consequence he had most anxiously and constantly avoided her. That during that period she had very frequently annoyed him by hanging about the outside of his house, and shouting at and abusing him. That he has always done his utmost to keep her away from him, and has frequently sent for the police and ordered them to remove her, which they have done.

It was contended on behalf of the appellant that, as the respondent had since his separation from his wife lived in the same town as that in which she had resided for the most part during that period, access between them being possible must be presumed, and that any child she might have whilst they were so living must be considered to be the child of the respondent and legitimate. And the case of *R. v. Mansfield*, 1 Q. B. 144, was relied on.

I, the undersigned, being of opinion that access between a man and his wife when living separate, though both residing in the same town, at the same time, need not necessarily be presumed, even in cases where the same is possible, where circumstances are proved tending to the inference that no such intercourse in fact took place, and being also of opinion upon the foregoing facts that the respondent, though he has been living in the same town as his wife since their separation, had not had access to her during that period, and that her child, born on the 23rd of August last, was not the child of the respondent, but an illegitimate child, considered that he was not liable to maintain it, and that he ought not to be punished under the 5 Geo. 4, c. 83, s. 3, for neglecting to do so. And I dismissed the information, and the respondent was discharged.

The opinion of the Court of Q. B. is desired as to whether I was right in point of law.

C. F. HAMMOND.

*Davison* for the appellant.—The decision of the magistrate was wrong. The presumption of law is, that where a man and his wife live in such circumstances that access is possible, and a child is born, he is to be taken to be the father. The reasons given are not sufficient to warrant the magistrate in finding that the husband had not access to his wife during the necessary period. It is not enough to rebut the presumption to show that the wife has been guilty of adultery during the time: (*Banbury Peerage* case, 1 Sim. & Stu. 155; *Hargreave v. Hargreave*, 9 Beav. 552.) In *Morris v. Morris*, 5 Cl. & Fin. 163, it was laid down that the evidence must be such as to leave no reasonable doubt that the husband is not the father of the child. So in *Goodright v. Saul*, 4 T. R. 356.

*Liddell*, contra, was not called upon.

WIGHTMAN, J.—There is no doubt about the rule of law, that when a child is born of a married woman during wedlock, and the parties are so situated that the husband might have had access to his wife during the necessary period, the husband is presumed to be the father of the child. But that presumption may be rebutted by other evidence, showing that access has not in fact taken place. The question therefore is, whether there was such evidence to rebut the presumption. [His Lordship then recapitulated the facts.] These circumstances satisfactorily prove that intercourse did not take place between the husband and wife during the time. I therefore think the magistrate came to a right conclusion, and I should have come to the same conclusion myself.

HILL and BLACKBURN, JJ. concurred.

*Judgment for the respondent.*

Tuesday, Jan. 15.

Ex parte ANDERSON.

*Habeas corpus—Colonies—Jurisdiction of Superior Courts in England.*

*The Superior Courts in England have a right to issue writs of habeas into the colonies, to bring up persons illegally imprisoned, unless their jurisdiction is taken away by statute. This court therefore issued a writ of habeas corpus to Canada, its jurisdiction to do so not being taken away by statute.*

*Edwin James (Flood and Gordon Allen with him).* moved for a writ of *habeas corpus*, to be directed to the governor of the province of Canada, to the sheriff of Toronto, and the keeper of the gaol there, to bring up the body of one John Anderson, together with the cause of his detention.

COCKBURN, C.J.—Why is the name of the governor introduced?

*James, Q.C.*—The reason is, because in the *S. Helena* case the name of the governor was introduced as well as that of the keeper of the gaol. The affidavit is made in the following terms:—"I, Louis Alexis Chamervozow, of No. 27, New Broad-street, in the city of London, Secretary of the British and Foreign Anti-Slavery Society make oath and say: I say, 1. That John Anderson, of the city of Toronto, in her Majesty's province of Canada, a British subject domiciled there, now is, as I verily believe, illegally detained in the criminal gaol of the said city there, against his will, not having been legally accused, or charged with, or legally tried, or sentenced for the commission of any crime, or for any offence against, or recognised by the laws in force in the said province, or in any other part of her Majesty's dominions, or not being otherwise liable to be imprisoned, or detained, under or by virtue of any such laws. 2. I verily believe that, unless a peremptory writ of *habeas corpus* shall immediately issue by this honourable court, the life of the said John Anderson is exposed to the greatest and to immediate danger." The Crown has power to issue the writ of *habeas corpus* into any part of her Majesty's possessions. Canada is a part of the possessions of the British Crown; and, in the language adopted in these cases, her Majesty has a right to have an account of the imprisonment of all her subjects in all her dominions. This court has as much right to issue this prerogative writ into Canada as a possession of the British Crown, as into the Isle of Wight or Yorkshire. Writs of *habeas corpus* went to Calais, when a possession of the British Crown, and have also gone to Ireland, and Canada stands in precisely the same position, being a possession of the British Crown. Canada was colonised in the reign of James I., and the first charter was granted in the 13th of James I. At that time (and the expression was material) the whole of that portion of America was called the "Plantations," and the Board of Trade was called the "Board of Trade and Plantations." Canada belonged to the British Crown till the year 1633, when it was ceded to France; and it was held by the Crown of France till the year 1759, when it was retaken, and ceded to the British Crown. The statute of the 14 Geo. 3, c. 83, treats Lower Canada as a colony in possession of England.

COCKBURN, C.J.—In Lower Canada the French law prevailed; but Toronto was an English colony in Upper Canada.

HILL, J.—The 14 Geo. 3, c. 83, recites that it was ceded to this country by the Treaty of Paris in 1763. The 8th section reserves civil matters for the old law; but, by the 11th section, the criminal law of England prevailed through the whole of Canada.

*James, Q.C.*—In the case of *The Canadian Prisoners*, 9 A. & E. 782, Lord Denman said: "The difficult questions that may arise touching the enforcement in England of foreign laws are excluded from this case entirely; for Upper Canada is neither a foreign State, nor a colony with any peculiar customs. Here are no 'mala prohibita' by virtue of arbitrary enactments; the relation of master and slave is not

Q. B.]

Ex parte ANDERSON.

[Q. B.]

recognised as legal; but Acts of Parliament have declared that the law of England, and none other, shall there prevail." By the 11th section of the statute the 14 Geo. 3, c. 83, the criminal law of England is in force through the whole of Canada, and, beyond all question, a British subject in Canada is within a portion of her Majesty's dominions. It is matter of right and clear law that, as soon as a country becomes a portion of her Majesty's dominions, more especially if, like Canada, it becomes so by conquest or cession, the writ of *habeas corpus* issues into it, upon the ground that her Majesty has a right to know what has become of any one of her subjects. No instance can be found of the writ going into Canada, and therefore it is necessary to rely upon analogous cases. That the writ lies and runs into every part of her Majesty's dominions is laid down in *Bac. Abr. tit. "Habeas Corpus" (B)*, in these terms:—"2. To what places it may be granted. It hath been already observed that the writ of *habeas corpus* is a prerogative writ, and that therefore, by the common law, it lies to any part of the King's dominions; for the King ought to have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, but to return the cause with *paratum habeo corpus*, &c. Hence it was holden that the writ lay to Calais at the time it was subject to the King of England." In *Cowle's case*, 2 Burrow's Rep. 834, Lord Mansfield said: "Writs not ministerially directed (sometimes called prerogative writs because they are supposed to issue on the part of the King), such as writs of *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, are restricted by no clause in the constitution given to Berwick; upon a proper case they may issue to every dominion of the Crown of England. There is no doubt of the power of this court where the place is under the subjection of the Crown of England; the only question is as to the propriety. To foreign dominions which belong to a prince who succeeds to the throne of England this court has no power to send any writ of any kind. We cannot send a *habeas corpus* to Scotland, or to the Electorate; but to Ireland, the Isle of Man, the Plantations and (as since the loss of the duchy of Normandy they have been considered as annexed to the Crown in some respects) to Guernsey and Jersey we may, and formerly it lay to Calais, which was a conquest, and yielded to the Crown of England by the treaty of Bretigny." Copies of the writs which have been issued to Calais in 1387 and 1389 may be seen in 8 Rymer's *Fodera*, 15. There was a writ issued from the Crown of England to Calais to bring up the body of Thomas, Duke of Gloucester, who was banished for treason to Richard II. The writ was attested at Westminster in 1389, and was issued by the H. of L., sitting as a court of judicature.

BLACKBURN, J.—It was not effectual, for the duke was put to death.

JAMES, Q.C.—Yes; and afterwards a writ issued against Halls (the governor of Calais-castle and the murderer of the duke), who was brought over to England, tried and beheaded, and his head was sent back to Calais and exhibited there to the people. Writs down to a much later period have been issued to places subject to the Crown of England, and with regard to Canada, which was called the "Plantations," they were held as of the manor of East Greenwich, of Windsor-castle and Hampton-court, and so on, which gave rise to the argument used on a former occasion in the House of Commons, that there was representation as well as taxation of the Canadians in the British Parliament. Lord Mansfield, in *Cowle's case*, said that the writ would issue to "every dominion of the Crown or England;" and that this court could send the writ to Ireland, to the Isle of Man and to the "Plantations." Vattel's *Law of Nations*, b. 1, c. 18. s. 210, is an authority for the position that where a nation took

possession of a distant country, and settled in it, it became a part of the parent State; and Grotius de *Jure Belli ac Pacis*, b. 2, c. 9, is to the same effect. In 2 Peere William's Rep. 74, 75, it is said: "Memorandum, the 9th of August 1722.—It was said by the Master of the Rolls to have been determined by the Lords of the Privy Council, upon the appeal to the King in Council from the foreign plantations, 'That if there be a new and uninhabited country found out by British subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and therefore such new found country is to be governed by the law of England.'" *Reg. v. Crawford*, 13 Q. B. 613, was an application for a writ of *habeas corpus ad subjiciendum* to the Isle of Man, in which it was held that the writ would run into that island since the 5 Geo. 3, by which the island was vested in the Crown, and formed part of its dominions. *Campbell v. Hall*, Cowp. 204, was then cited. Various writs issued from this country to Calais; in 1363 a writ of *amoveas* issued to that place; in 1364 a writ of attachment against the mayor of Calais, and in 1374, a writ of inquisition respecting the goods of a felon.

CROMPTON, J.—The question is, whether the courts in Westminster-hall have now a concurrent jurisdiction with the local courts in granting this writ.

COCKBURN, C.J.—In the *Berwick case*, Berwick was not subject to the law of Scotland, and therefore there was no superior court which could send a *habeas corpus* to prevent an illegal imprisonment, unless this court took upon itself jurisdiction. But is that the case in Canada?

JAMES, Q.C.—The fact that Canada has both a separate legislature and judicature makes no difference. The Superior Courts in England have a concurrent jurisdiction with the courts in Canada as to issuing writs of *habeas corpus*.

CROMPTON, J.—You may contend that this is a right of the Crown.

JAMES, Q.C.—The affidavit shows that this is the case of a subject who is illegally in custody, and who has never been tried; it is not the case of a man who has been tried in Canada, or who is under the sentence of a court which has power to sentence him. The mere institution of a local jurisdiction will not oust the Queen of the right which she has to ascertain whether any of her subjects are illegally imprisoned. In the case of the Isle of Man, there are local courts which have the power to issue writs of *habeas corpus*, and so also in the *St. Helena case* (*Ex parte Lees*, Ell. Bl. & Ell., 28). In this case a writ of *habeas corpus* was very recently granted, after a writ of error had issued.

CROMPTON, J.—I issued the writ as ancillary to the writ of error, it being necessary that the party should be here when the writ of error was disposed of.

JAMES, Q.C.—If this court refuses a writ of *habeas corpus* the party has a right to go in succession to each of the Superior Courts, and to the Court of Chancery; and if this court should refuse their writ, he would have a right to go to every court in Westminster-hall, and it would be no answer in the other courts to say that the writ had been refused by a court of co-ordinate jurisdiction. That is a strong argument to show that this court has a concurrent jurisdiction with the Canadian courts.

COCKBURN, C.J.—The question is, whether it is within the ambit of this court's jurisdiction, or whether the power of granting the writ is not vested by the Crown in another jurisdiction.

JAMES, Q.C.—The right is in the Crown, and the mere establishment of such a jurisdiction in a local court cannot limit the rights of the Crown without the authority of an Act of Parliament.

COCKBURN, C.J.—By the conquest or cession of Canada the law of England attached, and this court

has the power to issue writs of *habeas corpus* into that country, unless the Crown has either expressly or by implication taken away that power. The question is, whether by the establishment of a local judicature, and committing to it the duty of protecting the subject by issuing writs of *habeas corpus*, the Crown has not by implication taken away the jurisdiction of this court.

CROMPTON, J.—The Legislature may do that.

James, Q. C.—It is open to a party in this country to apply for the writ of *habeas corpus* to any court of co-ordinate jurisdiction. That is by the common law, and is peculiar to the writ of *habeas corpus*.

HILL, J.—There is one other case in which the subject has a similar right, that of prohibition.

James, Q. C.—It is a common law right of the subject to go to every tribunal for this writ, and, *a fortiori*, the courts in this country must have a concurrent jurisdiction with the colonial courts, unless it is taken away by an Act of Parliament.

COCKBURN, C. J.—Has not the right to go to every one of the courts arisen from the Habeas Corpus Act?

James, Q. C.—It is by the common law. This court is asked not to interfere with any judgment, but to grant a *habeas corpus* to liberate a man who is in illegal custody. He is not in custody under the commitment of any local court which has the power to try him; there is no judgment to set aside; but it is shown to the court that he is detained for no crime cognisable by the law of England. The learned counsel then referred to *Carus Wilson's case*, 7 Q. B. 984; and *Dodd's case*, 2 De G. & John., in which the writ had issued into the isle of Jersey. The case may arise when the courts in Canada might be unable to discharge their duties; that is a reason why this court should still retain the power of granting these writs.

COCKBURN, C. J.—Supposing the writ should go, what means has the court of enforcing it?

James, Q. C.—The court can enforce the writ by attachment; but it cannot be assumed that the Queen's writ will not be obeyed. The court can send its own officer to execute the writ. The same objection might be made in the case of the Isle of Man. Canada is a British possession, and a British colony; and the sheriff of Toronto and other officials are as much British subjects as if they were living in Yorkshire. An application has been made to the local court for a writ of *habeas corpus*, and refused; and it is now shown to this court that John Anderson, a British subject, is illegally detained in prison, having been guilty of no crime cognisable by the law of England. There are precedents for this application, and the mere fact that there are other courts which have a concurrent jurisdiction will not deprive the applicant of that protection for which he now prays the court.

Their Lordships then retired to consider their decision.

COCKBURN, C. J. said:—We have considered this matter, and the result of our anxious deliberations is, that we are of opinion that the writ ought to issue. We are, at the same time, sensible of the inconveniences that may result from the exercise of such a jurisdiction. We are quite sensible that it may be said to be inconsistent with that high degree of colonial independence, both in legislation and judicature, which has been carried into effect in modern times. At the same time, in establishing local legislation and judicial authority, the Legislature of this country has not gone so far as expressly to abrogate any jurisdiction which the courts in Westminster-hall might possess as to issuing writs of *habeas corpus* to any parts of her Majesty's dominions. We find the existence of that jurisdiction in these courts asserted in the earliest times, and exercised down to the most recent. We have it on the authority of the most eminent judges—Lord

Coke, Lord Mansfield, Blackstone, J., and Bacon's Abridgment—that these writs of *habeas corpus* have been issued, and are to be issued into all the dominions of the Crown of England wherever it is suggested to this court that one of the Queen's subjects is illegally imprisoned. Not only have we these authoritative *dicta* of the most eminent judges, and assertions of text writers, but we have the practical exercise of this prerogative from the earliest period down to modern times. The most remarkable cases are those where the writ was issued to the Island of Jersey, to the Isle of Man, and to St. Helena, and all these in very modern times. When we find that, upon these authorities, the power has been not only asserted but carried into effect as a matter of practice, even where a local legislature and judicature were established, nothing short of a legislative enactment expressly depriving us of this jurisdiction would warrant us in omitting to carry it into effect, when called upon to do so for the protection of personal liberty. It may be that the Legislature has thought proper to leave this concurrent jurisdiction in our courts, in this respect, even where local jurisdictions are established, to be exercised in the same way as it is exercised in the various courts of Westminster-hall. We can only act on the authorities, and we feel that we should not be doing our duty, under the authority of the precepts to which our attention has been called, if we did not issue this writ; therefore the writ must go.

Writ granted.

Wednesday, Jan. 16.

EMPSON (appellant) v. THE METROPOLITAN BOARD OF WORKS (respondents).

*Metropolis Local Management Act*—19 & 20 Vict. c. 120, ss. 161, 168—*Right of appeal*—*What objections can only be taken upon appeal*—*Publication of rate*.

*There is an appeal to the quarter sessions against an assessment made by assessors appointed under sect. 168 of the 19 & 20 Vict. c. 120 (the Metropolis Local Management Act), in the same way as against a rate made by overseers under sect. 161 of the same Act.*

*Where there is a rate good upon its face, and duly allowed and published, a justice who is called upon to enforce it cannot go into any questions affecting its validity, which are matters of appeal.*

*The question of whether or not a rate has been duly published is one of fact, and if there be any evidence to support the decision of the justice below, this court will not interfere.*

This was a case stated under the provisions of the 20 & 21 Vict. c. 43, by the metropolitan police magistrate for Greenwich, upon a complaint by the Metropolitan Board of Works against James Empson for nonpayment of a rate.

The case stated that the complainants are the assessors appointed by the Metropolitan Board of Works under the provisions of the 168th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, to levy the sum of 9073*l.* 10*s.*, being the amount neglected to be paid by the Greenwich Board of Works, in pursuance of a precept requiring payment thereof by them under the provisions of the 172nd section of the said Act.

The defendant is one of the ratepayers in the parish of St. Nicholas, Deptford, in the county of Kent, and the complaint was for neglecting to pay the sum of 10*s.* being the amount due by him on the rate made by the said assessors. The facts proved before the magistrates were the following:—The Metropolitan Board of Works, on the 3rd March 1857, made an assessment upon the Greenwich district board, amounting to the sum of 10,723*l.* 14*s.* 8*d.*, for defraying the annual expenses of the metropolitan board, and for payment of

Q. B.]

EMPSON v. THE METROPOLITAN BOARD OF WORKS.

[Q. B.]

the loans, mortgages, debts and liabilities of the late Metropolitan Commissioners of Sewers for the year ending 1856. That a precept was issued, dated the 13th March 1857, to the Greenwich district board, and duly served on the 14th March 1857, requiring payment of the said sum on or before the 30th May 1857, and that the Greenwich district board made certain payments in respect of the said precept, amounting in the whole to 1650*l.* 13*s.* 10*d.*, leaving a balance of 9073*l.* 10*s.* That on the 24th June 1859 the Metropolitan Board of Works, by appointment under the seal of the board, appointed the complainants to assess and levy the said sum of 9073*l.* 10*s.* so remaining unpaid. That on the 3rd Aug. 1859 the complainants made an assessment after the rate of 4*d.* in the pound upon the net annual value of the property rateable within the said parish, which was allowed by one of the magistrates of the Greenwich police court. That the defendant was assessed in the said rate for the sum of 10*s.* for a house and premises occupied by him within the said parish at the time of the making of the rate, and that on the 3rd Oct. last demand was made of the sum so due, and on his neglect to pay the same the summons in this case was issued. The following objections to the rate were then offered on the part of the defendant: First, that the Metropolitan Board of Works had no power to issue the precept of the 13th March 1857, and to demand the full sum of 10,723*l.* 14*s.* 8*d.*, inasmuch as 6275*l.* 18*s.* 7*d.* was for payment of the loans, mortgages, debts and liabilities of the late Metropolitan Commissioners of Sewers, under the 11 & 12 Vict. c. 112, of which the district of Greenwich was not liable to pay any portion; secondly, that nothing was now due under the said precept, the Greenwich district board having paid the sum of 1650*l.* 15*s.* 10*d.*, which was more than the metropolitan board could legally demand of them; thirdly, that consequently the assessment of the said assessors was invalid, and the rate made by them illegal; fourthly, that the assessment made by the said assessors was not estimated according to the estimate or basis on which the county rate was assessed in 1857, the county-rate of 1850 having been adopted instead of the county-rate of 1856; fifthly, that the defendant was not liable to pay the demand claimed, which it was contended was due, if at all, on the issuing of the precept of the 13th March 1857, at which time the defendant was not, nor until the month of March 1859 did he become, an occupier of rateable property, nor liable to pay rates in the said parish of St. Nicholas, Deptford.

The magistrate declined to entertain these five objections, considering that they were matters for appeal to the court of quarter sessions against the rate, and the rate not having been appealed against by the defendant, it was not competent to him to receive them at that stage of the proceedings.

With respect to the notices affixed on or near the doors of the parish church of St. Nicholas, Deptford, it was proved that there were two entrance gates into the churchyard, leading to the church, one gate more distant than the other from the church. This gate was found locked, and the notices were affixed on the outside pillars of this gate. The party putting the notices was not cognisant of the existence of the other gate which was nearest the church-door, and did not consequently go to it. Whether this gate was or was not locked did not appear. On the church-door leading from the latter gate was placed a board for notices to be affixed, and on which all notices are usually affixed. On the church-door leading from the other gate no such notice board is placed. The magistrate overruled the objection, considering that the notice so affixed was a sufficient compliance with the statute requiring the notice to be affixed "on or near the doors," &c. The magistrate thereupon

ordered and adjudged the amount so claimed to be paid to the said complainants by the said defendant.

By sect. 170 of the before-mentioned Act, the Metropolitan Board of Works are from time to time to assess upon the different parts of the metropolis the sums which in their judgment ought to be charged upon them for defraying the expenses of the said board in the execution of the Act, &c.; the annual value of the property to be estimated according to the estimate or basis on which the county-rate is assessed, &c.

By sect. 172 the board are to issue precepts requiring payment, to be directed (*inter alia*) to the board of works for a district.

By sect. 158 the district boards are to require the overseers of their parish to levy and pay over to such board the sums which the board may require.

By sect. 161 the overseers are to levy the amount, and to make an equal pound-rate on those who are assessed to the relief of the poor; and such rates are to be allowed in the same manner and be subject to all the same provisions in relation to appeal, &c., as the rate for the relief of the poor in the same parish.

By sect. 168 the district board may, in case of default or neglect of any overseers to pay the amount required by any such order, and the metropolitan board may, in case of any default or neglect of any district board to pay the amount required by any precept of the said metropolitan board within such time and in such manner as may be therein mentioned, appoint persons to levy any money required by such board for the purposes of this Act in any parish or district, "and such persons shall proceed in the same manner, and have the same powers, remedies and privileges, and be subject to the same regulations and penalties with reference to the levying of such money, as any overseers would have had or been subject to with reference to levying any such money in pursuance of an order of the vestry or district board, or where the same might be levied by the vestry under this Act, as such vestry would have had or been subject to with reference to levying the same."

The district board having declined to enforce the precept of the metropolitan board (except as to the sum of 1650*l.* 13*s.* 10*d.*), the latter board acted upon the 168th section, and appointed assessors to levy and collect the rate for raising the amount mentioned in their precept.

E. H. Woolrych now appeared in support of the order of the magistrate, and contended that none of the objections taken before the magistrate were available upon such a proceeding, for that the rate being good upon its face, the magistrate was bound to enforce it, there having been no appeal against the rate itself.

Lush, Q.C. was here called upon by the court, and he argued that the rate was bad in its origin, for that a liability was cast upon Greenwich, which, in law, it was not liable to bear, the rate being in part for debts to which Greenwich was not liable to contribute. [COCKBURN, C.J.—We have more than once laid it down that all which the magistrate has to do upon such an application is to see that the rate is good upon its face. If you object that the rate is made for an improper purpose you should appeal to the sessions.] There is no appeal under the 168th section, under which this rate has been made. If overseers levy a rate under sect. 161, there is an appeal; but where the rate is levied by assessors under sect. 168 no appeal appears to be given. [COCKBURN, C.J.—The words of sect. 168 involve an appeal.] The words of that section only refer to the "powers, remedies and privileges" of the overseers; nothing is said about a right of an individual to appeal. [COCKBURN, C.J.—The object is to place the persons who are specially appointed in the same position as the overseers. CROMPTON, J.—The 168th section, instead of re-

C. B.]

BACKHOUSE v. THE CHURCHWARDENS OF BISHOPWEARMOUTH.

[C. B.]

peating all the words of the 161st section, uses general words to express the same meaning.] The rate was bad in its origin, and therefore the magistrate had jurisdiction to inquire into the objection. [COCKBURN, C.J.—In the case of *The Luton Board of Health v. Davies*, 29 L. J. 173, M. C., an objection was there taken to the merits of the rate, and we said that where the rate is good upon its face, the remedy should be by appeal, and not by an objection before justices when it is attempted to enforce it. CROMPTON, J.—If the objection is a matter of appeal it cannot be urged before the justices. COCKBURN, C. J.—The principle upon which we have acted is a very clear one. Where there is a rate good upon its face, it is not for the justice to go into questions which are matters for appeal. CROMPTON, J.—We have gone so far as to say that under the statute of Elizabeth, where the party assessed has no land in the parish, that may be urged as an objection before the justice; but that is upon the peculiar wording of the statute, which directs the occupiers of lands in the parish to be assessed.] Then there is another question, namely, that the rate was not duly published. The 7 Will. 4 & 1 Vict. c. 45, s. 2, with reference to poor-rates, and which therefore applies to this rate, enacts that "the notice is to be affixed on or near to the doors of all the churches and chapels within such parish or place." In the present case the facts show that the notice was not affixed on or near to the door of the church. [HILL, J.—All that is required is, that it should be affixed on or near to the door. This was a question of fact for the magistrate.]

COCKBURN, C.J.—There is nothing in this objection, unless you can show that there was no evidence before the magistrate. He has, however, found the fact against you. *Judgment for the respondents.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs.,  
Barristers-at-Law.

Nov. 8 and 22.

#### BACKHOUSE v. THE CHURCHWARDENS OF BISHOPWEARMOUTH.

*Appeal by Quaker against an order for payment of church-rates—Power of justices of the peace to make such order, the validity of the rate being in dispute.*

*A quaker having refused to pay church-rates, a complaint was made to the justices of the peace, who made an order of payment upon him, upon which he appealed to this court, and disputed the validity of the rates:*

*He'd, that, as the dispute in question was as to the validity of the rates, the justices had no power to make the order.*

#### CASE.

Edward Backhouse, a Quaker, was summoned under sect. 4 of 7 & 8 Will. 3, c. 34, before the justices of the peace for the county of Durham, on the 11th Feb. 1860, to answer the complaints made by the churchwardens of the parish of Bishopwearmouth, in the said county of Durham, and severally dated the 21st Jan. 1860, for that he, having been duly rated and taxed in and by a certain church-rate for the said parish, made on the 15th July 1858, and in and by a certain other church-rate for the said parish, made the said 15th July 1858, and in and by a certain other church-rate for the said parish, made the 7th May 1859, had refused and neglected to pay such rates within six calendar months then last past, on demand duly made. As to the two rates of the 15th July 1858, it was proved on behalf of the respondents that on the 15th Jan. 1860 Edmund Gray, one of the churchwardens, had demanded these two rates from the appellant, who refused to pay them. It was proved that on the 3rd Feb. 1859

(more than six months previous to the date of the complaint) the collector had called at the house of the appellant and saw and asked a servant for the two rates. It was not proved, however, that the appellant's servant had ever communicated to him such application, or that he had ever authorised her to refuse payment. It was urged that a sufficient demand had been made on the 3rd Feb. 1859, but the justices did not consider that there had been a sufficient demand and refusal previous to six calendar months before the date of the complaint, so as to oust them of jurisdiction under 11 & 12 Vict. c. 43, s. 11, as to all the three rates. The appellant was then called upon to answer the matter of the complaints, whereupon he disputed the validity of all the rates under the following circumstances:—

The affairs of the parish of Bishopwearmouth have from time immemorial been managed by a vestry, called "the ancient select vestry" of the parish of Bishopwearmouth, consisting of the rector (who is *ex officio* the chairman) and of twelve ratepayers. It was not proved that the churchwardens were members of the vestry *ex officio*, but by the minute-book of the proceedings of the vestry, which was produced and given in evidence, it appeared that the churchwardens had usually attended the meetings of the vestry. The parish of Bishopwearmouth was formerly very extensive, and comprised certain townships, and also the hamlet of Sunderland. In 1719 the hamlet of Sunderland was severed from it, and created a distinct parish by an Act of Parliament passed for that purpose. Previous to the year 1844 several district churches had been built, and on the 11th Nov. 1856, by an order in council, separate districts were carved out of the original parish of Bishopwearmouth, and assigned to these new churches by the names of St. Thomas, St. Andrew, St. Paul, Hytton and Ryhope, and by the operation of 19 & 20 Vict. c. 104, s. 14, and the Acts incorporated therewith, these several districts became on the passing of that Act separate and distinct parishes, and as such authorised and required to hold distinct vestries, elect their own churchwardens and levy their own church-rates. In Feb. 1850, 600*l* was borrowed by the ancient select vestry, with the consent of the bishop of the diocese, and for the purposes contemplated by the Act, by way of mortgage of the church-rates of the then whole parish under the Act of 59 Geo. 3, c. 134. From the 29th July 1856 the parish hereinafter called Bishopwearmouth proper has comprised part of the township of Bishopwearmouth, the township of Bishopwearmouth Pannas, and the township of Silksworth, but not St. Thomas, Ryhope and Hytton, or St. Andrew.

The names, with the residences of the ancient select vestry in 1850, were set out in the mortgage deed as parties thereto of the second part.

In April 1858 the respondents were elected churchwardens, and at that time and after the 15th July 1858 the following persons, together with the rector, constituted the ancient select vestry, and either resided or had places of business, and were occupiers and ratepayers in such one of the several parishes. (Here follow the names of the vestrymen, seven of whom belonged to the parish of Bishopwearmouth proper, one to St. Thomas, one to Hytton, and one to Ryhope.)

The respondents Edwin Gray and John James Kayil, both of whom reside in the parish of Bishopwearmouth proper, were elected churchwardens at a meeting of the vestry on the 6th April 1858, at which were present the rector and six members of the "ancient select vestry," and the churchwardens Robert Sharp and Edwin Gray.

On the 15th July 1858 a meeting of the vestry was held, at which were present the rector and five other members of the vestry, and also the same churchwardens. At this meeting two rates were levied, one of 3*d*. in the pound and the other of 1*d*. The

C. B.]

BACKHOUSE v. THE CHURCHWARDENS OF BISHOPWEARMOUTH.

[C. B.]

resolution as to the  $\frac{3}{4}d.$  stated that this rate was laid upon the entire parish of Bishopwearmouth as it existed in 1850 at the date of the mortgage, and before any of the new parishes or districts, except Sunderland, had been severed, for satisfying the balance still remaining due to Christopher Bramwell, the mortgagee, and the interest and expenses thereon.

The rate was headed as follows:—

"An assessment for a church-rate of the parish of Bishopwearmouth, in the county of Durham, and for the purposes chargeable thereon according to law, made this 15th day of July 1858, after the rate of  $\frac{3}{4}d.$  in the pound by the ancient select vestry of the said parish.

"JOHN J. KAYLI, Churchwarden."

The following memorandum was subscribed at the end of it:—

"We, the undersigned, being the major part of the members composing the ancient select vestry of and for the parish of Bishopwearmouth in the county of Durham, do this day, 15th day of July 1858, at our vestry meeting for that purpose duly and legally convened and assembled, rate and tax all and every the inhabitants and parishioners of the parish of Bishopwearmouth aforesaid, liable to contribute to a church-rate for and towards the necessary repairs of the church of the parish, and for and towards the providing the necessaries for the decent celebration of divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of churchwardens for the current year, the several sums of money hereinbefore mentioned being a rate or assessment of  $\frac{3}{4}d.$  in the pound on the annual value of all rateable messuages, lands, tenements and hereditaments.

"J. P. EDEN,

"J. J. KAYLI, }

"NATHAN HORN,

"EDWIN GRAY, }

"J. S. ROBINSON,

Churchwardens."

As to the rate of  $1\frac{1}{4}d.$  in the pound for a church-rate, it was resolved that the rate should be laid upon all parties within the district of the parish remaining attached to the parish church.

The amount on the face of this rate was 240*l.* 1*s.* 8 $\frac{1}{2}d.$ , and the rate was headed as follows:—

"An assessment for a church-rate of the parish of Bishopwearmouth, in the county of Durham, and for the purposes chargeable thereon according to law, made this 15th July 1858, after the rate of  $1\frac{1}{4}d.$  in the pound, by the ancient select vestry by the said parish.

"JOHN J. KAYLI, Churchwarden."

And at the end of it is subscribed the same memorandum as that on the rate for  $\frac{3}{4}d.$ ; but having three additional signatures, viz., those of Anthony Ettrick and Robert Fenwick, and Matthew Lee, as churchwarden.

As to the rate of 2*d.* in the pound made on the 7th May 1859.

On the 26th April 1859 a meeting of the select vestry, duly convened, was held, at which the rector and five others were present, and also the churchwardens Edwin Gray and John J. Kayli, who were re-elected as churchwardens for the ensuing year.

On the 7th May 1859 a meeting of the select vestry was held, when a rate of 2*d.* in the pound was levied on the then parish of Bishopwearmouth proper; the rate had the same memorandum subscribed to it as the others.

All the above three rates were duly allowed and confirmed by the Consistorial Court of the Bishop of Durham.

Under the circumstances, it was contended by the appellant that if the said ancient select vestry ever had a legal existence, it had become defunct by the severance of the parish, and that it was not a legally constituted vestry when the said rates or any of them were levied, because many of the vestrymen were not parishioners of the parish for which the vestry was constituted and

[MAG. CAS.]

acted at the time the rates were made. It was further objected that the churchwardens were not elected nor the rates granted by a legal majority of the select vestry. It was also objected that the  $\frac{3}{4}d.$  rate was excessive, and that the  $1\frac{1}{4}d.$  rate included items not chargeable upon the church-rate. It was also urged that the mortgage-debt ought to have been paid off in 1856.

The justices being of opinion that the three rates were valid upon the face of them, made an order upon the appellant to pay the same on the terms of the 7 & 8 Will. 3, c. 34, s. 4; but they stated that they declined to enter into the question as to the invalidity of the rates by reason of the alleged illegal constitution of the ancient select vestry, either originally or by reason of the severance of the parish of Bishopwearmouth as set out in the case.

The question for the opinion of the court is, whether, under the circumstances, the appellant is liable to pay the first three several rates, or any one or any more of them, and, if so, which of them.

After the case had been argued at some length by Willes for the appellant, and Coleridge for the respondents, in which the following cases were cited—*R. v. The Churchwardens of Dursley*, 5 A. & E. 10; *R. v. St. Michael's, Pembroke*, 5 A. & E. 603; *R. v. Carpenter and others*, 6 A. & E. 794; *Reg. v. Abney*, 3 E. & B. 779; *Reg. v. Byrom*, 12 Q.B. 321; *Blackett v. Blizard and another*, 9 B. & C. 851; *Watkins v. Seaman*, 2 Lutw. 435; *Pigott v. Bearblock*, 4 Moore, 399—the Court said that they would consider the preliminary point raised for the appellant, viz., whether, as the validity of the rate was in dispute, the justices had such jurisdiction as would enable them to enforce the order, and if they decided that they had not, then they would not have to give judgment on the other points.

*Cur. adv. vult.*

Nov. 22.—ERLE, C.J. now delivered the judgment of the court. — In this case three church-rates had been made upon the appellant, and he, being a Quaker, had been summoned to appear before two justices for nonpayment under the 7 & 8 Will. 3, c. 34, s. 4, and had offered, *bond fide*, several serious objections to the validity of the rates. The magistrates were of opinion that the rates were valid on the face of them, and therefore made an order to pay, and declined to enter into the question of the invalidity of the rates by reason of the alleged illegal constitution of the vestry; and they have stated the facts given in evidence before them, and have sent to us the question, under the 20 & 21 Vict. c. 43, s. 2, whether the appellant is liable to pay all or any of these rates. The respondent alleges that the 7 & 8 Will. 3, c. 34, gives jurisdiction to the justices, and creates a duty in them to make the order under these circumstances. That statute recites that Quakers, by a pretended scruple of conscience, refused to pay tithes and church-rates, and enacts that two justices may, on complaint of a refusal to pay, examine the truth and justice of such complaint, and ascertain and state what is due and payable by such Quaker to the party complaining, and enforce payment; and then gives an appeal to the quarter sessions, and takes away the *certiorari* unless the title of such tithes, omitting church-rates, shall be in question. This Act, and some others which follow, were temporary Acts; but these provisions were made perpetual by the 1 Geo. 1, c. 6, and were extended to other dues and payments of like nature with tithes and church-rates; and the clause taking away the *certiorari*, unless the title to tithes is in question is materially altered by leaving it in all cases where the title to such tithes, dues, or payments shall be in question. The respondent's construction is said to be confirmed by the 53 Geo. 4, c. 127, s. 6, which extends the provisions of the last-mentioned statute to any value not exceeding 50*l.*, and makes no provision for taking away the jurisdiction of

C. B.]

READ v. STOREY.

[Ex.]

the justices in case there should be an objection to the validity of a church-rate; whereas, in sect. 7 immediately following, giving jurisdiction to two justices over persons not Quakers, up to 10*l*., there is such a provision, and so the respondent contends that Quakers were intentionally left to the decision of two justices, while the rest of the community were to have recourse to a tribunal more conversant with ecclesiastical law. On the other hand, it seems extremely improbable that the Legislature should intend to deprive Quakers of any legal protection which other persons are entitled to. Also the context of the first enactment, giving power to the justices to examine the truth and justice of the complaint and the refusal on account of a pretended scruple of conscience, indicates an intention that the compulsion of the justices should be used to overcome the pretended scruple, and to proceed, and if there should be a real objection to the validity of the rate the justices would not act in accordance with truth and justice if they compelled payment of an invalid rate without being able to decide the true liability of the party. The statute declares the intention of the Legislature to be so in respect of tithes, by leaving the *certiorari* to move the proceedings when the title comes in question; the reason of this extends equally to rates and dues. The Act 5 & 6 Will. 4, c. 74, tends to support the appellant's views of the intention of the Legislature, and enacts that a Quaker who is sued for any tithes or ecclesiastical rate under 50*l*. in any case shall be subject to the summary jurisdiction of two justices, and further provides that nothing therein contained shall extend to a case where the title to any tithes, or a rate or any *modus* or composition shall be *bonâ fide* in question. This statute confines the summary jurisdiction over tithes where the title is not in question, and there are expressions indicating the same intention, although imperfectly expressed in respect of church-rates. An examination of the statute does not lead to a clear decision of the case now before us; but we find nothing in it to exclude the operation of the general rule that the summary jurisdiction of justices ceases when a matter of title comes into question *bonâ fide* before them. Our answer is founded on the application of that principle, and for so doing there is considerable authority. In *Re Frouess*, cited by Denison, J. in *Rea v. Wakefield*, 1 Barr. 486, Pratt, C.J. declared his opinion that, where the right was in question, such cases were not intended to be within the statute then before the court, giving the justices jurisdiction in respect of small tithes. In *Re Wakefield* (*supra*), an order upon a Quaker for payment of dues other than tithes, being of the same nature as church-rates, had been removed by *certiorari* on this ground, that the title was in question, and therefore that the justices had no jurisdiction. The affidavits in answer showed the title was not really in question, but was disputed by a Quaker on a mere pretence. Lord Mansfield declared the Act was passed for the ease and benefit of Quakers, and that jurisdiction was given to the justices where the dues were withheld from obstinacy or mere scruple, but not when the legal right and title was in dispute. The court said, disputes of title must be contravened *bonâ fide* before the jurisdiction is ousted, and as that was not the case there, the *certiorari* was quashed, and the order of the justices for levying the rate was sent back to be executed. The court therefore by implication declared, if there had been a real dispute about the title to dues, it would have been the duty of the justices to refuse to make the order. In the present case, where the validity of the rate is *bonâ fide* put into question, we think the justices should not have proceeded, and therefore the order against the appellant to pay was improperly made. It follows, the question of title submitted to us the facts here stated was not for the decision of the justices, and that we could not properly give any

further judicial answer. The appeal, therefore, must be allowed. *Appeal allowed.*

Attorneys for appellant, *Hicks and Moss.*

Attorneys for respondent, *Clarke and Morice.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and S. M. CULLOCH, Esqs., Barristers-at-Law.

Nov. 21 and Jan. 12.

READ (appellant) v. STOREY (respondent).

*Beerhouse—Beer 1*½*d. a quart—Licence for sale of.*

*A licence is requisite for the sale of beer, whether sold at a price not exceeding 1*½*d. a quart, or any other price; by 3 & 4 Vict. c. 61, s. 13.*

The following case was stated for the opinion of the Court of Ex., pursuant to the 20 & 21 Vict. c. 43, upon a conviction of the appellant at the petty sessions held at Wincanton, in the county of Somerset, on the 27th Aug. 1860, and adjourned to the 29th of the same month, for selling beer without a licence.

#### CASE.

At a petty session holden at the Town-hall in Wincanton, in and for the division of Wincanton, in the county of Somerset, on the 27th Aug. 1860, before us the undersigned Henry Hobhouse and Richard Phelps, Esquires, two of her Majesty's justices of the peace, in and for the said county, a complaint preferred by William Storey, a sergeant of police (hereinafter called the respondent), against Richard Read (hereinafter called the appellant), under sect. 13 of the Act 3 & 4 Vict. c. 61, charging for that the said appellant: "did, on the 25th July last, at Wincanton, sell beer by retail without a licence," was heard by us the said justices, and adjourned to the 29th Aug. 1860, and then determined, the said parties respectively being present, when the appellant was duly convicted before us of the said offence, and we adjudged him to pay a penalty of 1*s*., to be applied according to law, and also to pay the respondent the sum of 5*s*. 6*d*. for his costs in that behalf.

And whereas the appellant, being dissatisfied with our determination upon the hearing and determination of the said complaint, as being erroneous in point of law, hath, pursuant to sect. 2 of the statute 20 & 21 Vict. c. 43, applied to us in writing within three days after the said determination, to state and sign a case setting forth the facts and the grounds of such our determination as aforesaid, for the opinion thereon of her Majesty's Court of Ex. at Westminster.

Now therefore we, the said justices, in compliance with the said application of the appellant, and the provisions of the statute aforesaid, do hereby state and sign such case as follows:—

At the hearing of the aforesaid complaint it was proved by the complainant, the respondent in this appeal, that on the 25th July 1860 he went to the appellant's house, and called for a pint of beer, with which he was served, and that he paid *¾*d. for it, and further, that the appellant had not a licence to sell beer, but that he had a board up with an inscription on it, "Table beer sold here."

The defendant, being the appellant in this appeal, did not deny that on the 25th July he sold beer of the denomination mentioned in the statute 42 Geo. 3, c. 38, s. 18, namely, beer at and after the rate of 1*½*d. a quart. He submits that by sect. 18 of that statute he was allowed to retail such beer at no greater or higher price than at and after the rate of 1*½*d. the quart, without obtaining a licence as a common alehouse keeper. That the stat. 3 & 4 Vict. c. 61, s. 12, recognises this Act, by authorising excise officers to enter houses kept open for the sale of beer of that description, and that in that section the word "licensed" is not used, although in the preceding section conferring a similar authority in regard to licensed beerhouses, the

[Ex.]

READ v. STOREY.

[Ex.]

word is there used. He submits, further, that the 13th section of 3 & 4 Vict. c. 61, does not apply to beer not exceeding 1½d. a quart, inasmuch as the interpretation clause in 1 Will. 4, c. 64, referred to by the 20th section of the 3 & 4 Vict., does not mention such beer.

We, however, being of opinion that a licence is necessary for the sale of beer at 1½d. a quart, and that by the 21st section of 3 & 4 Vict. c. 61, all the provisions of 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, are made applicable to that Act, and, moreover, that the interpretation clause, sect. 32, is also applicable to it, and which enacts that the word "beer" shall be deemed to include "beer, ale and porter," without any reference to price or quality, and seeing also that the 17th section of 4 & 5 Will. 4, c. 85, imposes a penalty upon all persons selling beer without a licence, wholly irrespective of price or quality, and thereby virtually repealing the 18th section of 42 Geo. 3, c. 38, we are decidedly of opinion that a licence was necessary, and that the evidence given before us brought the case within the operation of the said 13th section of the Act 3 & 4 Vict. c. 61, and accordingly give our determination against the appellant in the manner before stated.

The question of law arising from the above statement, therefore, is whether upon the true construction of the several Acts of Parliament hereinbefore referred to, a licence was requisite for the sale of beer at a price not exceeding 1½d. a quart.

Whereupon the opinion of the Court of Ex. is asked upon the said question of law, whether or not we, the said justices, were correct in our determination as aforesaid. And as to what further should be done or ordered by the said court in the premises.

Given under our hands this 2nd day of November, in the year of our Lord 1860.

(Signed) H. HOBHOUSE,  
R. PHELIPS.

*T. Thring* argued for the respondent, contending that it was not lawful for any person (not being the keeper of an inn, alehouse, or victualling-house), under the provisions of any of the Acts of Parliament mentioned in the body of the case [and which he referred to], to sell any beer by retail at a price not exceeding 1½d. the quart, without having an excise licence authorising him so to do. By 3 & 4 Vict. c. 61, s. 11, it is enacted that "It shall be lawful for any officer of excise at all times during the hours in which any house licensed for the retail of beer or cider may be kept open, to enter into every house, cellar, room, or place entered for the storing, keeping, or retailing of beer or cider, and to make search for and seize all wine and spirits, and sweets, which may be found in any such house, cellar, room, or place, and to examine all beer or cider kept therein." Sect. 12. "That it shall be lawful for any officer of excise during the hours in which any house is kept open for the sale of beer after the rate of 1½d. or after a less rate the quart, to enter into every such house, cellar, room, or place for the keeping or retailing such beer, and to make search for and seize all wines, spirits, sweets, and all beer which by law they are not entitled to sell." Sect. 13. "If any person not being duly licensed to sell beer or cider, shall retail any beer or cider, either to be consumed in or upon the house or premises, or off the premises where sold, or if any person shall sell any beer or cider to be consumed in or upon the house or premises where sold, without being duly licensed so to do, such person shall in addition to any excise penalty to which he may thereby become subject forfeit 5*l.*, such penalty to be recovered in the same manner as any other penalty (not being excise penalties) are by the said recited Acts (11 Geo. 4 & 1 Will. 4, s. 64, and 4 & 5 Will. 4, c. 85), or this Act, to be recovered, levied, and applied. Provided always, that no information or other proceeding for the recovery of the said penalty shall be ex-

hibited or commenced, except by and in the name of a constable or other officer of the place."

*Scotland*, for the appellant, contended that the appellant was not guilty of any offence within the 13th section of 3 & 4 Vict. c. 61. That the said section only applied to the sale of beer in respect of which an excise licence was required at the time the said Act came into operation, and that neither by the said Act nor any former Act was a licence required for the sale of beer at 1½d. or a less rate the quart. That the said Act expressly recognised the lawful sale of beer at 1½d. or a less rate the quart in unlicensed houses. That the former Acts 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, did not take away the previously existing right to sell such beer without a licence, but only extend, subject to certain amendments, the granting of the licences before required to other persons than those before capable of holding such licences be also referred to the several Acts of Parliament relating to the sale of beer. The following is a copy of a general order issued by the Board of Excise in reference to the sale of table-beer at the rate of 1½d. per quart:—"General order. Excise Office, London, 16th Nov. 1830. In pursuance of directions from the Right Honourable the Lords Commissioners of his Majesty's Treasury, signified by letter from one of their Lordship's Secretaries, dated the 9th inst.: Ordered, that no objection be made by the officers of this revenue to the sale of table-beer only, by retail, by persons not licensed in the same manner as before the passing of the Act 1 Will. 4, c. 64, provided such beer be not sold at a higher price than 1½d. per quart. By the board, CHARLES BROWNLE."

*Thring* in reply.

*Cur. adv. vult.*

Jan. 12.—*POLLOCK*, C.B. delivered judgment.—This was an appeal from the decision of the magistrates who had convicted the defendant for selling beer without a licence to sell, although the beer was of the price of 1½d. a quart. We are of opinion that the conviction should be affirmed. The case is clearly within the 13th section of the 3 & 4 Vict. c. 61; that is to say, the defendant has sold beer without a licence for so doing. It is therefore for him to show some exception in the Act of Parliament, or some qualification of the enactments in that section, which will exempt him from its operation. Now, he relies on the preceding section, which speaks of houses kept for the sale of beer at 1½d. or less the quart, and of the seizure of beer they are not entitled to sell. Certainly the section is not well drawn. With reference to a beerhouse the law in that clause in the Act of Parliament will not bear a very nice grammatical construction to be put upon it. This, it is said, assumes there is some beer they are not entitled to sell, and as the previous section applies to licensed beerhouses, sect. 12 must be taken to apply to unlicensed houses; and so it appears such houses may sell some beer, which can only mean beer of the price at which the defendant sold his. The section will not bear a critical examination; but probably does mean to relate to houses not licensed to sell—not licensed at all—but kept for the sale of beer at the rate of 1½d. or less a quart, and no other, and to authorise the seizure of some quality of beer. But, assuming that to be the case, we think it is enough to control the express words of the next clause, which in terms comprehends all beer of every description. There is no enactment like that in sect. 12 in the original statute of the 11 Geo. 4 & 1 Will. 4, and the succeeding Sale of Beer Acts. It is clear therefore that, before the 3 & 4 Vict., persons selling beer at 1½d. or less a quart, and not licensed, may be subject to a penalty under the 11 Geo. 4 & 1 Will. 4. The assumption, therefore, in the 12th section of the 3 & 4 Vict., that there is beer which a person may be entitled to sell, though not licensed (if there is any such assumption), is erroneous, and the section cannot



Q. B.]

DIXON v. DOUBLEDAY.

[Q. B.]

be treated as an enactment that such beer may be sold. Sect. 12 was probably introduced in relation to the then known state of things, namely, there were places not licensed at which beer was sold at the rate of 1½d. or less a quart, and it was necessary to give a right to the excise officers to enter and search there as in licensed houses. It was argued that the 42 Geo. 3, c. 38, s. 18, which prohibits every person not being a common brewer, nor licensed alehouse-keeper, from selling beer "at any higher rate than 1½d. a quart," in effect legalised the sale of cheap beer without any licence. It is to be observed that all that that section does is, not to permit such sale without a licence, but to except it from the additional penalty there mentioned. Even if legalised by the 42 Geo. 3, it really may have been intended by the 11 Geo. 4 & 1 Will. 4, and subsequent Acts, including the 3 & 4 Vict., to apply their enactments to all beer, strong and weak, there being on their passing less need to facilitate the sale of cheap beer, and possibly it being thought right that the new class of beersellers paying a licence should be protected from the competition of table-beer sellers. But we need not speculate on the objects of the Legislature. The enactment prohibiting the sale of beer without a licence is plain, and no exception ought to be applied to it without strong reasons, and we see none. We are therefore of opinion that the conviction was right.

*Conviction of justices affirmed. Judgment for the respondent.*

Attorneys for the respondent, Messrs. Dymes and Harvy, Lincoln's-inn-fields.

Attorney for the appellant, Mr. Cooper, Wincanton.

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLETT, Esqrs., Barristers-at-Law.

Saturday, Nov. 19.

DIXON (appellant) v. DOUBLEDAY (respondent).

*County rate—Committee of justices to prepare a basis—Their powers to require the attendance of parties and the production of documents—15 & 16 Vict. c. 81.*

By the 15 & 16 Vict. c. 81 (*An Act to consolidate and amend the statutes relating to the assessment and collection of county rates in England and Wales*) the justices at quarter sessions may, from time to time, appoint a committee of their body for the purpose of preparing a basis or standard for fair and equal county rates; and by sect. 7 the committee may require the overseers of the poor, constables, assessors, collectors, "and any other persons whomsoever," to appear before them, and to produce all parochial and other rates, assessments, valuations, apportionments and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes and places which may be liable to be assessed towards the county rate, and to be examined on oath and answer such questions as the said committee may put to them touching the said rates, assessments, valuations, or apportionments, or the value of the property aforesaid:

*Held, that the committee have, under this section, power to summon and examine on oath any person whomsoever, though he occupies no official position, and to require him to produce any documents in his possession which are necessary to enable them to ascertain the value of the property.*

*Where, therefore, the respondent was connected with collieries, and had in his possession documents showing the value of the property, and he was summoned by a committee under the Act to attend and produce all accounts of receipts and expenditure, and all other documents in his custody or power, relating to the*

*value of the said collieries, and he refused to comply with such summons:*

*Held, that he was bound to have complied with such summons, and that in not having done so he had rendered himself liable to the penalty under the Act.*

This was a case stated under the 20 & 21 Vict. c. 43, upon the dismissal of an information. The following was the information:—

"Northumberland to wit.—The information of William Dixon, of Alnwick in the county of Northumberland, clerk to the committee of justices of the peace for the said county, appointed under the Act of Parliament 15 & 16 Vict. c. 81, for the purpose of preparing a basis or standard for fair and equal county rates in the said county, duly authorised in that behalf and acting by the order and for and on behalf of the said committee, made before me Hugh Moises, Esq., one of her Majesty's justices of the peace in and for the said county, at Alnwick, in the said county, this 26th day of May in the year of our Lord 1860, who saith that Thomas Doubleday, of Newcastle-upon-Tyne, Esq., having been required by an order in writing of the said committee, signed by the said William Dixon as their clerk, and by their order and duly served upon him, to appear before the said committee on the 4th day of April instant, at the court-house, at Morpeth in the said county, at twelve o'clock at noon, and then and there to produce before them all accounts of receipts and expenditure and all other documents in his custody or power relating to the value of certain collieries and coal-mines in the east division of Castleward in the said county, to wit, Backworth Colliery and Barraden Colliery, such collieries and coal-mines being property in the several parishes within the said division liable to be assessed towards the county rate, and to be examined on oath, and answer such questions as the said committee might put to him respecting the said several collieries and coal-mines, so that with the aid of the returns from the parochial and other rates then in the custody of the said committee, they might be enabled more correctly to arrive at the true rateable value of such collieries and coal-mines, did unlawfully and without any reasonable excuse, neglect to appear before the said committee accordingly, contrary to the form of the statute in such case made and provided.

"W. DICKSON.

"Taken before me at the time }  
first above mentioned, at Alnwick } HUGH MOISES."  
in the said county.

The information was laid under the 15 & 16 Vict. c. 81, s. 8.

On the day of hearing all parties attended. The facts were admitted by the defendant to be correctly laid in the information. It was also admitted by him that he had in his possession private accounts and documents relating to the annual value of the collieries and coal-mines in the information mentioned, and that he was able to give evidence touching the net annual value, but he declined to produce the said documents, or to give the required evidence. It was admitted by the prosecutors that the defendant was not overseer of the poor, a constable, an assessor, a collector of public rates of or for any parish, township, borough, or place, within the county, and that he was not a person having the custody or management of any public or parochial rates or valuations of any such parish, township, borough, or place, within the county. It was also admitted by the prosecutors that the defendant had not in his custody or power any parochial or other rates, or assessments, valuations, apportionments, or other documents relating to the value or assessment on all or any of the property with respect to which he was required to give evidence; and, further, that any document in the defendant's possession, or information relating to the subject-matter of the inquiry, were so solely in his private capacity.

Q. B.]

DIXON v. DOUBLEDAY.

[Q. B.]

On the part of the said committee it was contended that they have the power to require the owners and lessees of collieries and lands, and any other person or persons whomsoever, to appear before them, and to produce their private accounts or other documents of a like nature in their custody or power relating to (that is, calculated to show) the net annual value of any property in the county rateable to the relief of the poor, and that the expression "any other persons whomsoever" in the 7th section of the Act is not confined or limited to persons being public officers having the custody of parochial and such like documents. That the primary object of the statute is to enable the committee to prepare a basis or standard for fair and equal county rates, the same to be prepared rateably and equally according to the full and fair annual value of the property rateable to the relief of the poor. That by sect. 6 the words "full and fair annual value" are to be taken to mean the net annual value of the property. That to enable the committee to arrive at and ascertain that value very extensive powers are given to them by sects. 5 and 7, including the power to call before them "any persons whomsoever" to produce documents, and to be examined upon oath touching the value of the property to be assessed. That if it be said that the expression "any person whomsoever" in sect. 7 must be construed to mean any persons of a public or quasi public character, such as constables and others mentioned in the Act, the answer to that argument is twofold: firstly, the object of the Legislature requires a more liberal construction of the words; and secondly, the marked difference between the language used in the 5th section (which is confined to persons of a public or quasi public character) and that used in the 7th section, clearly shows that the intention of the Legislature was to confer upon the committee the power of calling for private accounts and examining private individuals with reference to the net annual value of any of the rateable property in the county. It was also contended by the said committee that in the case of collieries the overseers have no means of ascertaining the rents paid by the lessees, or of ascertaining what additional annual value should be put upon the collieries in respect of things affixed and giving additional value to the freehold (such as waggon ways, &c.), and such information can only be obtained by the examination of the owners or lessees of the collieries or their agents, and by compelling them to produce such documents as are in their possession or power relating to the net annual value of the property in question.

On the other hand it was contended, on the part of the defendant, that the committee have not the power to require him to appear before them, and produce his private accounts, or other documents of a like nature relating to the value of any property liable to be assessed to the county rate, and to examine him on oath, and compel him to answer questions touching the value of property.

The view of the justices coinciding with that of the defendant, they dismissed the information.

By the 15 & 16 Vict. c. 81 (An Act to consolidate and amend the statutes relating to the assessment and collection of county rates in England Wales), s. 2, it is enacted that it shall be lawful for the justices of every county, at their general or quarter sessions, from time to time to appoint any number of justices, not exceeding eleven nor less than five, to be a committee for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property, messuages, lands, tenements and hereditaments rateable to the relief of the poor in every parish, &c.

By sect. 5 it is enacted that, "For the purpose of preparing such basis or standard . . . the said committee by their order in writing, to be signed by

their clerk, may from time to time . . . direct the overseers of the poor, constables, assessors, and collectors of public rates of or for any parish . . . and all other persons having the custody or management of any public or parochial rates or valuations of any such parish . . . to make returns in writing to the said committee . . . of the amount of the full and fair annual value of the whole or any part of the property within the parish . . . liable to be assessed towards the county rate, together with the date of the last valuation for the assessment of such parish, and the name of the surveyor, or if no surveyor, then the name or names of the person or persons by whom, and the manner in which the said valuation was made," &c.

By sect. 7 it is enacted, that "the said committee may from time to time, as often as they may deem it necessary . . . require the said overseers of the poor, constables, assessors, collectors, and any other persons whomsoever, to appear before them when and where and as often as the said committee may deem expedient, and to produce all parochial and other rates, assessments, valuations, apportionments and other documents in their custody or power, relating to the value of or assessment on all or any of the property within the several parishes and places aforesaid, which may be liable to be assessed towards the county rate, and to be examined on oath and answer such questions as the said committee may put to them touching the said rates, assessments, valuations, or apportionments, or the value of the property aforesaid," &c.

By sect. 8 it is enacted, that "every overseer of the poor, constable, assessor, collector, or other person so required to make returns, or to appear as aforesaid, who shall without any reasonable excuse neglect to make such returns in writing as aforesaid, or wilfully make any false return, and every person who shall neglect or refuse to appear when required to do so as aforesaid, or to be sworn or examined, or to produce such documents as hereinbefore provided, shall forfeit a sum not exceeding 20*l.*, to be prosecuted for and recovered by order of the said committee, before any two of her Majesty's justices of the peace."

Manisty, Q.C. (Liddell with him) now appeared for the appellant; and

Mellish (Davidson with him) for the respondent.

The arguments were similar to those used in the court below, and stated in the case.

CROMPTON, J.—The statute gives powers to the justices to make a standard for the county rate which is to be a lasting one, the parishes having a power of appeal. It is a very important matter to be adjusted, and therefore a committee is to be appointed to carry it out. I agree with Mr. Mellish as to what is the object of the Act, namely, to ascertain whether or not the parishes are fairly rated upon the rental and not a merely arbitrary rating. Now they can, by sect. 5, get the exact rating under the poor-rate. But I do not see how the committee are to get at the real value of the parish unless they get at the parts of it. They might get from the overseers the fact that the parish is not assessed on its fair annual value, and therefore it seems to me to be very necessary that there should be a power to ascertain the real value. That being the object of the Act, the words used are very strong, and seem to give the power to get at it by summoning before them all persons who can furnish them with the necessary information. This may be an inquisitorial proceeding, and be liable to abuse, but it is a very necessary power, and I do not see how the committee could get on without it. It seems to me that the persons to be summoned are not confined to overseers of the poor, constables, assessors and collectors, but extend to all other persons. The words are extremely strong, and giving them their ordinary meaning, it cannot be held that "any other person

Q. B.]

REG. v. BESTER.

[Q. B.]

whomsoever" means only any other person of the like nature as those previously mentioned. Then the words as to the documents are very strong; they are, "all parochial and other rates, assessments, valuations, apportionments and other documents in their custody or power relating to the value of or assessment on all or any of the property." Nothing can be stronger. I think the words give the power to summon any persons whom they may think necessary for the purpose of affording them the necessary information. It is a power given to a body of gentlemen in the belief that they will not exercise it vexatiously. I think the justices came to a wrong conclusion.

HILL, J.—I am of the same opinion. The question is whether the words "any other persons whomsoever" must be construed according to their plain and grammatical meaning, or are to be restrained to mean only those persons mentioned in the 5th section? And on full consideration I think the words are to be construed according to their natural meaning. The rule in such cases is, that the intention of the Legislature must be gathered from the object it had in view. The object here is very plain. Seeing then what was the object of the Legislature, it is of importance that all the requirements of the Act should be construed with reference to that object. One of the duties imposed by the 5th section is that of giving the date of the last valuation and the name of the surveyor. Now it was clearly the intention of the Act to give the committee a power to refer to the surveyor, but if the limitation is put upon the words that is contended for, the committee would have no power to have the surveyor who made the survey before them. Then the 7th section gives power not only to have before them the overseers, constables, assessors and collectors, but "any other persons whomsoever." There is no power for the committee to call for any document, except such as has reference to the value of the property. Now it may be said that this power is inquisitorial, and so it may be; but there is nothing unfair in giving the committee a power to make this inquiry. Looking at the whole Act of Parliament, I see nothing unfair, unjust, or improper, in holding that the words used are applicable to this person, and I therefore think that the magistrates came to an erroneous determination. (a)

*Case to go back to the justices.*

Wednesday, Jan. 16.

REG. v. BESTER.

*Municipal corporation—Election of councillor—Disqualification of candidate—Notice thereof to voters—Time for fresh election.*

*When a party seeks to invalidate an election upon the ground that votes given were thrown away by reason of the party for whom they were given being disqualified, it must be shown that such a number of voters as are sufficient to turn the election had notice of the disqualification before voting, and it is not sufficient to allege that the fact of disqualification "was generally and notoriously known in and through the said borough at and before the said nomination," &c.*

*Where a party has been elected a town-councillor of a municipal borough, and he resigns his office, the election to supply his place is well held, if it takes place within ten days after notice is given of the vacancy by two burgesses, as provided for by sect. 11 of the 16 & 17 Vict. c. 79.*

Lush, Q. C. (Newton with him) moved for a rule calling upon a Mr. Bester to show cause by what right he exercised the office of town-councillor of the borough of Godmanchester. It appeared that at the last

general election, on the 1st Nov., four councillors were to be elected, upon which occasion there was a contest, and ultimately a Mr. Bates was declared to be elected as one of the candidates (the lowest of the four) who had the greatest number of votes—a Mr. Custance being the next highest. At the time of the election it was said that Mr. Bates was disqualified, and upon this point the affidavit used upon this motion stated that he was not duly rated, &c., "and not living and never having been a householder within the said borough or within seven miles thereof, which latter fact was generally and notoriously known in and throughout the said borough at and before the said nomination of the said Robert Bates." Proceedings were afterwards taken by *quo warranto* against Mr. Bates, whereupon he resigned his office. Mr. Custance thereupon claimed the seat, but the town council declined to admit him, and they proceeded to a fresh election, upon which Mr. Bester was elected. [CROMPTON, J.—Are your affidavits sufficiently strong that it was notoriously known that Mr. Bates was disqualified? You only say that it was generally and notoriously known in and throughout the said borough. This is a very general statement.] The defendant will not be precluded by the granting of this application. There is another objection. By the 5 & 6 Will. 4, c. 76, s. 47, it is enacted that if any extraordinary vacancy shall be occasioned in the office of councillor, the burgesses entitled to vote shall on a day to be fixed by the mayor of such borough (such day not to be later than ten days after such vacancy) elect from the persons qualified to be councillors another burgess to supply such vacancy. And by the 16 & 17 Vict. c. 79, s. 11, it is enacted that "if any extraordinary vacancy shall happen in the office of councillor, the election to supply such vacancy shall take place not later than ten days after notice shall have been given to the mayor or town-clerk by any two burgesses, anything to the contrary notwithstanding." In the present case the election had not taken place within ten days after the vacancy, though it had taken place within ten days after notice having been given by two burgesses. The 47th section of the 5 & 6 Will. 4, c. 76, is not repealed by the 11th section of the 16 & 17 Vict. c. 79, and both sections may therefore stand together, and as the town-clerk was aware of the vacancy by Bates's resignation, because he prepared it, the new election ought to have taken place within ten days of that time. The meaning of the 16 & 17 Vict. c. 79, is, that when the town council themselves have no knowledge of the fact, then the time is to run from the date when they have notice from two burgesses. [HILL, J.—This would seem to be sufficient.]

CROMPTON, J.—I think there should be no rule in this case. It is no doubt a part of corporation law, that if voters are made aware of the disqualification of a candidate, their votes for him are thrown away. No doubt this rule operates harshly sometimes, as it may have the effect of putting into office a person who has a very inconsiderable number of votes. If the applicant had come forward and stated that such and such voters, who knew of the disqualification, voted for the party, and thereby gave him the majority, that would have been a different matter; but here he comes and asks us to draw an inference which, in fact, he himself has not drawn.

HILL, J.—I am of the same opinion. I think that Mr. Lush's affidavit is insufficient. In order to sustain his case, he ought to have given proof that a certain number of electors sufficient to turn the election knew of the disqualification. The mode of swearing in the present case ought not to be encouraged. (a)

*Rule refused.*

(a) Cockburn, C.J. was in the court for Crown Case Reserved, and Wightman, J. was at chambers.

(a) Cockburn, C.J. had left the court; Wightman, J. had gone to chambers.

Q. B.]

REG. v. MOURILYAN AND ANOTHER—EVERETT v. GRAPES.

[Q. B.]

## REG. v. MOURILYAN AND ANOTHER.

*The Metropolitan Building Act—18 & 19 Vict. c. 122, s. 3, 69, 72, 73—Expenses relative to a dangerous structure—From whom recoverable.*

*Where a chapel was leased by A. R. to C. D. for twenty-one years, and expenses were incurred by the commissioners under sect. 73 of the 18 & 19 Vict. c. 122 (the Metropolitan Building Act), such expenses were held to be recoverable from C. D., who was the owner as designated by sect. 3, and not from A. R.*

This was a case stated for the opinion of the court upon an order made by a metropolitan police magistrate upon the defendants as owners of a dangerous structure, for the payment of the sum of 36*l.* 9*s.* 8*d.*, the expense incurred by the commissioners under the 18 & 19 Vict. c. 122, s. 173 (the Metropolitan Building Act) in respect of such dangerous structure.

By sect. 69 the commissioners may cause a survey to be made of a dangerous structure, and by sect. 71 the surveyor is to give a certificate, and if he finds the structure to be dangerous, the commissioners are, by sect. 72, to require the owner or occupier to take down, secure, or repair the same. By sect. 73, if the owner or occupier fails to comply with the notice, the commissioners may (after certain proceedings) cause such structure to be taken down, &c., "and all expenses incurred by the said commissioners in respect of any dangerous structure by virtue of the second part of this Act shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs."

By the interpretation clause, sect. 3, it is enacted that the word "owner" shall apply to every person in possession or receipt, either of the whole, or of any part of the rents or profits, of any land or tenement, or in the occupation of such land or tenement, other than as a tenant from year to year, or for any less term, or as a tenant at will. The premises in question consisted of a chapel at Bermondsey, called Bethesda Chapel, used for divine service only on Sundays, of which property the defendants were the freeholders, but who had leased the same for twenty-one years to a Mr. Neil, and the question was, whether the defendants were the parties upon whom the order should be made, or the said Mr. Neil.

*Ellis* appeared in support of the order, and *Manisty*, Q. C. (*Coxon* with him) contra.

*COCKBURN*, C. J.—I am of opinion that the order of the magistrate was wrong, on the ground that the appellants were not the owners of the chapel, and consequently not liable to bear these expenses. It all turns upon the construction to be put upon the 72nd and 73rd sections; these provide that, when premises are in a certain state, then the proper parties shall cause the same to be shored up, and notice is to be given to the owner or occupier to take down, secure, or repair the same. The 73rd section goes on to provide how an order of justices is to be obtained requiring the owner or occupier to secure, &c. the premises; then, if this is not complied with, the commissioners may do it themselves and recover the expenses from the owner. Now the owner is the party primarily liable, and upon his default the occupier is liable. In this case the appellants are the lessors of premises to a person of the name of Neil, and he is lessee for a term of twenty-one years. It is plain that Mr. Neil being the lessee of the tenement, he is the owner of it. But it is said he is not liable because he is not in the occupation of it. The tenement is a chapel used on Sundays, and on other days it is shut up. The occupation must be taken subject to the nature of the premises. He is an occupier with a

greater interest than from year to year. The order would have been good as against him.

*CROMPTON* and *HILL*, JJ. concurred.

*Order quashed.*

Wednesday, Jan. 23.

*EVERETT* (appellant) v. *GRAPES* (respondent).

*Bye-laws—Not to keep pigs—Bad—5 & 6 Will. 4, c. 76, s. 90.*

*A bye-law, made by a town council, under the provisions of sect. 90 of the 5 & 6 Will. 4, c. 76 (Municipal Corporation Act), imposed a fine upon every person "who shall keep, or suffer to be kept, any swine within the said borough from the 1st day of May to the 31st day of October inclusive in any year."*

*Held, that such a bye-law is bad.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices, for an offence against a bye-law made by the town council of Newport, Isle of Wight.

The case stated that on the 12th Dec. 1859 the town council of the borough of Newport, in the Isle of Wight, under the powers conferred by the Act 5 & 6 Will. 4, c. 76, s. 90, made a bye-law, of which the following is a copy:—

"Every person who shall keep, or suffer to be kept, any swine within the said borough from the 1st day of May to the 31st day of October inclusive in any year, shall for every such offence forfeit and pay the sum of 5*s.*, and the further sum of 2*s.* 6*d.* for every day the same shall continue."

This bye-law was duly allowed pursuant to the statute.

The appellant William James Everett, who is a butcher and a pork butcher, residing and carrying on business in the said borough of Newport, was summoned upon the information and complaint of the respondent George Grapes, the superintendent of police for the said borough, for having on the 5th June 1860 kept certain swine within the said borough, in breach of the said bye-law. The summons came on for hearing on the 18th June 1860, and it was proved that on the day named in the summons the appellant had in his slaughter-house within the borough a large sow, and ten small pigs about three weeks old, and that he had also in the slaughter-house at the same time a large hog, the latter of which he said he was going to slaughter, but it was not proved that the keeping of the said swine was a nuisance, or that they were kept on any other day than the said 5th June. The appellant's attorney contended that the bye-law in question was not for the regulation merely, but was in restraint of trade, and was therefore illegal; and further, that the said town council had exceeded their authority in making it, as by the 90th section of the said Act they were only authorised to make such bye-laws as to them should seem meet for the prevention and suppression of all such nuisances as were not already punishable in a summary manner by virtue of any Act in force throughout such borough, whereas the bye-law in question prohibited the keeping of swine absolutely, irrespective of the question of whether they were kept in such manner as to be a nuisance. The justices were of opinion that the said bye-law having been made with all the formalities prescribed by the 90th section of the 5 & 6 Will. 4, c. 76, and not having been disallowed by her Majesty in Council, they were bound to enforce it without reference to the question as to whether it was reasonable or unreasonable; but assuming they could entertain that question, they considered that the bye-law was a "regulation," and not a "restraint" of trade, and was therefore valid. They therefore convicted the appellant of the said offence, and adjudged him to pay a penalty of five shillings.

Q. B.]

SPENCER v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

[Q. B.]

By sect. 90 of the 5 & 6 Will. 4, c. 76, it is enacted, "That it shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough, and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences," &c.

*Bere* appeared in support of the conviction, and contended that the bye-law was valid. [CROMPTON, J.—Bye-laws of this kind always have the qualification "so as to be a nuisance." WIGHTMAN, J.—Here the bye-law is generally against the keeping of pigs.]

*Dowdeswell*, for the appellant, was not called upon.

The COURT thought the bye-law bad.(a)

*Judgment for the appellant.*

Monday Nov. 26.

REG. on the prosecution of the PARISH OFFICERS OF RUSHTON.

SPENCER v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

*Railway—Assessment to poor-rate.*

*The percentage amount to be allowed on the capital and tenants' profits, is to be calculated on the rolling stock of a railway company, with reference to the value which an incoming tenant would give for it at the time when the rate is made, and not with reference to its cost price to the company.*

*A railway company is entitled to a deduction in respect of capital invested in moveable things, such as office and station furniture, but not in respect of things so attached to the freehold as to become part of it.*

*Things capable of being removed, but so far attached to the railway as to be intended to remain permanently connected with it as permanent appendages to it, and essential to its working, are to be included in estimating the rateable value of the company's premises.*

*The deduction to be allowed in respect of stations, buildings and sidings is to be calculated on the actual value, and not on the original cost.*

*Whether a railway company is entitled to a deduction for interest and tenants' profits upon its floating capital depends upon this, viz., whether there is any delay in realising the profits beyond what is necessarily incident to the ordinary employment of capital.*

Upon appeals by the North Staffordshire Railway Company against two rates made for the relief of the poor of the township of Rushton Spencer, in the county of Stafford, the following case was by consent and by order of Hill, J., stated for the opinion of this court, under 12 & 13 Vict. c. 45.

The North Staffordshire Railway passes through the township of Rushton Spencer, for a distance of 104 chains, and in respect of this portion of their line of railway, and the stations, buildings and sidings within the said township, the appellants are assessed in each of the said rates upon a net rateable value of 219*l*.

The appellants and respondents are agreed to take as the gross earnings in the said township of Rushton Spencer for one year the sum of 1761*l*.

The total working expenses of the line for one year ending the 30th June 1858, including rates, taxes, and Government duty and certain tolls payable to the Midland Railway Company, amounted to 132,290*l*, of which sum it has also been agreed that 965*l*. is the fair portion chargeable to the said township of Rushton Spencer, and to be deducted from the said gross

(a) Cockburn, C.J. was absent from indisposition.

earnings in ascertaining the net rateable value of the said line in the said township.

The appellants and respondents differ as to certain other items of deduction, hereinafter mentioned.

The rolling stock of the company, which includes all the locomotive engines, tenders, passenger carriages, horse-boxes, carriage-trucks, luggage-vans, goods, cattle and mineral waggons, and all other of every kind for the conveyance of persons, cattle, animals, goods, wares, minerals, merchandise, or other articles, matters, or things whatsoever on the railway cost the sum of 356,843*l*, and for the purposes of this case it admitted that this was a fair price at the time the articles constituting the railway stock were purchased, and also that similar articles would at the time of levying the rate have cost as much.

In addition to this stock the company has been obliged to provide, at a cost of 52,950*l*, turn-tables, cranes, weighing-machines, stationary steam-engines, lathes, electric telegraph and apparatus office and station, furniture and gas works. The turn-tables and some of the weighing-machines are affixed to the freehold by means of an iron band inserted in a large stone sunk in the land. The lathes and steam-engines are connected with the buildings in which they are placed by means of iron bolts. The electric telegraph consists, first, of posts driven into the ground; second, of wires passed through the sockets of such posts, but which wires may be disconnected from the posts without injury or displacing them; thirdly, of the electrifying machines, which are in no way affixed to the freehold. The gasworks consist partly of buildings and partly of gaugometers, and the other usual plant for making gas, and of the pipes for conveying the same from the works to the railway-stations; the other weighing machines, which are all used for the purposes of the traffic on the line, and the office and station furniture are unconnected with the freehold.

The company allege, and for the purposes of this case it may be admitted to be the fact, that it has been found necessary, in carrying on the traffic and business of the railway, that the company should have in hand at command a sum of money by way of floating capital, for the purpose of providing surplus stores, such as rails, sleepers, &c., to be used in case of accidents on the line or other emergency, and partly in paying the wages of porters, pointsmen and other servants of the company, and in the current expenses of the line, which are for the most part paid weekly, or at other short periods.

The traffic over the whole of the company's line of railway is worked under a contract, which contract it has been agreed shall form part of this case.

The total amount of deductions made by the company from the contractors at the time when the rates were made in respect of the depreciation of the rolling stock and plant in the hands of the contractors was 71,000*l*, which sum would not be more than sufficient to restore the said rolling stock and plant to its original value, but which sum it is admitted has not been expended in such restoration. The company have also expended in the erection of their stations, buildings and sidings the sum of 360,000*l*.

The respondents contended that the deduction to be allowed in respect of interest on capital and tenants' profits ought to be ascertained by taking as the capital sum upon which such interest and profits ought to be calculated, the actual or depreciated value of the rolling stock at the time the rates were made, and that no allowance for interest and tenants' profits should be made in respect of a floating capital. The respondents also contend that the deduction to be allowed in respect of the turn-tables, cranes, weighing-machines, stationary steam-engines, lathes, electric telegraph apparatus, gasworks, stations, buildings, and sidings ought to be

Q. B.]

SPENCER v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

[Q. B.]

ascertained by taking the amount at which they are collectively assessed to the relief of the poor in the several parishes and townships within which the several parishes and townships are severally situated, and dividing the said amount between each parish and township in a certain proportion agreed upon between the said respondents and appellants.

The appellants contend that they are entitled to claim, as the proper deduction in respect of interest on capital and tenants' profits, the percentage amount calculated upon the whole amount of the said capital sums of 356,843*l.*, 52,950*l.* and the floating capital. They also contend that the proper deduction to be allowed in respect of all the stations, buildings and sidings is 6 per cent. per annum (which is a moderate rate of interest for money invested in buildings) upon the original cost of construction, and to take the annual amount so ascertained as the value to be deducted. It is agreed that, with reference to this head of deduction, the original cost of construction of the whole of such stations, buildings and sidings was 360,000*l.*

The questions for the opinion of the court are :

First, whether the percentage amount to be allowed for interest on capital and tenants' profits is to be calculated on the capital invested on the rolling stock taken at its cost prices, or upon the depreciated value of the rolling stock as estimated at the time when the rates were made, or at any other time.

Secondly, whether the appellants are entitled to a deduction for interest on capital and tenants' profits upon the said sum of 52,950*l.* the additional amount of capital invested in turn-tables, cranes, weighing-machines, stationary steam-engines, lathes, electric telegraph and apparatus, office and station furniture and gasworks, or upon any and what portion of such items, and if so, upon the sum originally invested in the said plant, or upon the depreciated value of the same, estimated at the time the rates were made, or at any other time, or how otherwise a deduction, if any, should be made in respect of the last-mentioned plant, or in respect of any part thereof.

Thirdly, whether the appellants are entitled to a further deduction for interest and tenants' profits, or either, upon the said floating capital.

Fourthly, whether the deduction to be allowed in respect of the stations, buildings and sidings along the line of railway ought to be ascertained by taking the rateable value at which the same are assessed to the relief of the poor only, allowing 6 per cent. upon the original cost of construction as contended for by the appellants, or how otherwise a deduction should be made in respect of the said stations, buildings and sidings.

It is agreed that, upon the decision of the court being given on the said several questions, the proper amount of assessment to the said rates shall (if necessary) be ascertained and settled in conformity with such decision by agreement between the parties, or by an accountant to be appointed by the attorneys on both sides, and the rate amended accordingly. And it is further agreed that judgment confirming or (if necessary) amending the said rates in conformity with such decision, and for such costs as the court shall direct, shall be entered on motion by either party at the sessions for the said county next or next but one after such decision shall have been given.

*Lush and M'Mahon* argued on behalf of the parish.

*Scotland* for the railway company.

Cases cited :—*Reg. v. London, Brighton and South Coast Railway*, 15 Q.B. 313; *Reg. v. Great Western Railway*, 6 Q.B. 179; *Reg. v. The Southampton Dock Company*, 14 Q.B. 587; *Reg. v. Hauler*, 17 Q.B. 220; *Reg. v. Mile-end*, 10 Q.B. 208. *Cw. adv. vult.*

COCKBURN, C. J.—Four questions are propounded in this case for the decision of the court. The first is, whether the percentage amount to be allowed on the

capital and tenants' profits is to be calculated upon the cost price of the rolling stock, or on the depreciated value which that stock may bear at the time the rate is actually made. We are of opinion that the allowance must be made with reference to the actual and not the original value. The point has already been decided by this court in *Reg. v. The Great Western Railway Company*, 6 Q.B. 179, in which decision we entirely concur. In addition to the reasons given in the judgment of the court in that case, it may be observed that that is under the Parochial Assessment Act, and tenants' profits on stock must necessarily be calculated with a view to a deduction from the gross earnings, in order to ascertain what a tenant would give for the entire property. Nothing could be more inconvenient than that a different principle should prevail in calculating the profits in the two cases. Now the question, when considered under the Parochial Assessment Act, must be looked at not with reference to railway companies who may have expended in the purchase of stock a much larger sum than the stock would now realise, but with reference to an incoming tenant, and the amount of capital such tenant would have to lay out in the purchase of the rolling stock necessary to carry on the undertaking. It is obvious that what it would be worth the while of a person or company about to embark in a commercial undertaking to give as the rent for the premises in which such undertaking is to be carried on, would depend on the amount to be deducted in addition to repairs and other necessary outgoings from the gross earnings in respect of the profits, and to the capital invested in the concern. But it is plain that a tenant would calculate such profits on the amount of the capital actually required to be invested in the stock, and not upon what may have been the value of the stock at some other time, and to some other person. Now it must be assumed that the stock in its existing condition is sufficiently effective to produce the earnings which, after the necessary deductions, constitute the improved value of the railway; and it cannot reasonably be supposed, if the company were about to give up the undertaking, they would not be content to part with the stock at its actual value, or if they were to do so the incoming tenant could not procure other stock, of an equal efficient character and value, to supply the deficiency. It follows that, in estimating under the statute 6 & 7 Will. 4, c. 96, what a tenant would pay for, the profits must be calculated on the actual value of the stock. It cannot be supposed that in exempting profits under the 6 Vict. a different principle of calculation was intended to be acted upon. The second question is, whether the company are entitled to a deduction in respect of the capital invested in the various articles therein specified, being things necessary for carrying on the business of the company. The articles to which such a question may have reference may be divided into three classes—first, things moveable, such as office and station furniture; secondly, things so attached to the freehold as to become part of it; and, thirdly, things which, though capable of being removed, are yet so far attached as that it is intended they shall remain permanently connected with the railway, or the purposes connected with it, as certain permanent appendages to it, and essential to its working. It is clear, in respect of the first class of articles, a reduction should be allowed: it is equally clear that no deduction should be allowed as to the second; as to the third, the question is finally settled by the decision of the court in the case of *Reg. v. Southampton Docks*, 14 Q.B. 587. The third question, whether the company are entitled to a deduction in respect of the floating capital therein referred to, is one of considerable nicety, and which, as it appears to us, must depend upon whether on the whole capital employed a greater delay occurs in realising the return than is ordinarily incidental to the

employment of capital? No doubt the rent which an imaginary tenant contemplated by the Parochial Assessment Act could afford to pay would be the difference between the gross earnings after the necessary deductions and the amount of profits, due reference being had to the nature of the undertaking and the capital invested. Whatever tends to diminish such profits must go *pro tanto* to diminish the rent. Any delay in realising the profits beyond such as is necessarily incidental to the ordinary employment of capital, may, and it must be presumed they would be, taken fairly into account by the tenant in determining the rateable value. On the other hand, it must be observed that a large proportion of the earnings of a railway company is of a ready-money character. It may well be that when the whole of the capital and the whole of the earnings are taken into account the profits on the whole capital realised in the shares come, in this species of undertaking, under the average of commercial enterprise. If this should be a cause of delay in realising the profit that may arise as the amount of the capital, this may be considered to be compensated by the more than ordinary quickness of the return. On the whole, we have no means before us of determining the question with reference to this view of the case. All we can do is to point out the principle by which we think it must be determined. As regards the fourth question, we are of opinion that the deduction to be allowed in respect of stations, buildings and sidings must be calculated on the actual value at which they ought to be assessed, and not on the original cost of their construction.

Nov. 17 and 26.

SMITH (appellant) v. THE CHURCHWARDENS AND OVERSEERS OF ST. MICHAEL, CAMBRIDGE (respondents).

*Poor-rate—Inland Revenue offices—Stamp-office.*

*The appellant agreed to let, and did let, to the Inland Revenue department, for their offices, five rooms of a house in his occupation, it being stipulated that the rent was to be 90*l.* per annum, this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same. The appellant himself occupied the shop as distributor of stamps for the district: Held, that the premises so let and occupied were not exempt from being assessed to the rates for the relief of the poor.*

This was a case stated under the 12 & 13 Vict. c. 45, s. 11, in the matter of an appeal against a rate for the relief of the poor of the parish of St. Michael in the borough of Cambridge, made the 15th July 1859.

The case stated that the appellant is, and at the time of making the said rate was, the tenant of the house, No. 8, Rose-crescent, in the said parish of St. Michael. The rent paid by him to Charles Claydon, the owner of the said house, is 52*l.* 10*s.* per annum. A portion of the said house, consisting of five of the principal rooms thereof, is, and at the time of making the said rate was, occupied by the surveyor of her Majesty's taxes, and by the collector of inland revenue, under an agreement set forth in the schedule hereto. Another part of the said house, consisting of one room only, is, and at the time of making the said rate was, occupied by the appellant solely and exclusively, with the exception hereinafter stated, as an office for the vending of stamps by him as distributor of stamps for the Cambridge district, and for the transaction of public business connected with his office of distributor of stamps for the said district.

The remainder of the said house, consisting of two kitchens and a coal cellar on the basement and three rooms on the second floor, one whereof is used as a sitting-room, and the other two as bedrooms, is occu-

pied by a person named Wood and his family, under the circumstances hereinafter stated.

The appellant has agreed with Wood that the latter shall live upon the premises, and he pays Wood 6*l.* 10*s.* yearly, besides allowing him to live rent free and finding him with coals and candles. For this payment and allowance Wood, whose family consists of himself, his wife and daughter, cleans the rooms and lights the fires, and he has the exclusive use of the kitchens and of two of the said rooms on the second floor.

The appellant employs an assistant in his office, who also takes in orders under the advertisement hereinafter mentioned, and the appellant is paid by a commission on the stamps sold by him.

The appellant is the printer of the *Cambridge Independent Press* newspaper, published in Cambridge, and carries on a separate and distinct business as a printer, residing in a house on the Market-hill, where the business of printing and publishing the said newspaper is carried on, and where he carries on such private printing business. In the said newspaper, published on the 21st Dec. 1859, and on subsequent days, there appeared the following advertisement:—"Printing of every description economically, expeditiously and neatly executed, at 11, Market-hill, and Rose-crescent, Cambridge, where all orders will be thankfully received." Similar advertisements appeared in other publications. The No. 8, Rose-crescent, mentioned in the said advertisement, is the house in question. Previously to occupying the said house the appellant occupied and used as an office for the vending of stamps a shop in a house opposite, for which he paid a rent of 14*l.* a year, and no abatement was made in the amount at which the said house was rated on account of such part thereof being so occupied. The appellant is rated to the house-duty in respect of the said house. The rent of 90*l.* per annum payable to the appellant under the said agreement is, with the exception of 2*l.* 10*s.* per annum, exhausted by payments made by the appellant for the following purposes, namely, the said rent of 52*l.* 10*s.* per annum to the said Charles Claydon, the expenses of coal, firewood and other fuel, gas, wages to a person employed to reside on the premises in order to take care of the same, tenants' repairs, and other incidental expenses.

The appellant is rated for the said house in the said rate at the sum of 42*l.*, being the full annual rateable value thereof, after making the deductions required by law.

The question for the opinion of this honourable court is, whether the appellant is liable to be rated in the said rate in respect of the said house, or any part thereof.

If this honourable court shall be of opinion that the said appellant is liable to be rated in the said rate in respect of the whole of the said house, then the said appeal is to be dismissed, and the said court of quarter sessions shall and may adjudge accordingly, and that the appellant do and shall pay to the respondents their costs of and incidental to the said appeal, including the costs of and incidental to this special case.

If this honourable court shall be of opinion that the said appellant is not liable to be rated in the said rate in respect of any part of the said house, then the said appeal is to be allowed, and the said court of quarter sessions shall and may adjudge accordingly, and that the respondents do and shall pay to the appellant his costs of and incidental to the said appeal, including the costs of and incidental to this special case.

It this honourable court shall be of opinion that the said appellant is liable to be rated in the said rate in respect of part only of the said house, then the said rate is to be amended according to such directions as this honourable court may be pleased to give, and the said court of quarter sessions shall and may adjudge accordingly, and that each of the parties to the said

Q. B.]

REG. v. THE CHURCHWARDENS, &amp;c. OF FLETON AND OTHERS.

[Q. B.]

appeal pay their own costs of and incidental to the said appeal, including the costs of and incidental to this special case.

## SCHEDULE.

Cambridge.—With a view of concentrating all the Inland Revenue offices in Cambridge in one central building, situate and being No. 8, Rose-crescent, in the parish of St. Michael, in the town and county of Cambridge, I Henry Smith, distributor of stamps at Cambridge, on the one part, do hereby covenant and agree to let to the Hon. Board of Inland Revenue, five rooms and a closet in the aforesaid building, for the purposes hereinafter mentioned, retaining the front shop in my own possession as the stamp distributor's office; and I Stephen Rose, collector of inland revenue for Cambridge (collector on behalf of the Hon. Commissioners of Inland Revenue) on the other part, do hereby agree to take the five rooms and closet referred to above, for the purposes and subject to the conditions hereinafter mentioned, namely: Ground floor, No. 1, for the surveyor of taxes' office, being the first room as you enter on the left hand, with a closet therein; ground floor, No. 2, for the journal office, being the back room on the same floor; first floor, No. 3, for the collector's public receiving office, being the front room, with a closet therein; first floor, No. 4, for the collector's private office, adjoining the public office; second floor, No. 5, for the surveyor of taxes' store of blank forms, being immediately on the right hand of the upper stairs, with a closet opposite No. 5, for excise stores, &c., and also the general use of the water-closet, for the annual consideration of 90*l*, this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same. Possession to be given and rent to commence on the 25th day of March 1858, such rent to be paid half-yearly, namely, on the 29th day of Sept. (Michaelmas) and on the 25th day of March (Lady-day) in each year, as witness our hands the 24th day of Feb. 1858.

HENRY SMITH, Distributor of Stamps for Cambridge.

STEPHEN ROSE, Collector of Inland Revenue, on behalf of the Commissioners of Inland Revenue, London.

O'Malley, Q.C. (Couch with him) appeared in support of the rate.

Lusk, Q.C. (Keane with him) for the appellant.

The following statutes and cases were cited:—9 & 10 Will. 3, c. 25, s. 60; 7 & 8 Geo. 4, c. 53, s. 15; *Smith v. Birmingham*, 7 Ell. & Bl. 483.

The arguments sufficiently appear in the following judgment:—

Cur. adv. vult.

Nov. 26.—HILL, J.—In this case, which was argued before my brother Blackburn and myself, we took time to consider whether the appellant was to be considered the occupier of the whole of the house in respect of which he was rated, or whether five rooms and a closet in that house were in the occupation of the Commissioners of Inland Revenue. There is no doubt that the exclusive possession of part only of a house may be given so as in effect to make the two parts of a house separate tenements. The question in the present case was, whether such possession had been given; and we are of opinion that it had not. The agreement between the appellant, as the representative of the Commissioners of Inland Revenue, is set forth in the case: by it the appellant contracted to give to the Inland Revenue the exclusive enjoyment of five rooms in the house; and in the agreement it is expressed that the appellant agrees to let the other parties take the rooms; and it is stipulated that possession should be given of that part of the house, at a rent to commence at a particular time, all of which are words properly applicable to a demise of the five rooms. At the same time it is

stipulated, for the annual consideration of 90*l*, that this sum is to include all expenses—namely, rent, rates, taxes, gas, wood and coals—also providing a trustworthy person to reside on the premises and keep them clean, light the fires, and attend to the house. We think we must look, not so much to the words as to the substance of the agreement; and, taking the whole together, we think it must be construed not as a demise of the five rooms, but as an agreement by which the appellant came into the possession of those rooms, and keeping a servant there for himself; and, certainly, the exclusive enjoyment of the rooms was to be given in the same way as the guest at an inn, or a lodger in a house, has a separate apartment, or the master of a ship has a separate cabin, in which case the possession remains in the innkeeper, the lodging-house keeper, and the ship-owner. We think that the appellant was the occupier of the whole of the rated property. The other parts of the case were disposed of during the argument. The established law regarding occupation by servants of the Crown, and exemption from rates, is expressed by Lord Campbell, in *Smith v. The Guardians of Birmingham*, that no party can be rated unless he be a subject having a beneficial occupation in respect of which he may be rated. In the present case the appellant is a subject occupying in his own right the house in question, and deriving benefit to himself from that. It is true the benefit he derives arises partly from payments made to him as the servants of the Crown, and from privileges given to him in the capacity in which he acts. Nor do we see any reason or principle for extending the exemption to such a case. As to the room which the defendant occupies and in which he distributes the stamps, there is no pretence for saying the Crown occupied that room through their servant. Judgment will therefore be given in support of the rate.

*Judgment for the respondents.*

Nov. 10 and Jan. 12.

REG. on the prosecution of THE EASTERN COUNTIES RAILWAY COMPANY (appellants) v. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FLETON, HUNTINGDONSHIRE, AND OTHERS (respondents).

*Poor-rate—Railway-station—User of by another company at a rent greater than its value—Principle of assessment.*

*The Eastern Counties Railway Company are the sole proprietors of a station at Peterborough, and in the year 1848 they entered into an agreement with the London and North-Western Railway Company, to endure for 999 years, whereby the latter company were to have the joint use of the station for their traffic, they binding themselves to pay for such use according to certain terms stipulated. The Great Northern Railway having since been opened, a considerable portion of the traffic of the London and North-Western line has in consequence been diverted, and the station has become worth much less to that company, and if the station were now going to be the subject of such an agreement, the rent would barely amount to one-third of that which the London and North-Western Company have agreed to give. The parish officers of Fletton (in which the station is situate) having assessed the Eastern Counties Railway Company in the larger sum, i. e. upon the basis of the rent agreed upon by the before-mentioned agreement, the company appealed to the quarter sessions against the assessment, and the sessions holding that the company should have been assessed upon the basis of what an incoming tenant from year to year would give for the subject of occupation, reduced the assessment from the sum of 188*l*. 1*s*. to the sum of 635*l*. :*

*Held, that the quarter sessions were wrong, and that the original assessment was correct.*



Q. B.]

REG. v. THE CHURCHWARDENS, &amp;c. OF FLETTON AND OTHERS.

[Q. B.]

This was a case stated by the quarter sessions of the county of Huntingdon, upon an appeal by the Eastern Counties Railway against an assessment to the poor-rate for the parish of Fletton, in that county.

The case stated that, by a rate made on the 17th Aug. 1859, the Eastern Counties Railway were rated in respect of the occupation by them of certain lands and premises occupied by them in the said parish of Fletton; that is to say (here various properties were set out, but the contention had reference only to the following): the Peterborough Railway station, platform, sheds, machines, wharf, sidings, electric telegraph offices and wires, main line of railway, thirty chains in length, cattle pens, workshops, roads, garden land, and fifteen houses and cottages occupied by the company's servants. The gross estimated rental of this was set down in the rate as 2495*l.* 6*s.*; the rateable value at 1889*l.* 15*s.*; and the rate upon the company at 1*s.* in the pound, at 94*l.* 9*s.* 9*d.* The case went on to state that the rate was duly appealed against, on the ground that the appellants were overrated, and that certain other persons to whom notices of appeal were given were underrated; that the rate as against the company was bad, inasmuch as it was not, as regarded themselves, made upon an estimate of the net annual value of the property occupied by them, upon an estimate of the rent of which the same might reasonably be expected to let from year to year, free of all the usual tenants' rates and taxes, and tithe commutation rent-charge (if any), and deducting therefrom the probable average annual costs of the repairs, insurance and other expenses (if any) necessary to maintain them in a state to command such rent, according to the provisions of the statute in that case made and provided. But the said rate, so far as the same related to the said company, was made upon an estimate of more than the net annual value of the said railway lands, station, &c. occupied by the said company in the said parish, and that they were overrated, &c.

At the trial the contest was confined to the property called "the station." The appellants were in occupation of a great part of it, and for the purposes of this case were to be deemed to be the persons rateable in respect of the whole occupation. Prior to the month of April 1848, and up to and at the time of the making of the agreement next hereinafter mentioned, there existed great competition between the appellants and the London and North-Western Railway Company for the traffic in goods and passengers between Peterborough and London and between Peterborough and places to the north and east of Peterborough, the London and North-Western Railway Company at that time used a portion of the station in question, in part exclusively and in part jointly, with the appellants.

In the month of April 1848 the appellants and the London and North-Western Railway Company entered into an agreement as follows:—There was set out an indenture between the Eastern Counties Railway of the first part, and the London and North-Western Railway Company of the second part, which, after reciting that the two companies had constructed and opened for traffic railways to Peterborough, and that the station at Peterborough used in common by the two companies had been erected at the sole expense of the Eastern Counties Railway Company, and that a portion of the line over which the traffic of the London and North-Western Railway Company is carried is the sole property of the Eastern Counties Company, and that arrangements had been made by the two companies for the future conduct of the Peterborough traffic; it was witnessed that, in consideration of the premises, the two companies agreed as follows:—First, that the said company of the second part, shall, paying the rents and performing the conditions of the agreement, be entitled to use the said station and portion of the line aforesaid jointly with the Eastern Counties

Railway Company for the term of 999 years. Secondly, that the said company of the second part shall, for the said portion of line and station, pay annually, by half-yearly payments, the following rent and expenses (that is to say), first, such sum annually as shall be equal to one mile's gross earnings after deducting 40 per cent thereof to cover all expenses for each year, upon that portion of the London and North-Western Railway Company which lies between the Peterborough and Sibston stations; secondly, such sum annually as shall be equal to 5 per cent. per annum upon the costs of the land and buildings to be occupied exclusively by the said company of the second part; thirdly, such sum annually as shall be equal to 7 per cent. per annum upon one half of the outlay of the station and buildings jointly used by the said two companies with the exception of land, and as shall be equal to 5 per cent. upon the land occupied by such jointly used station and buildings; fourthly, one moiety of the expenses of the management and conduct of the said joint station. Fifthly, that the said company of the second part shall keep in repair at their own expense so much of the said station and buildings as they shall exclusively occupy as aforesaid, and shall repay the said company of the first part all the outlay they have made upon internal fittings. Sixthly, that the said company of the first part shall keep in repair at their own expense the station and buildings to be jointly used, and shall manage and conduct the affairs and business of the said joint station, and shall deliver an account half-yearly to the said company of the second part of the expenses of such management, and that the said company of the first part shall provide the same amount of accommodation in all respects for the said company of the second part as for themselves, and act with impartiality in the management of the said station. These were the provisions for the division between the companies of certain portions of the traffic. The station at Peterborough used in common by the said two companies, as mentioned in the said agreement, is "the station," and ever since the execution of the said agreement the same has been and still is in force and effect, and the occupation of the station has been in fact under and in conformity with the said agreement, and leaving out of consideration the sum receivable by the appellants in respect of the portion of the line described in the recital of the said indenture as "a portion of the line leading to such station," on which for the purposes of this case nothing turns, the sum annually receivable by the appellants from the London and North-Western Railway Company under the said agreement, and charged in their published accounts to their credit as so receivable (and which in fact has been in part received, and no reason has been assigned in the said accounts, or was alleged at the trial, why the remainder should not be received, except that at the trial it was sworn that the London and North-Western Railway Company had refused to pay the same), has annually amounted and still amounts, after deducting the expenses of the management and conduct of the said joint station, to 5084*l.* 3*s.* 1*d.*; that is to say, to 1735*l.* 10*s.*, being a sum equal to the 5 per cent. per annum upon the cost of the land and buildings exclusively occupied by the London and North-Western Railway Company, and to 3348*l.* 13*s.* 1*d.*, being a sum equal to the 7 per cent. per annum upon one-half of the outlay of the station and buildings jointly used by the said two companies, and 5 per cent. per annum upon the land occupied by such jointly used station and buildings.

Up to the year 1850 a very large traffic, both in passengers and goods from Peterborough and the north-eastern and midland counties, was carried to London by the Eastern Counties Railway, with a view to which traffic the station was laid out and erected by the ap-

[Q. B.]

REG. v. THE CHURCHWARDENS, &amp;c., OF FLETON AND OTHERS.

[Q. B.]

pellants. The traffic from these districts was brought on to the Eastern Counties Railway at Peterborough by the Great Northern Railway (which did not then extend towards London further than Peterborough) by the Peterborough Lyston branch of the Midland Railway and by the then London and North-Western Railway. In the year 1850 the Great Northern Railway was opened from Peterborough to London, by a route which was shorter than that of the Eastern Counties Railway by twenty-six miles.

Immediately upon the opening of the Great Northern Railway, all the passenger traffic and a large portion of the goods traffic between Peterborough and London was diverted from the Eastern Counties Railway to the Great Northern Railway. Goods, however, were still brought on to the Eastern Counties line at Peterborough by the Midland Railway Company until the year 1857, when, by the opening of the Leicester and Hitchin Railway, the Midland Railway Company obtained an independent route to London, and accordingly ceased to send goods from Peterborough to London by the Eastern Counties Railway.

In 1858 the Welwyn and Hertford branch line was opened, by which the traffic at Peterborough was still further diminished, and since that year (with the exception of coals as hereinafter mentioned) the traffic at Peterborough of all kinds, so far as the appellants are concerned, has been confined to the short local traffic. For the purposes of such traffic an ordinary road-side station would be sufficient, and in consequence of this diminution in the traffic a large repairing shop and other buildings at the station in question have been taken down, and others have been allowed to fall into decay. The Great Northern Railway Company have an entirely separate station at Peterborough for the purposes of their own traffic. Between Peterborough and Ely, to which branch the station in question belongs, the traffic is so small that the branch is worked at a loss by the appellants. There is a considerable coal traffic belonging to the appellants passing through the station. There is no depot of coals there, but the sidings are made use of for the purpose of shunting the trains, and additional sidings have from time to time been laid down for this purpose. There is a great competition between the railway companies for this coal traffic, and the rates are low, and this branch of traffic only becomes profitable when the coals are carried in large quantities and for long distances.

The buildings comprised in the station are now used in many cases for purposes entirely different and inferior to that for which they were originally erected, the offices intended for passenger traffic being used for store-rooms and other similar purposes. To an ordinary tenant, for any other purpose than that of a railway, the station would be of no annual value if he were bound to maintain the buildings in a state of repair.

At the trial of the appeal, the annual rateable value of "the station" as and for the purposes of a station, and for the purposes to which it was, in fact, applied, after making all deductions, was estimated by the witnesses called by the appellants at sums not exceeding 635*l.*, but those witnesses, in ascertaining the said annual rateable value, did not take into account the said annual sum receivable by the appellants from the North-Western Railway Company under the said agreement, or any part thereof. It was contended for the appellants that the said annual sum agreed upon in 1848, under a different state of circumstances for the objects mentioned in the agreement, ought not to be taken into account in ascertaining the annual rateable value of the station, or the sum at which it would now let to a tenant from year to year, and that the appellants were not, and are not by law, liable to be assessed to the rate in respect of or upon that sum, or any part of it.

The respondents contended that the hypothetical

tenant from year to year contemplated by the 6 & 7 Will. 4, c. 96, must be supposed to be placed in the same position as the appellants in respect of the payment made under the agreement, such payment arising necessarily out of the occupation; that, if the tenant would be entitled to the payment, it would enhance the amount of the rent which, as tenant from year to year, he would be willing to offer for "the station;" and that therefore the appellants were by law liable to be assessed to the rate in respect of or upon such payment.

The court were of opinion that the annual rateable value of the station, not estimating the payment from the North-Western Railway Company, was 635*l.*, and they ordered the rate to be amended by substituting in it the sum of 635*l.* for the sum of 1889*l.* 15*s.*

The question for the Court of Queen's Bench is, whether the sum of money payable to the appellants under the agreement of 1848 by the London and North-Western Railway Company, ought to form part of the rateable value of the station.

If the said Court of Queen's Bench should answer the said question in the negative, the order of the quarter sessions is to be confirmed, and the rate to stand amended, and the respondents are to be ordered by the said Court of Queen's Bench to pay to the appellants their costs of and occasioned by this special case.

If the Court of Queen's Bench should answer the said question in the affirmative, the order of quarter sessions is to be quashed as to the substitution therein of 635*l.* for 1889*l.* 15*s.*, and the said sum of 1889*l.* 15*s.* is to remain in the rate, and the appellants are to be ordered by the said Court of Queen's Bench to pay to the respondents their costs of and occasioned by this special case.

*Bovill*, Q.C. and *Markby*, for the appellants, contended that the sessions were right, and that the true test of the rateable value was that which a tenant would at present give to rent the premises, according to the provisions of the 6 & 7 Will. 4, c. 96 (the Parochial Assessment Act), the rent or compensation agreed to be given by the London and North-Western Railway Company not being the true criterion, that company having bound itself to give far more than the present real rateable value for the premises: (*South-Eastern Railway Company v. Dorking*, 3 Ell. & Bl. 499; *Reg. v. The Eastern Counties Railway*, 23 L. J. 96 n. M. C.; *The Newmarket Railway Company v. St. Andrew-the-Less*, 3 Ell. & Bl. 94.)

*Keane*, for the respondents, contended that the sessions were wrong, for that taking into consideration the liability of the London and North-Western Railway Company, the appellants are only rated at what a tenant would give: (*Colleson v. The Monkwearmouth Shore*, 4 Ell. & Bl. 13.)

*Jan. 12.*—*COCKBURN*, C.J.—This was a case stated for the opinion of this court by the Court of Quarter Sessions for the county of Huntingdon, on an appeal by the Eastern Counties Railway Company against a rate made on them in respect of their railway-station at Peterborough. The facts, so far as they are material, are shortly as follow:—The Eastern Counties Railway Company, the sole proprietors of the station in question, in the year 1848, entered into an agreement with the London and North-Western Railway Company, to endure for the term of 999 years, whereby the latter company were to have the joint use of the station for their traffic; they, on the other hand, binding themselves to pay for such use of the station according to certain terms stipulated in the agreement. The direct Northern Railway having since been opened, a considerable portion of the traffic of the North-Western line has, in consequence, been obstructed, and the station has become worth much less to the London and North-Western Company; and there is no doubt that if the

matter were *res integra*—if the present London and North-Western Company, or any other company, working their line unfettered by the existing agreement, proposed to take from the Eastern Counties Company the use of the station at a yearly rent—such rent would barely amount to a third part of the sum actually paid. The parish of Fletton, in which the station in question is situated, having assessed the Eastern Counties Company in the larger sum, the company appealed against the rate, on the ground that, according to the Parochial Assessment Act, the rateable value is not the rent actually paid by the existing occupiers, but that which it may be presumed that an incoming tenant from year to year would give for the subject of the occupation. Adopting their view, the court of quarter sessions ordered the rate to be amended by reducing the rateable value on which the company had been assessed, from the sum of 1889*l.* 15*s.* to 635*l.* We are of opinion that this decision was erroneous, and that the original assessment was right. The fallacy of the argument in favour of the company consists in looking at the London and North-Western Company as the occupiers, and in considering what a tenant from year to year, coming in their place, would pay as rent for the use of the station. But the London and North-Western Railway Company are not occupiers of the station at all. They had only an enjoyment by way of user—in other words, an easement. The occupiers are the Eastern Counties Company, subject to this easement of the other company; and the true question is, what would a tenant coming into the place of the Eastern Counties Company give for such occupation? Now it is plain that a tenant coming into their place, in considering what rent he would give, after the necessary deductions, would take into account, as increasing the value of the premises, the amount to be annually paid by the London and North-Western Company for their user of the station. It is true the Eastern Counties Company, if they were to let the station, though they could, of course, only let that subject to the right of the London and North-Western Company to use it, might, taking a lower rent from their immediate lessee, reserve to themselves the receipt of the amount annually payable by the London and North-Western Company. Whether under such circumstances they would not still remain liable as occupiers *quoad* a moiety of the line, the London and North-Western Company having only an easement therein, it is unnecessary to decide. It is sufficient, in our opinion, for the present purpose to say, that, *rebus sic stantibus*, they are assessable to the full amount of what they receive. The very principle according to which the value of the occupation to the hypothetical tenant contemplated by the Parochial Assessment Act is to be estimated, is to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to appear that these circumstances are about to undergo a change. But there is nothing in the present case to lead to the supposition that the Eastern Counties Company will either forego their right, under a very advantageous agreement, which is to bind the London and North-Western Company to a very remote future, or that the Eastern Counties Company will either let the station to any other occupier; or, if they do, will place such occupier relatively to the other company in a different position from that in which they themselves stand. It will be time enough to deal with such altered circumstances when they arise. At present the Eastern Counties Company, as occupiers of the station, derive a profit, not only from their own use of the station, but also in respect of the sum annually paid by the London and North-Western Company for their use of it, and they ought, in justice, to contribute to the local burdens in proportion to the entire benefit which they derive from the occupier; and we think they fail legally, as they cer-

tainly do morally, in the attempt to withdraw themselves from such fair and equal contribution. The order of quarter sessions must therefore be quashed, and the rate will stand according to the original assessment.

*Order of sessions quashed.*

Monday, Jan. 21.

REG. v. THE REGISTRAR OF THE MEDICAL COUNCIL OF ENGLAND.

*Medical Practitioners Act—Procuring entry of name on register by fraud—Infamous conduct—Erasure of name—21 & 22 Vict. c. 90, ss. 26, 29.*

*A medical practitioner represented that he had been educated abroad, and had a foreign diploma, and so procured his name to be entered on the register of medical practitioners, kept in pursuance of the 21 & 22 Vict. c. 90. The council afterwards erased the name, on the ground that the entry had been procured by fraud, but without giving the accused an opportunity of being heard. This court afterwards ordered the name to be restored, when the general council gave the accused notice that it was again proposed to erase his name, and called upon him to shew cause to the contrary. On the day fixed the accused attended with his solicitor, when a further charge of "infamous conduct in a professional respect" (sect. 29) was preferred, founded on an alleged attempt to procure a degree at a Scotch University, by another personating him and undergoing the examination. The accused claimed to be heard by counsel, which was refused, whereupon the inquiry proceeded, the accused, though present, making no defence. The council decided that the entry was fraudulently made, and that the accused had been guilty of infamous conduct in a professional respect: Held, that the name of the accused person was liable to be struck off the register, both under the 26th and the 29th sections, and that it made no difference, that the misconduct occurred before the passing of the Medical Practitioners Act.*

This was a rule nisi calling on the Registrar-General of the Medical Council for England, to shew cause why a *mandamus* should not issue commanding them to restore the name of the prosecutor Mr. Organ to the register, from which it had been erased by order of the council.

Under the Medical Practitioners Act, 21 & 22 Vict. c. 90, all persons having certain qualifications were entitled to have their names entered on the register; and by the 45th section a power was given to the general council of dispensing with those general regulations in favour of gentlemen practising in the colonies, or in England with foreign or colonial diplomas, or in the employ of the army and navy, or of the public service, or of the East India Company.

The prosecutor Mr. Organ had petitioned the council under that section, and represented that he was educated in a foreign university, where he had obtained a diploma, and also that he was in the public service as a medical officer and vaccinator to certain parishes in Yorkshire. The Medical Council decided to dispense with the general regulations of the Act in his favour, as being a person employed in the "public service," and his name was accordingly entered on the register.

Objections were subsequently made to his name continuing on the register, upon the ground, first, that he had obtained the privilege by fraud; and secondly, that he had also been guilty of "infamous conduct in a professional respect," which, by the 26th and 29th sections of the Act, were grounds for causing a name to be erased from the register. The Medical Council being satisfied that his name ought to be erased upon these grounds, ordered it to be erased; but they did so without giving him notice of their intention, and affording him an opportunity of appearing before them to shew cause to the contrary. He ac-

[Q. B.]

DAVIES v. LORD BERWICK.

[Q. B.]

cordingly applied to this court and obtained a *mandamus* to be restored, and that writ being obeyed by the council, they gave him a formal notice that it was proposed to erase his name from the register, and called upon him to appear and show cause to the contrary.

The prosecutor accordingly attended with his solicitor, and begged to be heard by counsel; but, as the council refused this application, he declined to take any part in the proceedings, though he continued present during the whole inquiry.

One part of the charge made against him was, that he had attempted to procure a medical degree at Edinburgh, by sending some one to personate himself, and undergo the examination in his stead. This occurred before the passing of the Medical Practitioners Act. The trick, however, it was stated, did not succeed, as the person sent to personate the prosecutor was plucked on the examination. In the result the council came to the conclusion that the entry was "fraudulently made," and that the prosecutor had been guilty of "infamous conduct in a professional respect," and ordered his name to be erased from the register.

He then again applied to this court, and obtained a rule for a *mandamus* to be restored upon the ground that the Medical Council had no power, either under the 26th or 29th sections, to order any name once registered under the 46th section to be erased for anything done prior to the registration.

No question was now raised as to the propriety of the erasure, but only as to the jurisdiction of the council to order it.

By the 21 & 22 Vict. c. 90, s. 26, it is enacted, "That no qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the registrar may be decided by the general council, or by the Council for England, Scotland, or Ireland (as the case may be), and any entry which shall be proved to the satisfaction of such general council or branch council to have been fraudulently and incorrectly made may be erased from the register by order in writing of such general council or branch council."

Section 29 enacts, "That if any medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall, after due inquiry, be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

M. Smith and Sleight showed cause on behalf of the council, and

Heyes, Serjt. supported the rule.

CROMPTON, J.—I am of opinion that the rule ought to be discharged. If the facts are disputed the general rule is to make the rule absolute for a *mandamus*, and send the case down to have the facts found by a jury. But the present is not a case of that kind, for the prosecutor Mr. Organ had an opportunity of disputing the facts, but he did not avail himself of it. If the council had power to adjudicate, this court will not interfere unless there was no evidence upon which to act. Under the 26th section any person may come and say that there had been fraud, and that section applies as well to persons whose names have been registered pursuant to the 46th section as to those whose names have been registered under the previous section; for there may be fraud in imposing upon the council as well as upon the registrar. If it were necessary to give an opinion upon the point, I should say that the 29th section also applied to the case.

HULL, J.—I am of the same opinion. I entirely agree with my brother Crompton that the granting of this writ is to a certain extent discretionary, and that

in this case the court ought not to interfere. Some terms ago the prosecutor obtained a *mandamus* to restore his name, upon the ground that the council struck his name off the register for misconduct, and did not give him an opportunity of being heard. But when the council gave him that opportunity, he attended with his solicitor, and when the specific charges were made known he asked to be heard by counsel. The Medical Council, in their discretion, declined to grant that request, and called upon him to answer the charges. He declined to do so, although the charges were minute and specific, and if untrue he might easily have answered them, but he confined himself to disputing the jurisdiction of the council. The council then found two facts; first, that the entry was fraudulently obtained, and they ordered it to be struck out under the 26th section; and they also adjudged that he had been guilty of "infamous conduct in a professional respect." The question thus arises, whether the 26th and the 29th sections apply. [His Lordship then referred to the various sections of the Act.] In my opinion the 26th section applies to a case like the present, where the name has been entered under the 46th section; and the 29th section also applies if the conviction takes place after, although the offence of "infamous conduct in a professional respect" may have been committed before the name is registered.

Rule discharged.

Fluker, attorney for the prosecutor.

Pinniger and Wilkinson for the Medical Council.

DAVIES (appellant) v. LORD BERWICK (respondent).

Master and servant—Servant in husbandry—

Who is not.

The appellant was hired "to keep the accounts of the farm, to weigh out the food for the cattle, to set the men to work and to lend his hand to anything, and especially to carry out the orders of his employer." Held, that he was not "a servant in husbandry" within the meaning of the 4 Geo. 4, c. 34, s. 3.

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction of the appellant as a servant in husbandry under the 4 Geo. 4, c. 34, s. 3, for refusing to obey his master's orders. It appeared that the appellant was hired at wages amounting to 1*l.* 5*s.* per week, to keep the accounts of the farm, to weigh out the food for the cattle, to set the men to work, "and to lend his hand to anything, and especially to carry out the orders of his employer." His misconduct, for which he was convicted, consisted in his refusing to do a particular act which he was ordered to do for his master.

By the 4 Geo. 4, c. 34, s. 3, it is enacted "that if any servant in husbandry . . . shall contract with any person or persons whomsoever to serve him, her, or them, for any time or times whatsoever, or in any other manner . . . or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof . . . then and in every such case it shall and may be lawful for any justice of the peace to commit," &c.

Bovill, Q.C. now appeared in support of the conviction, and contended that the appellant came within the description of "servant in husbandry," and that the conviction was right: (*Lilley v. Elwin*, 11 Q. B. 742; *Ex parte Ormrod*, 1 D. & L. 825; *Bowers v. Lovekin*, 25 L. J. 371, Q. B.)

Huddleston, Q.C., contra, argued that the appellant did not come within the description of servant in husbandry, for that he was in truth a farm bailiff: (*Kitchen v. Shaw*, 6 A. & E. 729.)

COCKBURN, C. J.—I think this conviction should be quashed. The statute evidently means by the designation used, a person who is to do something with his own hands. I cannot think that the first part of his employment refers to a servant in husbandry; for, first,

Q. B.]

OVERSEERS OF EAST DEAN v. EVERETT—REG. v. HENRY SPARROW. [C. CAS. R.]

he is to keep the general accounts of the farm; secondly, to weigh out the food and set the men to work. Now that is the general employment; and in addition he is to lend his hand to anything, and especially to carry out the orders of his employer; this, however, cannot make him a servant in husbandry. I think the conviction is wrong and ought to be quashed.

CROMPTON and HILL, J.J. concurred.

Conviction quashed.

Saturday, Jan. 26.

THE OVERSEERS OF EAST DEAN v. EVERETT.

*Poor-rates—Recovery—Overseers succeeding those who made rate*—43 Eliz. c. 2, s. 4—17 Geo. 2, c. 38, s. 11.

*The power given to "succeeding overseers" by 17 Geo. 2, c. 38, s. 11, to levy arrears to reimburse those who preceded them, is not confined to those overseers who immediately succeeded those who made the rate.*

The respondent was summoned by the appellants to the petty sessions for the Newnham division of the county of Gloucester, for poor-rates, one made on the 1st Jan. 1858, for 4s. 5d., and the other on the 16th June 1858, for 9s. 3½d. The overseers who made the rates continued in office until the 25th March 1859, at which time other persons were appointed, who remained in office till the 28th March 1860, when the appellants were appointed.

The summons was for the above-named two rates of 4s. 5d. and 9s. 3½d., and for costs 3s. 6d.

The justices, upon the hearing of the summons, decided that the appellants could not recover the said rate, because they were of opinion that a poor-rate cannot be recovered except by those who made it, or by those who may be the overseers in the year next after that in which it was made.

The said overseers being dissatisfied with the decision, applied to the justices to state and sign a case for the opinion of this court, whether, upon the facts stated, the justices ought to have made an order for the payment of the said rates made on the 1st Jan. and 16th June 1858, and have granted a warrant of distress.

*Hopwood* for the appellants.—There is nothing in the Acts of Parliament, 43 Eliz. c. 2, s. 4, and 17 Geo. 2, c. 28, s. 11, to limit the recovering of a rate to the overseers immediately succeeding those who made it, (11 & 12 Vict. c. 91, s. 1.)

No one appeared for the respondents.

CROMPTON, J.—But for the 11th section of the 17 Geo. 2, c. 38, there never could have been any difficulty about this question. That section provides "that in case any person or persons shall refuse or neglect to pay to such overseers as aforesaid any sum or sums of money that he, she, or they shall be legally rated or assessed to, it shall and may be lawful to and for the succeeding overseers, and they are hereby required, to levy such arrears, and out of the money so levied to reimburse their predecessors all sums of money which they have expended for the use of the poor," &c. But then in the 4th section of the 43 Eliz. c. 2, there is no such restriction—the word there used is "arrears." According to that a man who does not pay to one overseer must to a subsequent one, and as that Act stood there could be no difficulty. Then came the 17 Geo. 2, but it is clear that that Act was passed for the relief of outgoing overseers, and that the successors might be enabled to levy rates not levied by them, and to reimburse to them moneys expended by them. That appears sensible and just, and I dare say, when the case was before the justices, the later statute was alone brought to their notice, and not the earlier.

*Judgment for appellants. Remitted to justices, with answer in the affirmative that they should issue warrant.*

Monday, Jan. 28.

Ex parte McLeod.

*Where justices have heard an information and dismissed it, on the ground that they had no jurisdiction, at the same time offering to grant a case, this court refused to grant a rule desiring them to hear and determine.*

Collier, Q. C. moved for a rule to show cause why the justices of Southampton should not hear and determine an information laid by Murdock McLeod, one of the metropolitan police force, against a person named John Hammond, for an assault. By statutory enactment the metropolitan police are empowered to do duty in the dockyards, and at the time in question they were on duty at the Clarence-yard at Gosport, the complainant McLeod being one of them; an information was laid by him against Hammond for an assault upon him, and the justices, upon having their attention called to the 10 Geo. 4, c. 44, and the 20 & 21 Vict. c. 64, were of opinion that the assault was proved; but they said they had no jurisdiction, inasmuch as the statutes in question applied only to magistrates in the metropolis; and thereupon they said they had no power to interfere, and declined to adjudicate; but they dismissed the information, and offered to grant a case. [HILL, J.—The justices did adjudicate. CROMPTON, J.—They did what was right—they offered to grant a case; we cannot grant a rule for justices to decide a case in a particular way.] They declined jurisdiction. [WIGHTMAN, J.—They clearly have adjudicated.] It is now too late for a case; and if the justices have erred in law, this court will grant a rule.

Foulden, who appeared to show cause in the first instance, was not called on.

WIGHTMAN, J.—I think there should be no rule; the magistrates heard the case, have determined it, and dismissed the information; it is gone, and they have decided it; we cannot say they are to decide in a particular manner.

CROMPTON, J.—The complainant ought to have taken a case; we cannot interfere; we could not have granted a *mandamus* before the Act substituting these rules for a *mandamus*, for here the justices have decided the case.

HILL, J.—I am of the same opinion. I think, if before the recent Act a *mandamus* had been issued, the facts here stated would have been a good and sufficient return.

BLACKBURN, J.—I am of the same opinion; and even if there were authority to support this application, I think a case so much more convenient a remedy, that I think in our discretion we ought not to interfere.

Rule refused.

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 10.

(Before ERLE, C.J., CROMPTON, J., BEANWELL and CHANNELL, BB. and HILL, J.)

REG. v. HENRY SPARROW.

*Assault—Verdict of aggravated assault—Grievous bodily harm—Entering verdict.*

*An indictment contained counts charging an assault, and unlawfully and maliciously inflicting grievous bodily harm, and also a count for a common assault. At the trial evidence was given that the prisoner inflicted serious bodily injuries upon the prosecutor. The jury found the prisoner guilty of an aggravated assault without premeditation, and that it was done under the influence of passion:*

*Held, that the verdict was rightly entered on the record on the counts charging an assault and unlawfully and maliciously inflicting grievous bodily harm.*

C. CAS. R.]

REG. v. HENRY SPARROW.

[C. CAS. R.]

Case stated for the opinion of this court by the recorder of Birmingham.

The defendant was tried at the Michaelmas quarter sessions of the peace for the borough of Birmingham, on an indictment charging him in one set of counts with an assault on one Saml. Griffiths, and with having thereby unlawfully and maliciously inflicted grievous bodily harm upon the said Griffiths. The indictment contained also a count for common assault.

It was proved in evidence before me, that on the 6th Sept. 1860 the prosecutor was standing in a shop in High-street, Birmingham. The defendant passed and saw the prosecutor there. The defendant came and stood on the step of the shop for a few minutes, till the prosecutor was leaving. The defendant then handed to the prosecutor a letter and asked him to read it. The prosecutor declined to do so, and was going away. The defendant then struck the prosecutor with his fists two violent blows upon the mouth, another blow on the temple, and a fourth on the back of the ear. The prosecutor retreated backwards, the defendant following him up and striking at him. The prosecutor then struck the defendant a blow over the hat with a stick. In retreating the prosecutor's foot slipped against the kerb-stone, and he fell heavily upon his side. The defendant went to him, wrenched the stick from him, and then went away.

The prosecutor and the medical witnesses described the injuries which the prosecutor thereby sustained as follows:—Three of his front teeth and other teeth further up the jaw were loosened, his gums were lacerated, and his mouth was swollen. The pain under which the prosecutor was suffering immediately after the accident was stated by the medical witness to be insufferable. One of the front teeth and the back teeth have since partially fastened, but the two front teeth have not done so, and the prosecutor must lose the same. The mouth and jaw remained sore and stiff so that the prosecutor could not eat solid food for more than a week. His nervous system received a shock from which he suffered so that the medical men at an interval of sixteen days advised his going away from business for a time, and he received an injury on his side from which he had felt, and at the time of the trial (9th Oct.) was still feeling, pain.

I told the jury that the injuries inflicted on the prosecutor, as described by the medical witnesses and the prosecutor himself, fell within the definition of "grievous bodily harm," and that, if they believed the witnesses, there was evidence to support the first count (or set of counts) in the indictment; and in reply to a question from the jury, I explained to them that the question of whether the defendant intended to inflict grievous bodily harm upon the prosecutor did not arise in this case, but that the simple point for their consideration was, did the defendant unlawfully "assault the prosecutor, and thereby inflict upon him grievous bodily harm?"

The jury returned the following verdict:—"We find the defendant guilty of an aggravated assault, but without premeditation; it was done under the influence of passion."

It was contended on the part of the defendant, that that finding amounted to a verdict of guilty upon the count for the common assault only.

I held otherwise, and directed a verdict of guilty to be entered upon the first set of counts; and the question I submit for the consideration of the Court of Criminal Appeal is, was I right in so holding?

M. D. HILL, Recorder.

*Huddleston* (A. Wills with him) for the prisoner. —The question is, whether the jury found the prisoner guilty of the offence charged in the first set of counts in the indictment. These are framed either upon the 10 Geo. 4, c. 34, s. 29, or the 14 & 15 Vict. c. 19, s. 4. The latter enactment is, "And whereas it is ex-

pedient to make further provision for the punishment of aggravated assaults, be it enacted that if any person shall unlawfully and maliciously inflict upon any other person, either with or without any weapon or instrument, any grievous bodily harm, or unlawfully and maliciously inflict, cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the court to be imprisoned with or without hard labour for any term not exceeding three years: provided, however, that nothing herein contained shall be deemed or taken to repeal the provisions of the 29th section of the 10 Geo. 4, c. 34." The jury have not found the prisoner guilty of assaulting with intent to commit grievous bodily harm, but only of an aggravated assault. An aggravated assault does not necessarily mean one accompanied by grievous bodily harm—it may mean one of an insulting character, *e. g.* spitting at a person.

HILL, J.—Why should we assume that the jury have found a verdict contrary to the facts, when the verdict they have found is consistent with those facts? Mr. Archbold, in his treatise on Criminal Pleadings, begins with "aggravated assaults." No one exercising his common sense can have any doubt as to the meaning of the word.

CHANNELL, B.—The statement before us enables us to construe what the jury meant by an aggravated assault.

CROMPTON, J.—We must take the verdict with reference to the subject-matter of the charge, and what was left to the jury.

*Huddleston*.—The jury may, consistently with the facts, have intended not to find the prisoner guilty of intending bodily harm, but only of an aggravated assault. The recorder did not tell the jury that "bodily harm" and an aggravated assault were the same thing. The jury have not found what is really the ingredient in an assault with intent to do grievous bodily harm; secondly, the jury having found that the assault was without premeditation, and under the influence of passion, the verdict of guilty ought not to be entered on the first set of counts. As malice is the distinction between murder and manslaughter, so here it is the distinction between grievous bodily harm and a common assault. So in arson, malice is necessary to constitute the crime.

HILL, J.—You make no distinction between "premeditation" and "intention," between intentionally doing an unlawful act and causlessly doing it.

CROMPTON, J.—Here I think we must take it that the prisoner intended to do the act.

*Huddleston*.—The word "maliciously" is used in the statute, which means something more than intentionally.

*Ballantine*, Serjt. (*Adams* and *O'Brien* with him) for the prosecution, was not called upon.

ERLE, C.J.—We are of opinion that the conviction ought to be affirmed. The objection is made to the language in which the jury returned their verdict: "We find the defendant guilty of an aggravated assault, but without premeditation. It was done under the influence of passion." It is very rare indeed to meet with language which cannot be perverted. We must construe the language used by the jury by looking at the circumstances under which the verdict was returned. The question was raised, whether the prisoner committed the assault with intent to do grievous bodily harm. The intent was discussed, and an explanation of what the statute meant given by the recorder, and then the jury say, "We find the defendant guilty of an aggravated assault." It is impossible, to my mind, for any one to have entered any thing on the record in respect of that finding other than what has been entered. It was contended that this finding was a negative of some ingredient necessary to constitute the offence of "grievous

V.C. W.]

VAUGHAN v. SOUTH METROPOLITAN CEMETERY COMPANY.

[V.C. W.]

bodily harm;" and that the party must have intended to commit the crime of grievous bodily harm. We are all of opinion that the assault was intentional in the understanding of the law, though the jury have found that it was without premeditation and under the influence of passion. We therefore think that the verdict authorised the recorder in entering a verdict of guilty on the first set of counts.

The rest of the court concurring,

*Conviction affirmed.*

### V. O. WOOD'S COURT.

Reported by W. H. BENNET, Esq., Barrister-at-Law.

Nov. 14, 17 and 22.

VAUGHAN (Clerk) v. SOUTH METROPOLITAN CEMETERY COMPANY.

*Burial fees—District churches and chapels—Cemetery Act and Church Building Acts considered.*

*The incumbent of a district chapelry constituted by order in council under the Church Building Acts, is entitled to the fees payable by a cemetery company for the interment of the dead removed from the district attached to such chapelry, where the Act of Parliament incorporating the Cemetery Company has been passed previously to the assignment of such district chapelry.*

This was a bill filed by the Rev. Matthew Vaughan, the incumbent of the district chapelry of St. John Angell-town, Brixton, against the South Metropolitan Cemetery Company and their registrar, and also the incumbent of the said district parish, praying that it might be declared that the plaintiff and his successors, incumbents of the said district chapelry of St. John were entitled to the fees payable by the cemetery company in respect of the interment of persons removed for the purpose of interment from the said district chapelry within the consecrated parts of the said cemetery; for an account of the amount of such fees from the commencement of the incumbency of the Rev. N. A. Garland, the incumbent of the said district parish, and for payment thereof.

It appeared that by an Act incorporating the cemetery company (6 & 7 Will. 4, c. cxxix.) it was enacted by sect. 18, that upon the interment of every person within the consecrated part of the cemetery who should appear by the books of the company to have been removed for the purpose of interment from the parish in which the cemetery should be situate, or from any parish in the county of Surrey adjoining thereto, or from any of the parishes of Lambeth, Battersea and Wandsworth, or from any parishes within the cities of London or Westminster, or borough of Southwark, according to the limits therein mentioned, the said company should pay unto the incumbent for the time being of the church or chapel of the parish or other ecclesiastical district or division of the parish form which such person should be so removed, the fees following (setting out these fees).

By the 19th section it was enacted that the company should cause proper books to be kept for the purpose of ascertaining the amount of such fees.

By the 20th section the company was required twice in every year to cause an account to be made up of such fees, and delivered to the incumbents for the time being of the churches or chapels of the several parishes, or of the ecclesiastical districts or divisions of said parishes.

By the 22nd section it was provided that the incumbent should pay to the churchwardens or chapelwardens for the time being of his church or chapel, out of every sum of 20s. received by virtue of the Act, in respect of interments in any vault, catacomb or brick grave in said cemetery, the sum of 12s., and out of every sum of 7s. 6d. in respect of interments in the open ground of said cemetery the sum of 3s. 6d., to be

respectively paid and applied by them in the same manner and amongst the same persons (including the incumbents of such churches and chapels) and in the same proportions as the fees or interments which said churchwardens and chapelwardens were entitled to, receive in their respective parishes, districts, or divisions of parishes were and ought by law or custom to be paid and applied."

The subsequent sections provided for various modes of carrying out the above provisions.

In pursuance of this Act the company was formed, and now possess, a cemetery at Norwood, in the parish of Lambeth; St. Matthew, Brixton, was a parish adjoining thereto. Part of the cemetery was set apart for the interment of the dead, and duly consecrated.

The parish of Lambeth was divided into two distinct and separate parishes, the one known as St. Mary, Lambeth, the other as the district parish of St. Matthew, Brixton.

In 1853 a church called the Church of St. John, Angell-town, in the district parish of St. Matthew, Brixton, was duly consecrated, but no burial-ground is attached to such church.

In 1853 a district was assigned to such consecrated church at St. John, Angell-town, by an order in council of the 8th Aug. of that year.

The plaintiff has been the incumbent of such district chapelry of St. John from the said 8th Aug. 1853.

The defendant N. A. Garland is the incumbent of the district parish of St. Matthew, he having been appointed in 1855. He claimed the burial fees provided by the Cemetery Act, from such appointment.

The plaintiff submitted that he and his successors were entitled to them.

Sir H. Cairns, Q.C. and *Smeilgate* for the plaintiff.  
*Rolt*, Q.C. and *H. F. Bristowe* for the defendant  
Garland, the incumbent of St. Matthew's parish.

*Gifford*, Q.C. and *Baggallay*, for the cemetery company and the registrar.

*Cairns* in reply.

*Edgell v. Burnaby*, 8 Ex. Rep. 788; *Topell v. Ferrera*, Hobart's Rep. 175; together with the Church Building Acts, 59 Geo. 3, c. 134, s. 16; 1 & 2 Vict. c. 107, s. 12; 2 & 3 Vict. c. 49, s. 3; and also 58 Geo. 3, c. 45 and 134; 6 & 7 Vict. c. 37; 8 & 9 Vict. c. 70; 14 & 15 Vict. c. 97; 19 & 20 Vict. c. 104; and 20 & 21 Vict. c. 81, were referred to and commented upon.

*Cwr. adv. rail.*

THE VICE-CHANCELLOR said:—The question in this case turns upon the mode of distribution of certain sums payable by the defendants the South Metropolitan Cemetery Company under the provisions of their Act, to the incumbents of certain parishes from which the dead who are buried by the cemetery company shall be removed. The Act contains nothing in the recital which assists in the determination of the question before me. It simply recites that it is convenient that a general cemetery company should be established, reciting nothing with reference to the payments to be made, or the conditions upon which the privilege is to be conceded by Parliament of forming this cemetery company; the question arising between the incumbents of districts which have now been severed pursuant to various Acts of Parliament. These are numerous; but it is sufficient to say that one existed anterior to the passing of the Cemetery Act, the 53 Geo. 3, c. 43, one of the earlier Acts authorising the division of parishes into districts. The cemetery company's Act provides for the payment of the incumbents of parishes and ecclesiastical districts by a certain fixed sum of money with reference to every one whom they may inter, whose corpse shall be removed from such parishes or districts. It then provides for the appropriation of the money so to be received by the incumbents. The question arises in this way. Out of the large parish of St. Mary's,

V.C. W.]

VAUGHAN v. SOUTH METROPOLITAN CEMETERY COMPANY.

[V.C. W.]

Lambeth, a district parish called St. Matthews was severed, anterior to the passing of the Cemetery Act, from the general body of that parish. After the passing of the Cemetery Act another district was severed out of St. Matthew, which district is called the district of St. John, Angell-town, and of that district the present plaintiff the Rev. Mr. Vaughan is incumbent. The point in dispute therefore lies as between the incumbent of St. Matthew, namely, the Rev. Mr. Garland, the defendant, and the Rev. Mr. Vaughan, the incumbent of this district of St. John, Angell-town. Now the 18th section of the Act provides this: It is enacted "that upon the interment of every person within the consecrated part of the said cemetery, who shall appear by the books of the company to have been removed for the purpose of interment from the parish in which the cemetery shall be situated, or from any parish in the county of Surrey adjoining thereto, or from any of the parishes, of Lambeth, Battersea, and Wandsworth, in the said county of Surrey, or from any parish within the cities of London and Westminster, or the borough of Southwark, according to the limits thereof settled and described in an Act passed in the second and third year of the reign of his present Majesty, intituled 'An Act to settle and describe the divisions of counties, and the limits of cities and boroughs in England and Wales, so far as respects the election of members to serve in Parliament,' the said company shall pay unto the incumbent for the time being of the church or chapel of the parish or other ecclesiastical district or division of the parish from which such person shall be so removed, the fees following; that is to say, in case such person shall be interred within any vault, catacomb or brick grave, the fee of 20s., and in case such person shall be interred in the open ground, the fee of 7s. 6d." So far as anything appears by that section, there is nothing to point out that this is to be confined to things as they then stood at the existing period of the Act. The provision is, "that whenever any corpse shall be removed from any parish," &c., and Acts had been passed at the time which authorised the subdivision of parishes into ecclesiastical districts. The possible existence of such a case, therefore, is distinctly recognised by the provision I have read, which states that when a corpse is removed for the purpose of interment from the parish in which the cemetery is situated, or from any parish in Surrey adjoining thereto, or from any of the parishes of Lambeth, Battersea and Wandsworth, or from any parish within the city of London and Westminster or the borough of Southwark, the company shall pay to the incumbent of the church or chapel of the parish or other ecclesiastical district or division of the parish from which the corpse shall be removed, the fees of 20s. and 7s. 6d. respectively. Then the 22nd section contains this provision: "And be it further enacted that every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel, out of every sum of 20s. that he shall receive by virtue of this Act in respect of interments in any vault, catacomb, or brick grave in the said cemetery the sum of 12s., and out of every sum of 7s. 6d. in respect of interments in the open ground of the said cemetery the sum of 3s. 6d., to be respectively paid and applied by them in the said manner and amongst the same persons (including the incumbents of such churches and chapels), and in the same proportions as the fees on interments which the said churchwardens and chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes are or ought by law or custom to be paid or applied." Now, certainly there is some little difficulty created by that section of the Act, as to what the distinct intention of the Legislature was. The provision points, in a certain degree, to some existing state of things, speaking of church-

wardens who happen to be entitled at the time to receive these payments. And they are to be distributed in such a manner in the several parishes and districts, as are, or ought by law or custom to be applied. The question, therefore, that arises is, whether this affords sufficient indication to show that the Act, when it directed payments to be made to the incumbents of churches or chapels or other ecclesiastical districts, is to be confined to the existing parishes and the existing ecclesiastical districts, or is to be extended to all cases which might hereafter occur of fresh divisions or fresh ecclesiastical districts being constituted. Now, the way in which the defendant put the case is this: this is a provision which is evidently intended by the Legislature as a compensation to the clergyman for work and labour done with reference to interring the corpse in the churchyard; or, otherwise, with reference to his duties which he had performed with regard to the deceased during the time of the parishioner's residence. I make the last observation because it applies to the view stated by Gibson in his learned work, namely, viz, that upon his view of the case the clergyman is entitled to a fee upon the burial of any person out of the parish who has been an actual parishioner resident in the parish, and "communicating" in the parish church. That view seems to have been somewhat shaken, although not overruled by the case in the Q. B. to which reference was made, where the court held that the alleged custom that a fee should be paid to the clergyman upon every person dying in the parish and buried elsewhere was a bad custom. And the reason assigned was twofold: first, they said it was an unreasonable custom; as, for instance, that a person who accidentally died at an inn should pay two fees, one in the parish where he was buried, and another to the incumbent of the parish where he died; secondly, they put it upon the ground of work and labour done. With reference to that last ground, I may observe that one cannot look upon it as standing upon this view alone, because it is well known and certainly it was an argument used successfully with reference to many Cemetery Acts, and especially with reference to the general Act which compelled parishes under certain circumstances to provide burial-grounds, and yet provided a fee for the clergyman who no longer assisted in the interment; the argument used was, that the provision being very mean in most large towns, and happening to be concentrated in two or three payments, the clergyman of the parish being paid nothing whatever but Easter offerings and the surplice fees, that is the marriage and burial fees, these being the whole remuneration for the performance of all the duties incumbent upon him, it was not reasonable that because you removed once source of income to which a duty happened to be attached, therefore you should deprive him of all the income arising from it; because that is applicable not merely to the duty attached to it, but is one mode by which he is to be compensated for the performance of all his duties. One cannot therefore rely upon this provision, there being no recital to help me or rely upon as being concerned simply with the ground of compensation for work and labour done. That is borne out by the 22nd clause, because it seems to provide for fees more especially connected with burials, leaving the incumbent a considerable surplus out of what shall be paid to him. He is to pay 12s. out of the pound to the fees paid to the churchwardens, according to the fees applicable in one case, and 3s. 6d. in another case. That case therefore cannot be regarded as a safe decision in the present case. I do not think that this 12s. 6d. or the 3s. 6d. are to be considered as anything more than what the Legislature thought was reasonable to be paid to the incumbent of the district who attended the deceased, not only through his last illness, when he was in more immediate connection with



him, but also ministered in the way in which the incumbent does happily minister for the benefit of the parishioner throughout his course of ministration. It was not thought right that the emoluments attached to this duty should be cut away because the duty was transferred to other persons. That gets rid of a great deal of the argument relied upon by the defendant for giving that limited construction to the Act which he asks the court to impose upon it. But there is another point which the defendant has raised: he says, True it is you have got a district, but it is a district raised by the new Ecclesiastical Commissioners under former Acts of Parliament, among the rest under 9 Geo. 3, and other Acts referred to in the fifth paragraph of the Bill. That paragraph states that her Majesty's Commissioners for Building New Churches in pursuance of the 16th section of the statute of the 59 Geo. 3, c. 134, of the 12th section of the statute 1 & 2 Vict. c. 107, and of the 3rd section of the statute 2 & 3 Vict. c. 49, duly made a representation to her Majesty, bearing date the 23rd day of June 1853, that having taken into consideration all the circumstances of the said district parish of St. Matthew, Brixton, it appeared to them to be expedient that a district should be assigned to the said consecrated church of St. John, situate at Angell-town, in the said district parish of St. Matthew, Brixton, under and by virtue of the power or authority contained in the above-mentioned sections, and that such proposed district should be named or called "The District Chapelry of St. John, Angell-town," and that the boundaries thereof should be as in the said representation mentioned, as the same were more particularly delineated on the map or plan thereunto annexed, coloured green; and that it also appeared to them to be expedient that banns of matrimony should be published, and that marriages, baptisms and churchings should be solemnised or performed in the said Church of St. John, at Angell-town aforesaid, and that the fees to arise therefrom should be paid or belong to the minister or incumbent of such church for the time being, and that the consent of the bishop of the diocese of Winchester had been obtained thereto, as required by the various Acts and sections mentioned, and also the consent of the incumbent of the district parish of St. Matthew, as required by the statute, in order that the subdivision of such parish by forming thereout a district chapelry should take effect from the assignment of such district chapelry, in testimony whereof the Bishop of Winchester and Dr. Vaughan the incumbent, had signed and sealed that representation. And then, by an order in council dated 8th Aug. 1853, it is stated that her Majesty having taken the representation into consideration, did approve of such representation, and ordered that the proposed assignment of a district chapelry to the church of St. John, at Angell-town, in the district parish of St. Matthew, Brixton, should be accordingly made, and that the recommendation of the commissioners in respect to the publication of banns, and the solemnisation of marriages, baptisms and churchings in the said church, and the fees to arise therefrom, should be carried into effect agreeably to the provisions of the said Acts, and directed that order should be forthwith registered by the registrar of the diocese of Winchester; which was accordingly done. There is, I admit there the argument *expressio unius est exclusio alterius*, and therefore that burial fees were never intended to be included in this particular instance. But the first argument that arises upon that is, that it is not to be treated as a compensation for burial fees, but as a proper payment to be made to the clergyman in respect of the general provision of the Cemetery Act, and in order to provide a new provision for the several incumbents, so that whether they might or might not hereafter have the power of burying, this provision should be duly secured, first to the mother church, and then to the

incumbents. If I am correct in that view, then the question whether burial fees are specially mentioned is not of much importance, and the conclusion is sustained upon the statutes to which I was referred, that this district parish has every privilege, in consequence of its being a district, and by virtue of the Acts themselves, every privilege which the mother church has, including the burial fees; and therefore, whatever might have been stated in that order or petition, there is nothing to take away from the incumbent any privilege vested in him. It is quite true, no doubt, that no burial has been solemnised in the parish, and, under existing circumstances, is never likely to be; since the passing of the Metropolis Arrangement Bill it is probable that it is not at all likely. It is not likely the Legislature would permit, or those entrusted with the duty of carrying the Act into effect would permit, interments to take place in any new district. Such a state of things and such an effect could not have been contemplated by the Cemetery Act of the 6 & 7 Will. 4, and could not have been foreseen; nobody would have thought of arguing that anything contained in the South Metropolitan Cemetery Act could be affected by any subsequent Act of Parliament, enacting as it has done with respect to many parishes that there shall never be another burial in the parish; nor would it liberate the South Metropolitan Cemetery Company from making payments in respect of those interments which are now made in their cemetery. It does not appear that any great reliance is to be placed upon the circumstance of a privilege being given with regard to the celebration of marriages, which is always to be provided for in cases of this description, or that any reliance can be placed upon it as indicating an intention on the part of the Legislature to exclude the burial or any other fees that by law are payable to the incumbent. I find a distinct provision in the 18th section that the incumbents of district churches shall be paid the fees there mentioned, and nothing to say that it shall be the present or the future incumbent; the only indication of its being confined to the present incumbent being that which may be considered as contained in the 22nd section; but even there it is open always to this observation, that very possibly a discussion may arise as to who the persons are that are to receive the fees—whether the churchwardens or the chapelwardens, who are entitled to distribute them. When the time comes of no burial being performed in any parish, that may be a matter for serious discussion. A question may hereafter arise in consequence of the subsequent course of legislation. But I do not think there is sufficient in the 22nd section to show me that the Legislature intended to limit and confine its operation entirely to existing incumbents and existing ecclesiastical districts at the time of the passing of the Act, although in future there might be carried out and created, under the Act of Geo. 3, a number of new ecclesiastical districts, just exactly and with the same provisions as St. Matthew, the district which the defendant holds, was created. Nor do I think that the Legislature, having all that knowledge at the time of passing this Act, and with this knowledge, should be taken to have excluded from the benefit of this provision those who should hereafter occupy future district churches, confining it entirely to existing district churches. Upon the whole, therefore, I am of opinion, and I must hold, that the plaintiff is entitled to the payments which he claims. *Decree accordingly. No costs.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SANDERS, and C. J. B. HERTLEY, Esqrs., Barristers-at-Law.

Saturday, Nov. 19.

WALSBY (appellant) v. ANLEY (respondent).  
Master and workmen—Endeavouring to force a mas-

Q. B.]

WALSBY v. AXLEY.

[Q. B.]

ter to discharge some of his workmen—Conviction—6 Geo. 4. c. 129, s. 3.

A workman has a perfect right to go to his master and say that he will not continue to work for him unless he discharges certain other workmen, but if he combines with others to force his master to discharge certain workmen, by threatening to cease to work for him unless he complies, he commits an offence within sect. 3 of the 6 Geo. 4, c. 129.

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by one of the metropolitan police magistrates, under the 6 Geo. 4, c. 129, s. 3, for unlawfully on the 16th May 1860, by threats, endeavouring to force one Philip Axley, then carrying on the trade of a builder, to limit the description of his workmen.

It was proved before the magistrate by Philip Axley the prosecutor, and other witnesses, that the prosecutor carried on the trade of a builder in Whitecross-street, Middlesex; that he employed about 100 workmen.

That in the year 1859 there had been a strike of the workmen employed in the building trade, and that the prosecutor then resolved not to employ, and did not employ for some time, any workmen who declined to work under what was called "The Declaration;" that it was well understood in the trade what this declaration was, being to the following effect:—

"I declare that I am not, nor will I during my engagement with you, become a member of or support any society which directly or indirectly interferes with the arrangements of this or any other establishment, or the hours or terms of labour, and that I recognise the right of employers and employed individually to make any trade engagements on which they may choose to agree."

On the day named in the conviction the prosecutor had in his employment two or more men working under this declaration.

That on that day the defendant and two of the other workmen brought to the prosecutor a paper signed by defendant and about thirty other workmen, of which the following is a copy:—

"At a meeting of the joiners in the employ of Mr. Axley, Tuesday evening, May 15th, 1860, it was resolved—

"That Mr. Axley be given to understand that, unless the men who are working under the declaration in his shop be discharged, and we have a definite answer by dinner-time to that effect, we cease work immediately."

The defendant, in reply to questions put by the prosecutor, said they had no fault to find with him, his foreman, or clerks, or with the wages he (the defendant) received; and when the prosecutor inquired what it was he wanted, he answered, "You must discharge those two men who are working under the declaration, and if you do not we will leave work." The prosecutor answered, "I will not be dictated to, and I will rather close my shop than submit to your dictation." On the same day the defendant and all the workmen who had signed the paper left his employment, and had not returned up to the time of the conviction.

By sect. 3 of the 6 Geo. 4, c. 129, it is enacted, "If any person shall by violence to the person or property, or by threats, or by intimidation, or by molesting, or in any way obstructing another, force or endeavour to force any journeyman . . . to depart from his hiring . . . or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting, or in any way obstructing another, force, or endeavour to force, any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices or

the number or description of his journeymen, workmen, or servants, every person so offending or aiding, abetting, or assisting therein, being convicted thereof, in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months."

Gifford appeared in support of the conviction, and argued that the facts stated in the case clearly showed that the appellant had committed an offence under the statute: (*Reg. v. Pearham*, 29 L. J. 31, M. C.; 1 L. T. Rep. N. S. 91, 106.)

Sleigh, for the appellant, argued that no offence had been committed, for that it was not unlawful for a workman to refuse to work unless his conditions were complied with. He endeavoured to distinguish this case from that of *Reg. v. Pearham*.

COCKBURN, C.J.—I am of opinion that the conviction ought to be affirmed. Every workman in the service of an employer is entitled to the full exercise of his discretion as to whether he will continue in that employment, so long as he is not bound by any contract, and to give the employer the alternative of either losing his services or discharging obnoxious persons with whom he might not choose to work; and, more than that, several men who might consider other workmen as obnoxious, have a perfect right to put the same alternative to their employer. But if the men go further than that, and seek to coerce the master by the threat of what was likely to operate to his injury, that comes within the meaning of the Act. In the present case it was not one man who went to the employer, but several who adopted the same course; not with the view of giving him an opportunity of exercising his discretion, but, by threatening to leave his employ, to compel and coerce him to discharge the obnoxious persons. At first I entertained some doubts whether this combination amounted to a threat, but I entertained no doubt that it came within the clause which referred to the molesting the master. But, upon reflection, I have come to the conclusion that if done in the honest exercise of his right, the workman might put such an alternative to his master, even if it were done in combination. Yet when I see that the purpose was that of turning the men out of his employ, by molesting the master, it is altogether illegal, and the parties come within the Act of Parliament.

CROMPTON, J.—At first I entertained great doubts, and on first reading the case I certainly entertained a contrary opinion, for I thought that the threats referred to some matter which was of itself unlawful. It was therefore important to see if there was a threat of anything improper or unlawful. I think that any workman may say, "it is my intention not to work with certain people." Then comes the question, whether a number of workmen can combine together that the master shall not employ a particular body of persons? My opinion is, that a number cannot combine together to do what would tend to the mischief of another person. One man may go and say, "I will not work for you unless you turn away such and such persons," but a number could not do that, as it would amount to a threat that they would do an illegal act.

HILL, J.—I am of the same opinion. The word "threat" in the Act must be construed in connection with the words which precede and follow. It may be a threat to do an illegal act, and the question is, whether the act threatened to be done is an illegal act. A man has a perfect right to go to his employer and say all that was said in this case, or several might do it; but if they acted in combination, not honestly and independently, but for the purpose of coercing the master, they are guilty of a conspiracy at common law. The combination and the attempt to carry it out were illegal, and would be indictable at common law. I therefore think that the magistrate was right, and that his decision should be affirmed. *Conviction affirmed.*

Wednesday, Jan. 23.

REG. v. THE CHURCHWARDENS & C. OF TIVERTON, DEVON.

*Poor-law—Settlement—Renting a tenement—Payment of rates—Wesleyan minister.*

A. B., who was a Wesleyan minister, occupied a house at C., which had been taken for him in accordance with the rules of the Wesleyan body, by the circuit stewards, and paid the rent for the same, which was, pursuant to such rules, afterwards allowed him. He was duly rated to the poor and other rates, which he paid, and the amount of which in like manner was allowed him. He occupied in this way for more than a year:

*Held, that he thereby gained no settlement, either by renting a tenement or the payment of rates.*

This was an appeal by the parish officers of Tiverton, Devon, against an order of justices adjudging a lunatic pauper, of the name of Benjamin Holmes Worth, to be legally settled in their parish, and adjudging the payment of a sum of money to the parish officers of Mangotsfield for his past maintenance and for his future maintenance. The parties, however, consented to the statement of a case for the opinion of this court, and the order of a judge was obtained accordingly, for that purpose, under sect. 11 of the 12 & 13 Vict. c. 45. The following are the facts:—

The said pauper lunatic, Benjamin Holmes Worth, is the legitimate son of William Worth. The said William Worth was born in the said parish of Tiverton, in or about the month of Jan. 1781. From the year 1832 to the year 1835, both inclusive, the said William Worth was a Wesleyan minister, and the practice of the Wesleyan congregation of which the said William Worth was a minister during that period was as follows: Certain members of the congregation were appointed stewards for a circuit comprised within a given distance, and were called circuit stewards, and one of the duties of such circuit stewards was to take houses within their circuit as residences for their ministers officiating within such circuit, and to furnish such houses with furniture fit and proper for such residences. Sometimes the circuit stewards paid the rents of such houses, and sometimes the ministers; but in the latter case the amount of the rent so paid by the ministers was repaid to them by the circuit stewards; in like manner the amount of the rates and taxes paid by the minister in respect of such house was repaid to the said minister by the said circuit stewards. In the year 1832 the circuit stewards of the circuit within which the parish of Carisbrooke, in the county of Southampton, in the Isle of Wight, was situate, in conformity with the aforesaid practice, *bonâ fide* took and rented a tenement situate in the said parish of Carisbrooke, such tenement consisting of a separate and distinct dwelling-house and garden, as a residence for their minister officiating in that part of the said circuit, and furnished the said dwelling-house with furniture fit and proper for such residence. And the said circuit stewards *bonâ fide* took and rented the said tenement so situate in the said parish of Carisbrooke, such tenement consisting of a separate and distinct dwelling-house and garden, for the term of one whole year from the 29th Sept. 1832, at and for the rent of 20*l.* a-year, that being also the yearly value of the said tenement, as a residence for their minister officiating in that part of the said circuit, and on the 29th Sept. 1832 the said tenement having been so as aforesaid taken and rented by the said stewards, the said William Worth having been appointed to officiate as such minister in that part of the said circuit, and continuing to be such minister from that time until and upon the 29th Sept. 1835, with the consent of the said circuit stewards, as such minister came to reside in and occupy, and as such

minister resided in and occupied the said tenement, the said dwelling-house being so furnished as aforesaid under the said yearly taking for the term of one whole year, that is to say, upon and from the 29th Sept. 1833, and so on afterwards on the same terms from the said 29th Sept. 1833, until and upon the 29th Sept. 1835. The said William Worth actually paid the said rent of 20*l.* for the said tenement, to the landlord thereof, for each of the said years in which he so resided and occupied the said tenement, but the amount of such rent was afterwards repaid to him by the said circuit stewards.

The said William Worth, in and during each of the said years in which he resided in and occupied the said tenement, was assessed to the poor-rates for the said parish of Carisbrooke, in respect of the said tenement, and paid such rates and resided in and occupied such tenement for forty day and upwards in each of the said years after payment of the said rates.

The amount so paid by him for the said rates was repaid to him by the said circuit stewards, in conformity with the practice aforesaid.

The said William Worth was appointed to officiate as minister at Carisbrooke, in conformity with the custom of the Wesleyans, which custom is to appoint their ministers to officiate in a given place for one year certain.

The appointment is absolute.

During the year a minister cannot be removed from the place of his appointment.

It is also the custom that no minister shall officiate longer than three years in any one place.

The questions for the opinion of the court are—

First, did the pauper lunatic's father William Worth acquire a settlement in the said parish of Carisbrooke by renting the said tenement under the circumstances herein set forth?

Secondly, did he acquire a settlement in the said parish of Carisbrooke by being assessed to and paying the poor-rates for the said parish under the circumstances herein set forth?

*Sawyer.*—The pauper's father gained no settlement in Carisbrooke by renting a tenement. By the 1 Will. 4, c. 18 which governs this settlement, it is enacted that "no person shall acquire a settlement in any parish or township maintaining its own poor by or by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, as in the said Act expressed" (6 Geo. 4, c. 57) "unless such house, or building, or land shall be actually occupied under such yearly hiring in the same parish or township by the person hiring the same for the term of one whole year, at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same." The facts of the case show that he was not tenant of the premises. There was no renting of the house. [CROMPTON, J.—It seems difficult to say that he was as regards the house anything more than the servant of the stewards.] Nor was any settlement gained by the payment of the parochial taxes, as it is necessary also under that head of settlement, the party must rent the premises.

*Kingdon*, for the appellants, was called upon.—The minister has a fixed residence and cannot be moved for twelve months. [CROMPTON, J.—That does not make him the more a tenant.] The stewards take the house as agents for him; he is rated to the poor-rate, and is tenant for all practical purposes.

CROMPTON, J.—It is quite clear that the pauper's father did not occupy as tenant. It was certainly not the custom to remove under a twelvemonth, but he may have been removed; if he paid the rent he was repaid it. He therefore gained no settlement.

HILL, J. concurred.

*Judgment for the respondents.*

Q. B.]

SINDON AND OTHERS v. BANKS.

[Q. B.]

Feb. 7 and 8.

SINDON AND OTHERS v. BANKS.

*Friendly society—Treasurer—Action against to recover balance—Summary jurisdiction of justices.**The trustees of a friendly society may sue in the Superior Courts, to recover from the treasurer of the society moneys received by him and not paid over, and they are not confined to the summary procedure before justices, provided by the 18 & 19 Vict. c. 63, s. 40.*

This was an action commenced in the County Court and removed by *certiorari* into this court, brought by the trustees of the Friendly Society of Hastings to recover from the defendant 30*l.*, as money had and received for the use of the society.

Plea 3.—That the cause of action was a matter in dispute between the plaintiffs as trustees, and the defendant as a member of the society, and was directed by the statute to be decided by justices of the peace.

At the trial it appeared that the defendant was a member of the society, which was founded in 1815, and whose rules were duly certified by the Registrar of Friendly Societies under the 10 Geo. 4, c. 56. From 1833 to April 1856 the defendant held the office of treasurer of the society, when he ceased to be treasurer, but remained a member until the 12th June following, when for misconduct he was struck off the books of the society, under rule 53; but in 1859 he was reinstated as a member of the society. The moneys in question were received by the defendant in 1853, but the fact was not discovered by the society until 1856, and on the 12th June 1856 a formal demand, in writing, of payment of them was made by the society. The verdict was found for the plaintiffs for 30*l.*

The following are the material rules of the society:—

Rule 29. If any dispute shall arise as to the legality of payment of any fine, money, or allowance; or as to the disqualification of a member at the time of his admission; or between any officer or member, or any nominee or representative laying claim to the effects of any deceased member; the complaining party shall be required by the clerk to attend at the next committee meeting, and all cases shall be decided by ballot; but no member shall be allowed to vote where a brother or other relation is the offending or aggrieved party; and the committee are to demand of the aggrieved person any written document or certificate to be adduced in proof which they shall require; and if the parties complaining do not attend the committee and produce the written evidence required, the case shall be considered as decided against the officer, nominee, or representative; but if after the decision of the committee the member or ex-member, nominee or representative, is not satisfied with such decision, the complaining party shall give notice thereof to the clerk, according to form No. 11, and the matter in dispute shall be referred to and finally decided by two of her Majesty's justices of the peace acting in and for the borough of Hastings; and it shall be lawful for the justices, on complaint being made to them of any refusal or neglect to comply with the rules, orders and regulations of the society by any member, to summon the person against whom the complaint is made, to appear at the time and place named in the summons; and upon his appearance, or in default thereof upon due proof of the service of such summons, it shall be lawful for the justices to proceed to hear and determine the said complaint according to these rules; and if they shall adjudge any sum of money to be paid by such person against whom such complaint shall be made, and if such person shall not pay such sum of money to the person and at the time specified by such justices, they shall proceed to enforce their award by causing such sum, together with a sum for costs not exceeding 10*s.*, to be levied by distress, or by distress and sale of the

moneys, goods, chattels, securities and effects belonging to the said party: (10 Geo. 4, c. 56, ss. 27 and 28.)

Rule 31 provides that six members shall be chosen as trustees, and that the trustees shall elect one of their own number annually to be treasurer.

Rule 32 provides that the treasurer, trustees, or any officer shall not be liable to make good any deficiency which may arise in the funds, unless such persons shall have declared by writing under their hands, deposited and registered in like manner with the rules, that they are willing so to be answerable; and it shall be lawful for such person to limit his or their responsibility to such sum as shall be specified in any such instrument or writing, when required to give bond or security by the committee; provided that the trustees, treasurer, and every other officer shall be personally responsible and liable for all moneys actually received: (10 Geo. 4, c. 56, sect. 21, 22.)

Rule 53 enacts (among other things) that any member receiving any moneys on account of the society misapplying the same, or any part thereof, or keeping it for his own private use, or otherwise than as herein directed, the member so offending shall be excluded and sued for the deficiency, pursuant to Act 10 Geo. 4, c. 56, s. 25.

The following are the material enactments of the Friendly Societies Acts:—

Sect. 27 of the Friendly Societies Act, 10 Geo. 4, c. 56, enacts, that provision shall be made by one or more of the rules of every such society, to be confirmed as required by this Act, specifying whether a reference of every matter in dispute between any such society or any person acting under them and any individual member thereof or person claiming on account of any member, shall be made to such of his Majesty's justices of the peace as may act in and for the county in which such society may be formed, or to arbitrators, to be appointed in manner hereinafter directed. And if the matter so in dispute shall be referred to arbitration, certain arbitrators shall be named and elected at the first meeting of such society or general committee thereof that shall be held after the enrolment of its rules, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of the said society, of whom a certain number, not less than three, shall be chosen by ballot in each such case of dispute. The number of the said arbitrators and mode of ballot being determined by the rules of each society respectively, the names of such arbitrators shall be duly entered in the book of the said society in which the rules are entered as aforesaid, &c., &c.

In July 1855 the 18 & 19 Vict. c. 63, was passed to amend the laws relating to friendly societies, and by sect. 1, the 10 Geo. 4, c. 56, was repealed, except as to offences committed, or penalties, or liabilities incurred, &c. before the commencement of that Act, which came into operation on Aug. 1, 1855.

Sect. 22 of the Friendly Societies Act, 18 & 19 Vict. c. 63, enacts, that every such treasurer or other officer, whether appointed before or after the passing of this Act, at such times as by the rules of such society he should render such account as aforesaid, or upon being required to do so by the trustee or trustees of such society, or by a majority of the said committee of management, or by a majority of the members present at a meeting of the said society, as aforesaid, within seven days after such requisition, shall render to the trustee or trustees of the said society, or to the said committee of management, or to the members of such society at a meeting of the society, a just and true account of all moneys received and paid by him since he last rendered the like account, and of the balance then remaining in his hands, and of all bonds and securities of such society, which account the said trustee or trustees, or committee of management, shall cause to be audited by some fit and proper person or persons by

them to be appointed, and such treasurer, if thereunto required, upon the said account being audited, shall forthwith hand over to the said trustee or trustees the balance which on such audit shall appear to be due from him, and shall also, if required, hand over to such trustee or trustees all securities and effects, books, papers and property of the said society in his hands or custody, and if he fail to do so, the trustee or trustees of the said society may sue upon the bond aforesaid, or may sue such treasurer in the County Court of the district, or in any of the Superior Courts of Common Law, or in any other court having jurisdiction, for the balance appearing to have been due from him upon the account last rendered by him, and for all the moneys since received by him on account of the said society, and for the securities and effects, books, papers and property in his hands or custody, leaving him to set off in such action the sums (if any) which he may have since paid on account of the said society, and in such action the said trustee or trustees shall be entitled to recover their full costs of suit, to be taxed as between attorney and client.

SECT. 40 of the Friendly Societies Act, 18 & 19 Vict. c. 63, enacts that every dispute between any member or members of any society established under this Act, or any of the Acts hereby repealed; or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society; and the decision so made shall be binding and conclusive on all parties without appeal, provided that where the rules of any society established under any of the Acts hereby repealed shall have directed disputes to be referred to justices, such disputes shall, from and after the 1st Aug. 1855, be referred to and decided by the County Court as hereinafter mentioned.

A rule *nisi* having been obtained to enter the verdict for the defendant on the ground that the action was not maintainable, and that the proceeding before justices pursuant to the 18 & 19 Vict. c. 63, s. 40, was the only remedy,

*Deaman* (Lush with him) showed cause.—The claim by the trustees in this action does not arise upon the rules of the society, but is a matter independent of their provisions, being a claim for money had and received by the defendant to their use. SECT. 40 of the 18 & 19 Vict. only relates to disputes between the society and the members *qua* members. The proviso at the end of sect. 40 is repealed by 21 & 22 Vict. c. 101, s. 5, which, however, does not apply to this case. SECT. 22 applies to fraudulent misappropriation of moneys, &c., withholding of property of the society; and although there might be grounds for saying that the defendant has brought himself within that clause, yet at the trial this was treated on both sides as a civil matter only. The moneys were received in 1853, and it may be urged on the other side that the 10 Geo. 4, c. 56, is the Act which applies to this case. The 27th section of that statute is the material one on which the other side rely. The object of that provision was to save expense and prevent litigation, but the language of it is not directed to the case of officers ceasing to be such with moneys of the society in their hands: (*Crisp v. Bunbury*, 8 Bing. 394; *Morrison v. Glover*, 4 Ex. 430 *Doe dem. Morrison v. Glover*, 15 Q.B. 103; *Cutbill v. Kingdom*, 1 Ex. 494; *Reeves v. White*, 17 Q.B. 995.) This was not a dispute between the society and defendant as an individual member of the society at the time the claim arose.

*J. Brown* and *Archibald* in support of the rule.—It is not material to decide whether the 10 Geo. 4, c. 56, or the 18 & 19 Vict. c. 63, governs this case, for both Acts are *in pari materia*, and the corresponding

put upon both. This was a dispute between the society and the defendant as a member. Although treasurer, the defendant was at the same time a member of the society. [CROMPTON, J.—Your argument must extend to the case of trustees or other officers who are members.] It does so. There is no reason why the word "member" in sect. 40 of 18 & 19 Vict. should be restricted to mere members who are not officers. It is equally desirable to have cheap and expeditious remedies against the treasurer. The section is wide enough to include the treasurer. The defendant was expelled from the society on the ground of this being a dispute between him and the society.

CROMPTON, J.—I am of opinion that this rule ought to be discharged. The question depends upon the two clauses in the Acts referred to, and the rules of the society cannot alter the effect of them. If the statute directs that the rules of such societies shall contain certain provisions, and they do not, the proceedings must still be regarded in point of law as if the rules did contain such provisions. We have to see whether the common law remedy by action is taken away in this case. The two statutes of 10 Geo. 4, c. 56, s. 27, and 18 & 19 Vict. c. 63, s. 40, are *in pari materia*. I think we should be straining the enactment if we said that the word "member" in those sections meant "treasurer" or "trustee." Those words are introduced into various sections when it was intended to include such persons within their provisions. SECT. 24 of 18 & 19 Vict. c. 63, is a strong provision for recovering from officers and members by a summary and speedy process before justices, moneys and securities obtained by fraud, or withheld, or wilfully misapplied, but it could not be said that that provision took away the common law remedy by action. The 27th sect. of 10 Geo. 4, c. 56, is, however, the real clause in question, and that is confirmatory of the view that it is expressly restricted to individual members of the society, and it would be strange to say that the word "member" therein includes "treasurer" or "trustee." SECT. 25 empowers justices to hear cases of fraud similar to sect. 24 of 18 & 19 Vict., and to punish by fine or imprisonment, which provision is quite inconsistent with saying that all disputes can only be adjudicated upon according to sect. 27. SECT. 25 gives another mode of proceeding in such cases, and there is nothing in it to prevent parties from taking the common law remedy if they please. SECT. 22, which makes the treasurer and other officers liable for moneys actually received by them, does not contain any restriction as to the mode in which they are to be made liable. Then as to sect. 40 of the 18 & 19 Vict. c. 63, every remark made upon sect. 27 of 10 Geo. 4, c. 56, is applicable to this enactment: but, if anything, sect. 40 is still more free from doubt. Then sect. 27 of 10 Geo. 4, clearly puts "member" in contrast with "trustee, treasurer, or other officer or the committee." SECT. 24 of the 18 & 19 Vict. is an analogous section to sect. 25 of 10 Geo. 4, as to punishment of fraud and withholding of money; and sect. 20 is analogous to sect. 22 of the 10 Geo. 4, as to the responsibility for moneys actually received by trustees. Then comes sect. 22 of the 18 & 19 Vict., which regulates the mode in which the treasurer is to account. It was argued that the proceedings under this section was the only mode in which the treasurer could be proceeded against. That section points out the way in which the treasurer is to render his account, and on failure to pay over the balance, empowers the society to sue, and gives the society costs as between attorney and client. But when no account is required to be rendered, it is idle to say that you cannot sue without adopting the course pointed out by sect. 22. On the whole, it is not made out to my mind that the enactment in question applies to treasurers and trustees, and that should be clearly made out in order to take

[Q. B.]

REG. v. AULTON—THORNE v. COLSON.

[Q. B.]

away the common law right of action, and therefore I think this rule ought to be discharged.

HILL, J.—I am of the same opinion. The first question that arises is, whether the case depends on the statute of 18 & 19 Vict. c. 63, or the 10 Geo. 4. c. 56. The statute of 18 & 19 Vict. came into operation in Aug. 1855, and by the first section repealed the 10 Geo. 4. c. 56, save and except as to any offences committed or penalties or liabilities incurred, or bond or security given, or proceedings taken under the same before the commencement of this Act. It has been suggested that the right of action in this case was a subsisting right of action when the statute of Victoria came into operation, and that the 10 Geo. 4. was therefore saved as to this case by the above proviso. I do not see that it is clear that this is a liability under the statute of 10 Geo. 4, and if it were necessary to give an opinion upon the point, I should say that the statute 18 & 19 Vict. is the one that governs this case. This, however, is unimportant, because the two statutes are *pari materia*, and the material sections in each are very nearly the same in point of language. The question to be considered is, was this a dispute between the society and a member thereof, within either the 37th section of 10 Geo. 4, or the 40th section of 18 & 19 Vict.? In my opinion it was not a dispute within either the one or the other section. The object of the enactment was to protect the property of each societies by providing a cheap and summary remedy, and by extending the remedies of such societies against those who might convert their property. It appears to me that it would be extending the meaning of the sections far beyond the intention to make them applicable to treasurers, or trustees, or officers, who might have become possessed of the property, and misappropriated it or refused to hand over the same when called upon to do so. That does not appear to me to be a dispute between an individual member and the society. The sections referred to show that it was intended to give cumulative remedies against such persons as the treasurer, trustees and similar officers. For these reasons I am of opinion that our judgment should be for the plaintiff, and that this rule should be discharged.

*Rule discharged.*

Saturday, Jan. 26.

REG. v. AULTON.

*Weights and measures*—5 & 6 Will. 4, c. 63—

*Unstamped earthenware cups.*

*Unstamped cups and vessels of earthenware or other material ordinarily used by persons in the course of their business are liable to be seized if they do not correspond with the Imperial measures.*

*Welsby (Streeten and Vaughan Richards with him)* allowed cause against a *certiorari* to bring up an order of the quarter sessions of Worcester, confirming a conviction of the justices in petty sessions, subject to a case for the opinion of this court.

The appellant, before and at the time of the seizure hereafter mentioned, was a licensed victualler and retailer of beer in Dudley, in the county of Worcester, and sold beer to customers out of the house, and to customers to drink in the house, the beer in the latter case being supplied sometimes outside the bar, sometimes within the bar, and sometimes in the parlour.

The respondent Henry Burton is the inspector of weights and measures for the district of Dudley. On the 23rd Aug. 1859 he entered appellant's house for the purpose of examining the appellant's measures, he there found appellant's wife, and told her that he was come to inspect her measures; she thereupon produced a number of measures, which he examined and found to be correct. On a shelf in the bar, on the left-hand side, apart from those measures, were nine earthenware cups. The inspector said to the appellant's wife, "I must try those also." She said, "They are cups, and

[MAG. CAS.]

we only use them for the parlour; you'll not find them measure." The inspector, however, insisted upon trying them, and they were handed to him. He tested them with the measure found by the sessions to be a copy of the Imperial pint measure, and found them to contain three quarters of a quart less than the said measure. These cups were without stamp or mark. The same price was charged for the beer sold in them as in the stamped pint measures, but some of the witnesses stated that when beer was supplied to them in those cups they did not suppose that they were receiving a full pint; whilst other witnesses said that when they were served with beer in those cups they meant to have, and thought they were getting, a pint of beer, for which they were paying the usual full price. The inspector seized the said cups as being unjust measures, and caused an information to be laid against the appellant to recover the penalties alleged to have become payable by reason of his having unjust measures in his possession.

The case came on for hearing before the justices on the 5th Sept. then following, when the appellant was convicted and adjudged to pay the penalty of 9s. and costs.

On appeal to the quarter sessions, it was contended for the appellant, first, that the conviction was bad for not stating an adjudication as to the costs and mode of enforcing payment thereof—(this point was now abandoned); secondly, that unstamped earthenware jugs or drinking cups, ordinarily used as measures, are not measures within the meaning of the 28th section of the 5 & 6 Will. 4, c. 63.

The court of quarter sessions overruled the objections and found, that the cups in question had been ordinarily used by the appellant as pint measures, but that he had not otherwise represented them to be pint measures.

If the court should be of opinion that either objection should prevail, the conviction to be quashed; otherwise to be confirmed.

5 & 6 Will. 4, c. 63, ss. 6, 12, 21, 28; and *Washington v. Young*, 5 Ex. 403, were referred to.

*Keane (Chance with him)*, contra, was called on in support of the rule.—This conviction is not supported by the facts of the case. These earthenware cups do not purport to be measures. The report of *Washington v. Young* is incorrect; the reference should have been to sect. 28 instead of sect. 21. [CROMPTON, J.—The judgment in that case is conclusive; it is an inviolable rule that although we might be of a different opinion, we never interfere with a decision in point; we are confined to the law, and unless you can show there was no evidence, we must hold that the decision is right].

CROMPTON, J.—I am of opinion that the case referred to is exactly in point, and I also think it good law. The words of the Act are large, and we are bound by that decision.

HILL, J.—I think we are bound by that case, and I also think it well decided. I think a person ordinarily using measures which do not correspond with the Imperial measure is liable to the penalty.

*Rule discharged—Conviction affirmed. (a)*

Wednesday, Jan. 23.

THORNE (appellant) v. COLSON (respondent).

*Stage-plays—Duologue*—6 & 7 Vict. c. 68.

*A dramatic performance (a duologue) by two persons, is a stage-play, within the meaning of the 6 & 7 Vict. c. 68.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a dismissal of an information laid under

(a) But they must be represented as such; that is to say, they must be used as measures. A glass of ale or a cup of beer may be sold as such, although not of the right capacity.

Q. B.]

THORNE v. COLSON.

[Q. B.]

the 6 & 7 Vict. c. 68, for unlawfully keeping a place of public resort for the public performance of stage-plays:—

The case stated that—

At a petty sessions of her Majesty's justices of the peace for the borough of Margate, in the county of Kent, holden at the town-hall in the said borough, on the 21st Aug. 1860, the defendant Jacinth Colson, of Margate aforesaid, professor of music, appeared before us, the undersigned James Standing, Esq., mayor of the said borough, Thomas Blackburne, William Forward Gilder, George Yeates Hunter, and Richard Jenkins, Esqrs., the justices then present, to answer an information of Richard Samuel Thorne, the lessee of the Theatre Royal, Margate, aforesaid, for that the said Jacinth Colson, on the 22nd Aug. instant, in the said borough, did unlawfully keep a certain place of public resort for the public performance of stage-plays and entertainments of the stage, without authority by virtue of letters patent from her Majesty, or licence from the Lord Chamberlain of her Majesty's household, or her Majesty's justices of the peace for the said borough of Margate, within which said borough the said place of public resort is situate (the same place not being a booth or show excepted from the operation of the statute in that behalf), and the said parties respectively being present, the said charge was duly heard by us, and upon such hearing we dismissed the information. And whereas the said Richard Samuel Thorne hath, pursuant to the provisions of the before-mentioned statute, given us notice and required us to state and sign a case setting forth the facts and grounds of our determination at the hearing of the said information, in order that he might take the opinion of the said Court of Q. B.:

Now we, the said justices, pursuant to such notice and the provisions of the statute aforesaid, do hereby state and sign such case as follows:—

It was proved to our satisfaction at the hearing of the said information, that the defendant was the rated owner and occupier, and paid the rates of a place, called the London Bazaar, wherein toys and fancy articles are usually sold, and situate in the High-street of the said borough, and while the alleged stage performance was going on, the walls of the said bazaar were fitted up round with the toys, &c., and which were visible, although they appeared to be put out of the way, and not exposed as at other times.

There was no proof that the defendant, who was in London at the time, had himself let his place to the performers, but his attorney admitted that his client's wife had done so in his absence.

It was further proved that on Wednesday, the 22nd Aug. inst., two of the witnesses, after payment of 1s. each at the door, were presented by the money-taker with a bill of the performance, and admitted to such place; these bills, which are alike, were tendered in evidence by the informant's attorney, and admitted by the defendant's attorney, and to one of them we have marked our names and annexed it to this case, that the court may in its discretion refer thereto. It announces for performance at the London Bazaar aforesaid, on Aug. 16, 17, 18, 20 and 22, "by royal authority and command, a new and fashionable drawing-room entertainment—Not quite so Fast, or Errors Redeemed—A Story of the Heart. Scene 1. Room at the Hotel, Cambridge. Scene 2. The Heroine's Boudoir. Scene 3. A fashionable Drawing-room in London. Scene 4. The wedding characters, personated by Miss Rosina Pennell and Mr. Reginald St. Clair." A descriptive list of these characters, which appear to be fourteen in number, follows, and after setting out some favourable descriptions of criticisms on the entertainment, apparently extracted from newspapers, the bill concluded thus:—"Reserved seats (stalls), 3s.; second seats, 2s.; area, 1s."

It was likewise proved by the evidence of two witnesses that there was then in part of the said place or bazaar a stage, with a curtain across it; that a little music had been played on the piano, a bell rung, and the curtain raised; that the different characters set forth in the bill were personated by two people calling themselves Rosina Pennell and Reginald St. Clair, and that they went off the stage and came on again several times together and separately; that they appeared in several different costumes, and represented several different characters when on the stage, sometimes speaking in soliloquy and sometimes holding a dialogue with each other on the stage for ten minutes at a time; and that a song was sung by the said Rosina Pennell, she accompanying herself on the piano; that about eighty people were present to witness the performance; that Reginald St. Clair, in one of his characters, appeared as the sincere lover of the lady, and in another as one seeking after her money, and that in the course of the performance he proposed marriage to the lady.

One of the witnesses, Thomas MacKnight, who described himself as an author by profession, and in the habit of attending theatres, stated that he had attended the performance on the evening of the 22nd instant, and in his opinion it was an entertainment of the stage, but that he did not consider himself a skilled witness, and that Mr. and Mrs. German Reed's entertainment was much the same as this.

Another witness, Nelson Lee, the lessee of the City of London Theatre, who has been for thirty years engaged as a proprietor or manager of theatres, and who had been present for a short period at the said performance, said that it appeared to him to be the commencement of a farce; that it was what he had always understood to be called duologue, and a performance of the stage; and that duologues are occasionally represented on the stage; that Mr. and Mrs. Howard Paul and Mr. and Mrs. German Reed's entertainments were duologues; that similar entertainments were given in London theatres in Passion-week; that he had seen duologues which were parts of farces cut down.

And whereas upon the evidence before us, we the justices, upon the evidence, considered that the said performance was not a stage-play within the meaning of the Act 6 & 7 Vict. c. 68.

We dismissed the information on the following grounds:

Firstly, that the Act 6 & 7 Vict. c. 68, being a penal statute, requires to be strictly interpreted, and that as the word "duologue" does not appear among the stage entertainments enumerated in the 23rd section, we did not consider it to be a stage-play.

Secondly, that as the witness Nelson Lee had stated that, although he considered such a performance as that given in the defendant's bazaar to be an entertainment of the stage, he admitted that such performances were given in London theatres during Passion-week—a time when we believe it would be unlawful to perform stage-plays thereon—we, the justices, in consequence of such admission, concluded that other managers of London theatres must differ in opinion from the said Nelson Lee, and that they could not consider such entertainments to be stage-plays. A further doubt being thus raised in our minds, we felt it incumbent to give the defendant the benefit of such doubt.

If the court should be of opinion that we the justices were correct in the dismissal of the information, the same is to stand; if not, a conviction is to be returned under the 2nd section of the Act for regulating theatres, or such other proceedings taken as the court shall direct.

By the 6 & 7 Vict. c. 68, s. 11, it is enacted "that, except as aforesaid, it shall not be lawful for any person to have or keep any house or other place of

public resort in Great Britain for the public performance of stage-plays without . . . licence from . . . the justices of the peace as hereinafter provided," &c.

By sect. 23 it is enacted "that in this Act the word 'stage-play' shall be taken to include every tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof," &c.

Poland now appeared for the appellant, and contended that the justices were wrong, for that a duologue is as much a stage-play as a performance by a greater number.

Lush, Q. C. contra.—There is a fatal defect in this information, for it is laid against the owner of the premises, and the case itself states that there was no proof that he had himself let the place to the performers. The 2nd section is directed only against the manager. [Poland.—That point is not raised by the case. CROMPTON, J.—It may be doubted whether or not the defendant was liable for the act of his wife in letting the premises. You cannot say, Mr. Lush, that this was not a stage-play within the interpretation clause.] I cannot contend that it is not.

CROMPTON, J.—Then let the case go down again to the justices to be reheard with reference to the liability of the defendant, with our intimation that it is a stage-play within the Act.

To be reheard by the justices.(a)

Thursday, Jan. 24.

REG. v. RECORDER OF LEEDS.

*The justices of the borough of L. made an order for the removal of a pauper from L. to A., notice of appeal was given by the overseers of A. to the sessions of the county in which L. was situate, instead of to the borough sessions, and on discovering their error a letter was written one day before the holding of the borough sessions, abandoning the notice, whereupon the respondents attended at the last-named sessions, and obtained an order for their costs:*

*Held, that the recorder for the borough of L. had jurisdiction to make such order, and that under the above circumstances the respondents were entitled to their costs.*

Maule showed cause against a rule for a certiorari to bring up an order of the Recorder of Leeds, with a view to its being quashed. The justices of the borough of Leeds made an order for the removal of a pauper from Leeds to Applethwaite in Somersetshire. Notice of appeal was given by the overseers of Applethwaite to the sessions for the West Riding of York, instead of to the borough of Leeds sessions, and on their discovering that the notice should have been given to the borough sessions, a letter was written by them inquiring whether the appeal could be heard by consent between the parties, and if it could not, declaring their intention of abandoning the notice. The notice was given on the 18th July, on the 28th Aug. grounds of appeal were served, and on the 9th Oct. the above-mentioned letter was written. The borough sessions were held on the following day, viz. 10th Oct., and the sessions for the West Riding of York on the 15th Oct. To the letter abandoning the notice of appeal, respondents replied that nothing could be done

(a) This is a decision of great importance, as seriously affecting a very large class of popular amusements, such as those of Mr. and Mrs. German Reed, some of the Nigger songs, and many others that might be named. In substance this case determines that any dialogue spoken by two or more persons is a dramatic performance. Hence the absurd consequence, that a scene of a play read to an audience in dramatic style, the same voice speaking for all the characters, is not within the law, while the same scene read by two persons is so.

by consent. Under these circumstances the overseers of Leeds attended at the borough sessions on the 10th Oct. and obtained an order for their costs, which order it was now sought to quash. *Reg. v. The Recorder of Liverpool*, 15 Q.B. 1070, and *Reg. v. The Justices of Buckinghamshire*, 4 Ell. & Bl. 259, n., are clear decisions on a notice such as was here given; and with the light thrown on its validity by the judgments in those cases, the appellants might safely have gone to the sessions and had the appeal tried. The respondents were therefore bound to be prepared, and the letter written on the 9th Oct., the day before the borough sessions, was clearly too late to avoid the expense. The notice given by the appellants was a good notice; the borough sessions had jurisdiction, and the respondents were entitled to their costs: (8 & 9 Will. 3, c. 30, s. 3.)

*Show contra.*—The order for costs was made behind the backs of the appellants. The power to give costs is given by the 8 & 9 Will. 3, c. 30, s. 3, and 12 & 13 Vict. c. 45, s. 6. *Reg. v. The Justices of Salop*, 4 Ell. & Bl. 257, is an authority in favour of the appellants, and is distinguished from the cases cited, in the judgment of Lord Campbell. No doubt the appellants were bound to pay some costs, but not these costs, and the recorder had no jurisdiction to make the order.

CROMPTON, J.—I am of opinion that this rule should be discharged. After the notice given, and looking also to the cases referred to by Mr. Maule, I think that the parties were entitled to suppose that they might be called on to appear at the right sessions, that is to say, the sessions for the borough of Leeds; they had therefore a right to make preparation, and to incur costs. The letter of the 9th Oct. was too late, and cannot interfere with the respondents' right to recover costs incurred before that time. I think it clear that the recorder had jurisdiction, and this rule will therefore be discharged, but without costs.

HILL, J.—I am of the same opinion. We could not make absolute this rule without saving the recorder had no jurisdiction. Now clearly he had; but I think there is good ground for saying that the conduct of the respondents' attorney was disingenuous, and therefore the rule will be discharged without costs.

Rule discharged.

Saturday, Nov. 19.

BATTING AND OTHERS (appellants) v. THE BRISTOL AND EXETER RAILWAY COMPANY (respondents).

*Railway—Conviction for obstructing the line—Intent to obstruct.*

*By sect. 211 of the 6 Will. 4, c. 36 (private) (the Bristol and Exeter Railway Company's Act) it is enacted "That if any person . . . shall do any act, matter, or thing to obstruct the free passage of the said railway or any part thereof," he shall be liable to a certain penalty:*

*Held, that, to render a party liable under this section, he must have intended to have committed the obstruction complained of.*

*Where therefore a person was crossing the railway at a crossing which he had a right to use with a waggon laden with timber, and the waggon got accidentally hitched with the gate-post, and a collision occurred with it and a train whilst it was so hitched:*

*Held, that, although the party was guilty of carelessness, yet, as he did not intend to create an obstruction he was not liable to a penalty under the foregoing section.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction by justices of the appellants, who were charged with having obstructed the free passage of the Bristol and Exeter Railway, by drawing and placing across the said line at Bramford Speke a waggon loaded with timber, which by the local Act, 6 Will. 4,



Q. B.]

REG. v. GEORGE BRUMMITT.

[C. CAS. R.]

c. 36, s. 211, is punishable by penalty not exceeding 10*l*. nor less than 5*l*., and in default of payment to imprisonment not exceeding three months.

The facts as they appeared in evidence were, that the defendant Batting is the occupier of an estate in Bramford Speke, Devon, part of which lies on one side of the railway and part on the other. The only ingress and regress to and from one of his fields is over a level crossing on the railway, at a place appointed for the purpose by the company. Some elm-trees had been felled in this field, and the defendant Strong was employed to draw away the trees. The defendants Osborne and Wickers are Strong's servants.

On the 22nd May Strong and his two men were there for the purpose, with a timber-waggon and horses. They loaded the waggon with two elm-trees, with which they were about to cross the railway at the proper place, when they were informed that a train was due, and were cautioned not to pass. Defendant Batting was present assisting. He sent his son up the line to see if the train was coming, with instructions if he saw it to hold up his hands. The line curves a short distance above the crossing, and on the son's going beyond the curve he saw the train coming on. The two defendants Batting and Strong, however, without waiting for any signal from the son, ordered the two other defendants Osborne and Wickers to take the horses and waggon across the railway, which they began to do, and as they drew it across one of the hind wheels of the waggon became latched in a gate-post at the side of the railway, from which they had proceeded, and the waggon with the two elm-trees on it thus became fixed in a direct line across the railway, taking up the whole crossing. The men were using every exertion to free the waggon, but could not do it, and after some minutes the train came on. It was impossible to stop it, and the driver seeing a collision inevitable, kept up his full speed, and most providentially cut through both the elm-trees, and the train passed on without injury to life or limb, damaging, however, the engine very considerably. It was a passenger train.

It was elicited by the defendants, on their cross-examination of the company's servants, that the trains did not always keep their time; that in fact they were sometimes an hour or more after their time, and it was contended that persons having the right as the defendants had of using this crossing on foot and with carriages, are not obliged to wait the uncertainty of the passing of the trains; and that but for the accidental locking of the wheel of the waggon in the gate-post the waggon would have been drawn across the line before the arrival of the train; and moreover, that the company are bound to keep a man at the gates of the crossing.

On the part of the company it was insisted that the defendants knew the train was due, and that instead of sending Batting the son up the line to see if the train was approaching, they ought to have waited a reasonable time before attempting to draw over so unwieldy and unmanageable a vehicle as a loaded timber-waggon; that the company are not bound to keep a man at the gates of a private crossing; that there was a want of proper caution in the use of the crossing, and therefore the defendants were guilty of obstructing the free passage of the railway within the meaning of the Act of Parliament.

The justices took this view of the subject, and convicted the defendants in the penalty of 5*l*. each.

By the Bristol and Exeter Railway Company's Act (private), 6 Will. 4, c. 36, s. 211, it is enacted "that if any person shall throw, place, or wilfully scatter or drop any gravel, stone, rubbish, or other matter or thing upon any part of the said railway . . . or shall do any act, matter, or thing to obstruct the free passage

of the said railway, or any part thereof, he and every person actually or constructively aiding or assisting therein shall respectively forfeit and pay any sum not exceeding ten pounds nor less than five pounds for every such offence."

Kinglake, Serjt. (*M. Smith*, Q.C. with him) appeared in support of the conviction.—He referred to *Reg. v. Hobroyd*, 2 Mo. & R. 339; 3 & 4 Vict. c. 97, s. 15; 14 & 15 Vict. c. 19, s. 6.

COCKBURN, C. J.—I am of opinion that, upon the facts of the case, the conviction cannot be sustained. The construction of the Act of Parliament is certainly very ambiguous, but I can quite understand that, though a person has a right to cross a line, yet, if he does so at a dangerous time, he may commit a serious offence. The question is, whether or not that offence is set out in that Act of Parliament? Now here the appellants were entitled to cross the line, provided they did so at a reasonable time. Then, did they intend to obstruct the line? It is not so found, and it is clear that they never intended that there should be any obstruction. They intended to get safely across, and with no intention of obstructing. They obstructed by a pure accident, and in consequence, instead of getting across, their waggon remained upon the line. Therefore, notwithstanding in consequence of their act the accident occurred, it was not with any intention on their part. That the act was a negligent one I agree; for, as trains are liable to be late, and there was a curve, it was only common prudence on their part to use great caution; but whether this is a criminal or merely a civil injury is another matter. Although, therefore, they did something which had the effect of obstructing the line, yet, as they never intended it, I think they are not liable under that statute.

CROMPTON, J.—I think the fair meaning of the Act is, that they should do something which they mean to be an obstruction.

HILL, J.—I am of the same opinion. The question is, whether the parties who were exercising a right of crossing the line, but were doing so carelessly, but without any intention of causing an obstruction, were guilty within the meaning of the Act. I am of opinion that they were not. [His Lordship here read the section.] Now I construe the words "or shall do any act, matter, or thing to obstruct the free passage of the said railway" to mean with *intent* to obstruct, for I think that, if a person were to do such an act with such an intention, he would be guilty, although no obstruction may in fact have taken place.

*Judgment for the appellants.*(a)

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 19.

(Before COCKBURN, C.J., WIGHTMAN and WILLIAMS JJ., BRAMWELL, B. and KEATING, J.)

REG. v. GEORGE BRUMMITT.

*Larceny—Lead fixed to a building—Evidence of ownership.*

*Proof by an agent of the receipt of rents, of letting the premises, ordering the repairs and managing the property generally on account of A. B., is sufficient evidence of title in A. B. without producing the*

(a) But although the words of the Act may not be read literally, so as to include every act of obstruction, why should not gross negligence be held as equivalent to intention as the same principle as in manslaughter? The course of argument might be this: The law assumes an intent to do what is done; it is for the defendant to excuse himself by showing that his intent was otherwise; gross negligence is not such an excuse, for a man is bound to use ordinary diligence to avoid an infraction of the law.

*title-deeds, upon a count of an indictment for stealing lead, the property of A. B. fixed to a dwelling-house of the said A. B.*

Case reserved for the opinion of this court by the chairman at the West Riding of Yorkshire Epiphany sessions 1861 :—

The prisoner was tried before me at Christmas general quarter sessions of the peace for the West Riding of the county of York, holden at Wakefield on the 1st Jan. 1861, on an indictment; which charged him on the first count with feloniously ripping, stealing and carrying thirty-one pounds weight of leaden piping, the property of John Hope Shaw and others, then and there being fixed to a dwelling-house of the said John Hope Shaw and others.

On the second count with feloniously receiving the same.

On the third count with stealing thirty-one pounds weight of leaden piping, the property of Thos. Wood, then and there being fixed to a dwelling-house of the said Thomas Wood.

On the fourth count with feloniously receiving the last-mentioned lead.

The jury found a general verdict of guilty, and the prisoner was sentenced to nine calendar months' imprisonment with hard labour; but was admitted to bail until the opinion of the Court of Criminal Appeal could be had on the following case.

John Barff, a justice of the peace, proved that he managed the property from which the lead in the third count of the indictment was stolen for his nephew Thos. Wood, who resided in Patras; that he ordered all repairs, received the rents in his nephew's absence, and let the property to Mr. Waite, the present tenant; that prisoner called upon him on the Thursday morning before the robbery, and said he was repairing Captain Binstead's (a neighbour's) house, and that the spouts of Mr. Waite's house were out of repair, and asked witness's leave to repair them, as he could do it cheaply; that witness refused, and said that he should order his own workmen to do the work if repairs were required.

Counsel for the prosecution proposed to ask Mr. Barff whether Thomas Wood was owner of the premises in question.

The counsel for the prisoner objected to this question on the ground that the ownership would appear from the title-deeds, the best attainable evidence, as the deeds might show the property to be in trust for Mr. Wood, or that the mortgagee had the legal title; in either of which cases Mr. Wood might not be the legal owner, and these inferences were consistent with the evidence of Mr. Barff, or Mr. Wood might be himself an agent merely of a third party, Mr. Barff acting for him in his absence.

The evidence of the ownership of John Hope Shaw and others to the property in the first count mentioned was held by the court to be insufficient. And the court held, that the evidence as to the ownership of Waite's house was sufficiently proved to be in Thos. Wood.

The opinion of the Court of Criminal Appeal is requested, whether the evidence of Mr. Barff was sufficient to prove the ownership of the property in Thos. Wood, the prosecutor. J. G. SMYTH, Chairman.

Campbell Foster, for the prisoner, now applied to have certain evidence given at the trial, which the chairman of the sessions had declined to insert, added to the statement of the case, and which it was contended showed conclusively that the property was not in Thomas Wood.

COCKBURN, C. J.—There is abundant evidence set out to show that the property is well laid to be in Thomas Wood. The objection is purely of a technical nature, and you now ask us to assist you in raising it by an amendment. We refuse to do so.

C. Foster.—The evidence of ownership is not sufficient. There was some evidence at the trial that Wood was not the owner, and that Barff was merely the conduit-pipe through which the rents were received.

WIGHTMAN, J.—Where do you find it in this case?

COCKBURN, C. J.—The objection is altogether beside the merits of the case. The prisoner stole the lead, and there is evidence before us that Wood was the owner.

WILLIAMS, J.—There is enough evidence of title to support an action of ejectment, and why not this conviction?

C. Foster.—In *Rex v. Hutchinson*, R. & R. 412, upon an indictment for stealing goods from a dissenting chapel, the second count described them as the property of a person who was employed to take care of the chapel, kept the keys of the chapel, and received a salary for so doing; and it was held that the goods could not be considered as belonging to the chapel-keeper, who was no more than a mere servant. So in this case it may be inferred that Barff and Wood were not the owners, but acted only as the agents for the owners.

Waddy, for the prosecution, was not called upon to argue.

COCKBURN, C. J.—It appears to me that there is only one inference to be drawn from the circumstances stated. On the evidence before us the property appears to be well laid in Wood. The receipt of rents is *prima facie* evidence of a seisin in fee. A man is not bound in such a case to produce his title-deeds. The point is too clear for argument.

The rest of the Court concurring,

Conviction affirmed.

#### REG. v. PHILIP WILLIAM MAY.

*Embezzlement—Clerk or servant—Person collecting orders on commission.*

*The prisoner was informed by letter from the prosecutors that for all business he did for them, he would be allowed a commission. It was his duty to account to the prosecutors for any money he might receive for them immediately on the receipt of it:*

*Held, that, upon this evidence, the prisoner was not shown to be a clerk or a servant within the 7 & 8 Geo. 4, c. 29, s. 47.*

Case reserved for the opinion of this court by the chairman at the Epiphany Staffordshire sessions 1861.

At the recent Epiphany sessions for the county of Stafford, Philip Wm. May was indicted, for that he being the clerk or servant of the Right Hon. Earl of Granville and others, feloniously embezzled on the 1st Aug. last 94*l.*; and on the 22nd Sept. 37*l.* 15*s.*, the moneys of his employers.

The evidence showed that the prisoner was employed at Newcastle-upon-Tyne, in Northumberland, to obtain orders there for the sale of iron for the prosecutors, who carried on business at Hanley, in Staffordshire, as manufacturers of iron, under the name of the Shelton Bar Iron Company, at a certain commission upon the orders which he should obtain.

This employment took place under a letter from the manager of the prosecutor's works, of which the following is a copy :—

"Shelton Bar Iron Works, near Stoke, Staffordshire,  
19th Sept. 1859.

"Mr. P. W. May.

"Dear Sir,—In reply to your letter, we are not disposed to appoint any agent at Newcastle, but for all business you do for us we shall be happy to pay you a commission.

"We expected that after your conversation with the writer a good business would result.

"Yours truly,

"Shelton Bar Iron Company,

"W. P. BODEN.

"15, Lisle-street, Newcastle-upon-Tyne."

The manager of the company, Mr. Roden, was not called as a witness, but the cashier of the company, who had nothing to do with the employment of such persons as the prisoner, said that a person who like the prisoner got orders on commission, was called an agent in their trade, and that he had no doubt but there was some other letter appointing the prisoner an agent for the prosecutors. There was no evidence of, or of a notice to produce any such letter. There was not any evidence to show whether the prisoner was employed for or by any other persons than the prosecutors.

It was his duty to account to them for any money which he might receive for them immediately on receipt of it.

On the 1st Aug. last, at Newcastle-on-Tyne, he received on account of the prosecutors the sum of 94*l*. from persons to whom he had sold iron for them, and on the 2nd Aug. wrote from that place to them a letter of business, in which he did not mention the receipt of this sum, and on the 22nd Sept. last, at the same place, he received another sum of 37*l*. 15*s*. on their account also; and on the 29th Sept. wrote from the same town another business letter to the prosecutors, in which he did not mention the receipt of this second sum. Being soon afterwards applied to on behalf of the prosecutors for these two sums, he wrote from the same place to them two letters which they received through the post-office in Staffordshire, and of which the following are copies:—

"8, Malton-terrace, Newcastle, Oct. 28, 1860.

"W. S. Roden, Esq.

"Dear Sir,—I am truly sorry and ashamed that I have taken such a liberty as to make use of money received on account of the Shelton Bar Iron Company, but shall in a short time be able to remit the amount; therefore pray of you to pardon such conduct, and prevent any unpleasant proceedings, which I own would be my desert, and at same time to myself and family. I should have replied to your several letters, but have delayed, expecting daily to make up the sum. Hoping that you accede to my request,

I remain, dear Sir, yours truly

"P. W. MAY.

"P.S. I inclose Mr. Toward's acceptance, which should have been sent before, but was mislaid on his leaving home, and only returned yesterday."

"8, Malton-terrace, Newcastle, Oct. 31, 1860.

"Dear Sir,—I am sorry that such is the upshot of my connection with you. Pray give me a little longer, and my brothers at Snyd colliery, adjoining you, will no doubt put matters right. If my money does not come in the mean time legal proceedings would spoil it, and prevent me getting anything. Therefore, as my earnest desire is to replace all, I hope you will not pursue the course that you threaten.

"I note your remarks respecting orders in future, and hope that affairs may ultimately show a better aspect. I remain your obedient servant,

"P. W. MAY.

"Messrs. The Shelton Bar Iron Company."

This being the case for the prosecution, it was objected on behalf of the prisoner—

First, that he was not shown to be a clerk or servant to the prosecutors within the meaning of the statute, &c.

Secondly, that no act of receiving or embezzling had taken place within the county of Stafford.

The court overruled both objections; but on the jury returning a verdict of guilty, postponed passing sentence until the next adjourned sessions, in order that the propriety of such ruling may be submitted to the Court for the Consideration of Crown Cases Reserved.

If either objection was valid, the verdict is to be set aside; if not, the verdict is to stand.

The prisoner is in gaol awaiting judgment.

LICHFIELD, Chairman of Quarter Sessions.

COCKBURN, C. J.—The point is, whether the defendant was a clerk or servant within the meaning of the statute. This is the case of a person going about and getting orders for the prosecutors upon which he received a commission. He may be employed by fifty other persons to do the same for them in their business. We will hear the counsel for the prosecution.

*Kewley* for the prosecution.—It is submitted that the prisoner was a clerk or servant within the statute. In *Carr's* case, Russ. & Ry. 198, the prisoner was employed by various houses as a traveller to get orders and to receive debts and had a commission on such orders and debts; he paid his own expenses and did not live with any of his employers or act in any of their counting-houses. S. and Co. were amongst his employers, and he was indicted for embezzlement of moneys he had collected for them. Upon a case reserved the judges held that the prisoner was their clerk within the statute. That case is not distinguishable from the present. There the prisoner was employed by several houses at the same time in a similar manner as defendant was in this case.

COCKBURN, C. J.—In the case of a traveller, he is under the control of his employers; he is bound to go here and there, and to do this and that according to orders. Here the prisoner was free to act or not, and not subject to any such control as seems to be involved in the relation of master and clerk or servant. A traveller may be ordered to go to Manchester or Newcastle, and to do this or that. It could not be contended that a person in a county town who procures persons to insure their lives with an insurance company, and receives a commission for so doing, is the clerk or servant of the company. He is an agent, not a clerk or servant. It must be established that the relation of master and servant exists. Here the prisoner was simply a commission agent. A traveller in one sense may be a clerk.

*Kewley*.—*Spencer's* case, Russ. & Ry. 299, decides that it is sufficient to establish the relation of master and servant or clerk, if the prisoner is employed on one occasion only to receive money.

COCKBURN, C. J.—Suppose a merchant living in London writes to another abroad, and says, "Any orders you send will be shipped, and we will allow you commission." Is the latter a clerk of the merchant?

WILLIAMS, J.—On the other hand, if a person is employed to get orders and to receive the money, and is paid a remuneration in respect of both services, I think that would bring the case within the statute according to many of the decisions, but here it is not stated that the prisoner was engaged to receive money.

*M'Mahon* for the prisoner.—In *Rae v. Goodbody*, 8 Car. & P. 665, Parke, B. said, he wished that *Carr's* case should be reconsidered. In *Reg. v. Walker*, 27 L. J. 207, M. C.; S. C. 8 Cox's Crim. Cas. 1, the prisoner kept a refreshment house, and was employed by the prosecutors to get orders for a manure, to collect money and pay it over. He was paid by commission. He was to go about among the farmers to get orders, but no definite time was fixed for so doing. He was called the prosecutor's agent for the district. The prosecutors had a store under the prisoner's control from which he supplied the manure upon the orders he obtained. In order to obtain the security of a guarantee society for the prisoner's conduct, it was arranged that the prisoner should have a salary of 1*l*. a year. The prisoner having got into arrears, was treated as a debtor for the amount. The prisoner fraudulently appropriated money which he received from customers, and gave a false account. It was held that the cri-

C. CAS. R.]

REG. v. HENRY MOORE.

[C. CAS. R.]

justice showed the relation of principal and agent, not that of master and servant.

By the COURT, Conviction quashed. (a)

## REG. v. HENRY MOORE.

Larceny—Finding property—Appropriation—Felonious intention.

The prosecutor went to the prisoner's shop to have his hair cut, and he also made a purchase. His purse, containing notes and gold, were in a coat pocket, which was laid on a chair while his hair was being cut, and next morning he missed a 10l. note from his purse. The jury found that the note was dropped by the prosecutor in the shop, and that the prisoner found it, and that at the time he picked it up the prisoner did not know, nor had he reasonable means of knowing, who the owner was, but that he afterwards acquired knowledge of who the owner was, and after that converted the note to his own use; that the prisoner intended, when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever that owner might be, and that the prisoner believed at the time he picked up the note that the owner could be found:

Held, that upon this finding the prisoner was guilty of larceny.

Case reserved for the opinion of this Court, by Mr. Commissioner Kerr, at the Central Criminal Court:—

At a session of the Central Criminal Court, holden on the 26th day of Nov. 1860, Henry Moore was tried before me on an indictment charging him in the first count with stealing a Bank of England note for 10l., the property of David McGregor, and in the second count with receiving the same, knowing it to have been stolen.

It appeared from the evidence that the prosecutor went to the shop of the prisoner to have his hair cut, which was done by the prisoner; that the prosecutor before leaving, purchased some hair-oil, and then left the shop. When he went to the prisoner's shop the prosecutor had in a clasped purse in the pocket of his great coat, which he carried on his arm, two 10l. notes (one of them the subject of the indictment) and some gold. He folded his great coat and laid it on a chair while his hair was being cut, and he paid for the hair-oil from the purse in which the notes and gold were.

Next morning he discovered the loss of the 10l. note, alleged to be stolen, returned to the prisoner's shop, stated to the prisoner his belief that he had lost it in the shop, and offered him a reward of 3l. if he would restore it. The prisoner told the prosecutor he knew nothing of the note, but in his statement before the magistrate he explained that he had given gold for the note the same day that the prosecutor lost it, but was afraid to explain this to the prosecutor lest he should be obliged to give up the note to him.

Evidence was called in support of the prisoner's statement, that he had given gold for a 10l. note about the time of the loss by the prosecutor to a man in his (the prisoner's) shop, and it was proved that the pri-

soner, on the same day when the prosecutor inquired after the note, parted with it.

The jury found the prisoner guilty, but recommended him to mercy on the ground that they believed the note was dropped in the shop and found by him there.

Mr. Best, counsel for the prisoner, then contended that if the jury believed the prisoner to have found the note, they ought to acquit.

Whereupon I put certain questions to the jury, in answer to which they found—

First, that the note was dropped by the prosecutor in the shop, and that the prisoner found it there.

Secondly, that the prisoner at the time he picked up the note did not know, nor had he reasonable means of knowing, who the owner was.

Thirdly, that he afterwards acquired knowledge of who the owner was, and after that he converted the note to his own use.

Fourthly, that the prisoner intended, when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever that owner might be.

Fifthly, that the prisoner believed at the time he picked up the note that the owner could be found.

I thereupon directed the verdict of guilty to be entered of record, and reserved for the opinion of this court the question, whether, upon the above findings, the prisoner was properly convicted.

The prisoner remains in gaol awaiting judgment.

R. MALCOLM KERR,

One of the Commissioners of the Central

8th Jan. 1861. Criminal Court.

*Sleigh* for the prisoner.—It is submitted that this conviction ought to be quashed. In order to convict the prisoner of larceny, it was essential to prove these two ingredients: first, that the prisoner intended at the very time he took up the bank-note to appropriate it to his own use; and secondly, that he had then the means of knowing who the owner of it was. The merely taking up lost property, although with the intention to appropriate it, is not sufficient.

COCKBURN, C.J.—Your difficulty is, that the prisoner knows who the owner is before he converts the note.

*Sleigh*.—That does not make it a felonious conversion. In *Reg. v. Thurborn*, 1 Den. C. C. 387, S.C. nom. *Reg. v. Wood*, 3 Cox Crim. Cas. 453, it was held that the knowledge, or means of knowledge, as to the owner must be co-existent with the fact of finding. A mere belief in the mind of the prisoner that the owner can be found is not enough. In *Reg. v. Dixon*, 1 Dearsley, C.C. 580, S.C. 7 Cox Crim. Cas. 35, where one question left to the jury was, whether at or after the time of the finding the prisoner believed that there was not reasonable probability that the owner could be traced; and the jury answered that they were of opinion that the prisoner did believe that the owner could be traced; Jervis, C.J., said: "It does seem to me that it was left to the jury to speculate upon what was in the mind of the man, without any facts to support that speculation."

WIGHTMAN, J.—In the present case the prisoner, at the time of finding the note, makes up his mind to deprive the owner, whoever he may be, of the property in it, and he does know who the owner actually is, before he converts the note. In *Reg. v. Thurborn*, Parke, B., in the course of his elaborate judgment, says: "If the prisoner had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either." But here the original taking was not innocent.

*Sleigh*.—Whether the original taking was innocent depends upon whether the note was marked or not, or

(a) This decision is quite inconsistent with that in *Carr's* case, 1 R. & R. 198, where a person taking orders and receiving payments on commission was held to be a servant. The judges here appear to have treated it as if the prisoner had been employed simply to procure orders, overlooking the explicit definition of the duty undertaken by him to account for any money he might receive for his employers immediately on the receipt of it. This appears to me to imply much more than the mere relationship of a commission agent. As by far the greatest number of frauds of this kind are committed by persons employed as was the prisoner, this defect in the law should now be amended, and conversion to his own use by the receiver of money for another should be made a misdemeanour.

the circumstances of the finding such that the owner could be traced. It is not like the case where a purse or property has been mislaid, and the owner may probably be expected to come back to look for it. Upon the statement in this case the note is found by the jury to have been absolutely lost. In *Reg. v. Dixon* the jury found that there was a reasonable probability at and from the time of the finding that the owner could be traced, and that the prisoner believed that the owner could be traced. That finding was stronger against the prisoner than the one in the present case, and yet the court quashed the conviction.

WILLIAMS, J.—In *Reg. v. Thurborn*, Parke, B. puts the judgment of the court favourably for your client, viz., that whether it is a felony or not does not depend upon what is passing in the mind of the finder at all, but he lays it down that where *dominus rerum non apparet*, the subject-matter is incapable of being the subject of larceny.

WIGHTMAN, J.—In the present case you must add that the finder took up the note *animo fraudis*.

*Sleigh*.—Even assuming that the prisoner intended at the time of finding the note to appropriate it to his own use, it is no larceny unless he had then the means of knowing who the owner was. In *Reg. v. William Charles Giffard*, 52 Central Criminal Court Sessions Paper, 242, the prisoner was indicted for stealing a 10*l.* bank-note, and the defence was that he found it, and that, as there was no mark upon it showing to whom it belonged, his retaining it did not amount to a felony, and Crompton, J. directed the jury that if they considered the prisoner found the note, not knowing whose it was, and not having the means of knowing, it was their duty to acquit him.

COCKBURN, C.J.—Suppose a person finds a valuable diamond necklace—say of 10,000*l.* value in a ball room, and takes it up intending to keep it, whoever the owner may be, would that not be a larceny?

*Sleigh*.—If at the time of finding, the person had the means of knowledge, it would be larceny; but if he had not then the means of knowledge, it would not be larceny. In *Reg. v. Christopher*, 1 Bell's C. C. 27, 8 Cox Crim. Cas. 91, the latest case on this subject, it was decided that where a person finds lost property and appropriates it to his own use, it is necessary, in order to convict him of larceny, that the jury should find that at the time he took possession of the property he knew, or had the means of knowing, who the owner was, and took possession of it with the felonious intent to appropriate it to his own use.

WILLIAMS, J.—Suppose a sheep strays into a man's field, and the man kills and eats it, not knowing the owner, is he guilty of larceny?

*Sleigh*.—No.

COCKBURN, C.J.—In *Reg. v. Thurborn* Parke, B. uses this language: "To prevent the taking of goods from being larceny, it is essential that they should be presumably lost; that is, that they should be taken in such a place and under such circumstances as that the owner would be reasonably presumed by the taker to have abandoned them, or at least not to know where to find them."

*Sleigh*.—In *Reg. v. Dixon*, where *Reg. v. Thurborn* was cited, the jury found that the prosecutor had not abandoned, and that the prisoner believed he had not abandoned, his right to the money. In *Reg. v. Christopher*, Channell, B. said: "In *Reg. v. Dixon*, in which *Reg. v. Thurborn* was referred to, it was held, that if a man find lost property and keep it, and at the time of finding it have no means—no immediate means—of discovering the owner, he is not guilty of larceny because he afterwards has means of finding him, and nevertheless retains the property to his own use." And Hill, J. said: "Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shown that at the time of finding he

had the felonious intent to appropriate the thing to his own use. The other ingredient is, that at the time of finding he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner may be found. There must be the immediate means of finding him."

COCKBURN, C.J.—The facts were very different to those in this case. Here the prisoner keeps a shop, a customer comes in, takes out his purse and drops a bank-note out of it; the prisoner must know that the customer will come back to inquire about it. Can it be said that he has not the means of knowing who the owner may be?

*Sleigh*.—There is no finding in this case to support the view just put. Belief which may be unfounded, and means of knowledge, are different things.

WIGHTMAN, J.—Is there any reported case in which all the facts found in this case have been combined? There are cases in which one or other of them have existed separately.

*Sleigh*.—No. Here there is no finding inconsistent with the position that this was lost property.

COCKBURN, C.J.—If the findings in this case do not amount to larceny, the law is more lax than I take it to be.

The rest of the Court concurring,

*Conviction affirmed.*

## COURT OF EXCHEQUER.

Reported by F. BAILEY and S. M. CULLOCK, Esq., Barristers-at-Law.

Tuesday, Jan. 29.

Ex parte THE DEPUTY CORONER OF MIDDLESEX.

*Deputy coroner—Privilege from arrest when in execution of the duties of his office.*

*A coroner's deputy is privileged from arrest when engaged in the duties of the office of coroner.*

Huddleston, Q. C. moved, on behalf of the deputy coroner for Middlesex, who had been arrested by the sheriff this morning when on his way to the office of the coroner, where he was going to get the necessary papers and other documents necessary to enable him to discharge his duty of deputy coroner, for holding certain inquests to-day, that such deputy coroner may be discharged out of custody, on the ground that he was privileged from arrest when in execution of the duty of his office. The applicant was duly appointed deputy coroner under the 6 & 7 Vict. c. 83, "An Act to amend the law respecting the duties of coroners;" and in Jervis on Coroners (2nd edit., p. 88), it is said: "Although there is no express adjudication upon the subject, it would seem from principle that coroners are privileged from arrest while in the execution of their judicial duties. The privilege from arrest of suitors and witnesses connected even with a civil cause is not confined to an attendance upon the Superior Courts of Law, but extends to every tribunal established for or connected with the administration of justice; and the Superior Courts have uniformly manifested an inclination to extend rather than confine this exemption, that parties might not, from the fear of arrest, be deterred from attending the place of trial. The same reason which exempts from arrest the judges and officers of the Superior Courts, would seem equally to apply to coroners, the administration of whose office concerns as well the interest of the prerogative as of the subject, and who ought not, therefore, to be deterred by an apprehension of arrest from executing it openly as occasion may require. In a late case this question arose incidentally at Nisi Prius, in an action against the sheriff of Staffordshire for not arresting a

[Q. B.]

REG. v. JUSTICES OF SURREY.

[Q. B.]

coroner. On behalf of the plaintiff it was proposed to show that several inquests had been held by the coroner between the delivery of the writ by the sheriff and the return of the writ, when Gaselee, J., before whom the cause was tried, expressed his opinion that no coroner could be arrested *ex parte*, *morando*, *vel redendo* for the purpose of taking an inquest." [MARTIN, B. referred to *Callahan v. Twiss*, 9 Ir. Law Rep. 422, where it appeared that a coroner was arrested while engaged in summoning a jury for the purpose of holding two inquests, and was discharged.] If the coroner is privileged from arrest while in the execution of the duties of his office, so also is his deputy. [MARTIN, B.—Yes; he is entitled to be discharged under the circumstances, and the better course would perhaps be to draw up the rule at once, as the deputy coroner and the officer are now here; or the sheriff may be sued for an escape.]

*Gray (amicus curiæ)* mentioned *Brown v. Compton*, 8 T. R. 424, as an authority that no such action could be maintained.

The COURT ordered the prisoner to be discharged.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HESTELT, Esqrs., Barristers-at-Law.

Tuesday, Jan. 29.

REG. v. JUSTICES OF SURREY.

*Highway*—Road made at the expense of a railway company—Proposed dedication to public—Certificate of justices.

*Justices*, after the parish had resolved that a road proposed to be dedicated to the public was of sufficient utility, were called upon to certify that it was made in conformity to the Highway Act, 5 & 6 Will. 4, c. 50, s. 23. They refused to grant their certificate, being of opinion that it was but a part of a road, which in another part was not of the requisite width:

*Held*, that the justices were right in their decision.

T. Jones moved for a *mandamus* to certain justices of Surrey, commanding them to certify, pursuant to the 5 & 6 Will. 4, c. 50, s. 23 (Highway Act), that a highway had been made in a substantial manner and of the width required by the Highway Act.

It appeared that the road in question was made by the South-Eastern Railway Company adjacent to the station at Red-hill, Surrey; that the line of railway at this spot was formed upon an embankment which cut the road in question into two parts; the two parts communicated, however, with each other by a tunnel through the embankment. There was no objection to the width of the two parts of the road on either side of the railway, but the tunnelled part, though a carriage way, was not of the requisite width. The justices, when called upon to certify under the 5 & 6 Will. 4, c. 50, s. 23, as to parts not under the tunnel, declined to give their certificate, being of opinion that the whole of the three parts formed but one road, and the part under the tunnel not being of the requisite width, and doubting their jurisdiction to certify as to part only, although a vestry meeting had been held, and a resolution passed that the road was of sufficient utility to justify its being kept in repair at the expense of the parish.

Act. 23 of 5 & 6 Will. 4, c. 50, enacts, "That no road or occupation way made, or hereafter to be made, by and at the expense of any individual or private person, body public or corporate, nor any roads already set out, or hereafter to be set out as a private driftway or horsepath, in any award of commissioners under an Inclosure Act shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the

[MAG. CAS.]

person, body politic or corporate, proposing to dedicate such highway to the use of the public shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person, or body politic or corporate, to view the same and certify that such highway has been made in a substantial manner, and of the width required by this Act, at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof; then and in such case after the said highway shall have been used by the public and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate. Provided nevertheless, that on receipt of such notice as aforesaid the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the next special sessions for the highways to be held in and for the division in which the said intended highway shall be situate, and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices."

*Jones*.—The justices were wrong in their decision. The question is, whether or not, by reason of the road under the railway not being of sufficient width, the other roads on either side of the railway which are of sufficient width can be said to be highways within the meaning of the 23rd section? It is submitted that they can, and that the justices ought to have certified as to them.

BLACKBURN, J.—Is it not for the justices to be satisfied that they are highways?

CROMPTON, J.—The justices say that these three parts ought to form but one highway. The railway company cut up what ought to be one highway into two parts, with a narrow part between them. A mere certificate that so much, specifying the part by measurement, was according to the Act, would amount to nothing.

*Jones*.—There was no road where the way goes under the tunnel.

WIGHTMAN, J.—This was one continuous road, and the middle of it was not of the requisite width. You propose to have the justices' certificate for each end. Is that within the statute?

*Jones*.—These parts are not the less highways in point of law on that ground. In *Bateman v. Buck*, 21 L. J. 406, Q. B., it was decided that a public highway may in point of law exist over a place which is not a thoroughfare.

WIGHTMAN, J.—No doubt it is a highway, but is it such as that the justices are bound to give the certificate contemplated by sect. 23? Can you break up what is really but one highway into several parts, and require a certificate of justices for each part?

CROMPTON, J.—Can you ask them to certify that these parts are two distinct roads? They refuse, on the ground that they are but one road.

*Jones*.—The company cannot close up the part under the tunnel. It is dedicated. If it were closed up, the justices would be bound to give certificates for

Q. B.]

TURNIDGE v. SHAW.

[Q. B.]

the two parts on either side of the railway. The company made the road, which is two miles long, as landowners.

WIGHTMAN, J.—I am of opinion that a rule ought not to be granted. The question is, whether the road is so made as to make it incumbent on the justices to grant their certificate under sect. 23. It is admitted that a certain part of the road is of the requisite width, that a certain other part is not of the requisite width, and that the remaining part is of the requisite width. It is contended that the two parts of the requisite width constitute two distinct roads, but I am of opinion that it was not competent for the railway company to split the road up into fragments such as these, and to call each a separate highway, for the purpose of obtaining the certificate of the justices and making the roads repairable by the parish.

CROMPTON, J.—I am of the same opinion. It does not appear to be any reason why the justices should grant their certificate, that the parish has assented to the proposed dedication. The Act says that, besides obtaining the assent of the parish, the justices are to give their certificate that the new road is made in a substantial manner and of a certain width, and to their satisfaction. The justices very properly go to look at what the road proposed to be dedicated is, and on a view they raise the objection. It was really asking the justices to treat the two ends of the road as the road. I think the justices were quite right. It would be evading the Act if parties could do this.

HILL and BLACKBURN, JJ. concurred.

Rule refused.

Thursday, Jan. 31.

TURNIDGE (appellant) v. SHAW (respondent).

*Thames Conservancy Act 1857.*

*By 30 Geo. 2. c. 21, s. 5, for the preservation of the fishery of the Thames and the Medway within the jurisdiction of the mayor of London as conservator; the mayor's deputy, the water bailiff and his assistants are empowered to enter any boat, &c. and seize spawn, fry, brood of fish, &c.; and by sect. 6 persons obstructing them are liable to a penalty of 10*l.*, and by sect. 11 on appeal against convictions is given to the Court of Conservancy.*

*The Thames Conservancy Act, 20 & 21 Vict. c. cxlvii. s. 52, transferred to the new corporation created by that statute, called the Conservators of the River Thames, the powers, authorities, rights and privileges of the Queen and the corporation of London in relation to the conservancy, and the regulation and preservation of the Thames, and the rivers, streams and watercourses within the flow and reflux of the tides of the said rivers. Sect. 76 imposes a penalty of 5*l.* on persons opposing any officer in the due execution of the Act:*

*Held, that the powers given to the Mayor of London to appoint persons assistants in exercising the powers given to the water bailiff are powers relating to the conservancy of the Thames, and are consequently transferred to the Conservators of the Thames by the 20 & 21 Vict.:*

*Held, further, that the penalty of 10*l.* imposed by the 30 Geo. 2. c. 21, s. 6, did not attach to persons obstructing the assistants appointed by the Conservators of the Thames under 20 & 21 Vict.:*

*Held, further, that the penalty of 5*l.* imposed by 20 & 21 Vict. c. cxlvii. s. 76, did attach to the case of persons obstructing such assistants under the 20 & 21 Vict. when engaged in searching boats for spawn, fry, brood of fish, &c., which duty belongs to the conservancy of the Thames.*

CASE.

At a petty session holden at Rochford, Essex, on the 26th Jan. 1860, before three of her Majesty's justices of the peace, an information preferred by Thomas

Turnidge, assistant river keeper (the appellant), by direction of the Conservators of the River Thames against Thomas Shaw, fisherman (the respondent), whereby the said T. Shaw was charged for that he did on the 11th Jan. 1860, at the parish of Leigh, in the said county, obstruct and hinder the said T. Turnidge in the execution of the powers vested in him by the statute in such case made and provided, as an officer of the Thames conservators duly appointed, pursuant to the statute in such case made and provided, whereby and by force of the statute in such case made and provided the said T. Shaw had forfeited the sum of 10*l.*, came on to be heard by the said justices, and was by them adjourned to the 26th Feb. then next.

The said information came on to be heard pursuant to such adjournment, and the justices did then and there hear and determine the same, and did dismiss the said information.

The appellant being dissatisfied with the determination of the said information, as being erroneous in point of law, applied to the justices in writing within three days next after such determination, to state and sign a case. Whereupon they stated such case accordingly.

By stat. 30 Geo. 2, c. 21, s. 5, it is enacted that for the better preservation of the fishery of the river Thames and waters of the Medway, within the jurisdiction of the mayor of the city of London, as conservator of the river Thames and waters of Medway, (sect. 1), and for preventing as much as may be any abuses from being committed therein, it shall and may be lawful for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water-bailiff, his assistant and assistants, such assistants having been named and appointed to be assistant and assistants by warrant under the hand and seal of the mayor of the said city for the time being, and likewise for all and every other person or persons, who shall for that purpose be specially authorised by any warrant or warrants under the hand and seal of the said mayor, from time to time, and at all times, to enter into any boat, vessel, or craft, of any fisherman or dredgerman, or other person or persons fishing or taking fish, or endeavouring to take fish upon the said river of Thames, or upon the said waters of Medway, within the jurisdiction aforesaid, and there search for, take and seize all spawn, fry, brood of fish, &c. as shall then be in any such boat or boats, vessel or craft, in or upon the said river or waters, and to take and seize on the shore or shores adjoining to the said river or waters of Medway, within the jurisdiction aforesaid, all such spawn, fry, brood of fish, &c., as shall be there be found.

By sect. 6 of the same statute it is enacted, "that if any person or persons shall obstruct or hinder the said water-bailiff, his assistants, or any of the said officers, or any constable, headborough, or other peace officer, in the execution of any of the powers vested in them by this Act, or of any warrants to be issued by the said mayor, recorder, or any alderman of the said city, or justice respectively, in pursuance of this Act, the person or persons so offending therein shall for every such offence forfeit the sum of 10*l.*"

Sect. 11 authorises the levy of penalties by distress. "But in case any such offender shall think himself aggrieved by such conviction, and shall within five days enter into a recognisance before such magistrate or magistrates before whom he shall be so convicted (which said recognisance shall be returned within the space of fourteen days to the said court of the mayor and aldermen), conditioned for his personal appearance at some court of the said mayor and aldermen of the said city, to be holden within six weeks after the acknowledging such recognisance, or at the next court of conservancy to be held for the county in which

[Q. B.]

TURNIDGE v. SHAW.

[Q. B.]

such offence shall be committed, and to stand to and abide such order as shall be made in the premises by such court, the said court of mayor and aldermen, or court of conservancy, is hereby empowered and directed, upon a petition of appeal presented to them by the party or parties so convicted complaining of such conviction, finally to hear and determine the matter of such appeal, and the said courts respectively are hereby empowered to order any penalties to be mitigated, or to set aside such conviction, or to confirm the same, and award such costs to be paid by the appellant as to them shall seem meet; and the said court of mayor and aldermen, or court of conservancy, may, on forfeiture of any such recognisance, estreat the same."

The Thames Conservancy Act 1857 (20 & 21 Vict. c. 147, local) by sect. 50, vests "all the estate, right, title and interest of the mayor and commonalty of the city of London, and all the estate, right, title and interest of her Majesty in the bed and soil and shores of the Thames, in the conservators appointed under that Act; and by sect. 52 enacts that from and after the commencement of this Act all the powers and authorities, rights and privileges, at any time heretofore given or granted to, or which are now vested in, or which have been or may be exercised by the mayor and commonalty and citizens, or by the mayor and aldermen of the city of London, or by the common council, or by the mayor for the time being of the said city, by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation or regulation of the river Thames, and of the several rivers, streams and watercourses within the flow and reflow of the tides of the said river and port of London, shall be and the same are hereby vested in the conservators by this Act appointed, to be by them exercised in the same manner, and under and subject to the same restrictions as the same are now respectively legally exercised by her Majesty, or by the mayor and commonalty and citizens, or by the said mayor and aldermen, or by the common council, or by the said mayor, save only and except so far as the same may be modified by or be inconsistent with the provisions herein contained."

Sect. 76 imposes a penalty not exceeding 5*l.* on any person who shall resist or make forcible opposition against any person employed in the due execution of this Act, or shall assault any surveyor, or engineer, or agent, or any collector of toll, in the execution of his office.

Sect. 149 provides for the recovery of penalties before any justice.

Sect. 161 gives an appeal to the court of quarter sessions.

At the hearing of the said information the charge was supported by the Conservators of the River Thames, who appeared by counsel and attorney.

On behalf of the appellant it was proved to our satisfaction that on the 11th Jan. last the appellant went on board the respondent's boats, then lying at Leigh aforesaid, within the limits of the jurisdiction of the Conservators of the River Thames, to examine the shrimps caught by the respondent; that he stated the object of his visit, and produced his appointment; that he saw in the respondent's boat a quantity of small shrimps which he considered "brood;" that he endeavoured to seize them, and that thereupon the respondent assaulted him and prevented the seizure.

The appointment of the appellant under the seal of the Conservators of the River Thames was read as follows:—

"Know all men by these presents that we the Conservators of the River Thames have named and appointed, and by these presents do name and appoint, T. Turnidge, of Leigh, in the county of Essex, to be assistant river-keeper during our pleasure; and we do hereby authorise the said T. Turnidge to enter any

boat, vessel, or craft of any fisherman, dredgerman, or other person or persons fishing or taking fish, or endeavouring to take fish upon the said river Thames, within our jurisdiction, and there to search for, take and seize all spawn, fry, brood of fish, spat of oysters and unsizable, unwholesome, unseasonable fish, and also all unlawful nets, engines, and instruments for taking or destroying fish as shall then be in any such boat or boats, vessel, or craft in or upon the said river, and to take and seize on the shore or shores adjoining to the said river, within the jurisdiction aforesaid, all such spawn, fry, brood of fish, spat of oysters, or unsizable, unwholesome, or unseasonable fish, and also all unlawful nets, engines, or instruments for taking or destroying fish as shall there be found, and after taking or seizing such unlawful nets, engines, or instruments, or any spawn, fry, brood of fish, spat of oysters, or unsizable, unwholesome, or unseasonable fish, you the said T. Turnidge are to bring, or cause the same to be brought, before the Mayor of the city of London for the time being, or the recorder of the said city, or one of the said aldermen of the said city (if seized within the limits of the said city of London and the liberties thereof), either upon the said river or on shore, or before the mayor of the said city, or the recorder of the said city, or one of the aldermen of the said city, or one of her Majesty's justices of the peace of the county in which such seizure shall be made (if made upon the said river out of the limits of the said city or liberties thereof, but within our jurisdiction as aforesaid), or before one of her Majesty's justices of the peace of the county in which the same shall be seized on shore, in order that all such unlawful nets, engines, or instruments, as also all such spawn, fry, or unsizable, unwholesome, or unseasonable fish as shall be seized as aforesaid, may be forthwith burnt or destroyed, and the party from whom the same shall be taken punished according to law, and you are to receive no money, gratuity, or reward whatsoever from any person to prevent, delay, or hinder any prosecution, or compound or wilfully conceal any offence which shall be committed contrary to an Act of Parliament made and passed in the 30th Geo. 2, entitled 'An Act for the more effectual preservation of the spawn and fry of fish, and for the better regulating the fishery thereof,' which shall come to your knowledge, under pain to forfeit and lose 5*l.* for each time you shall be convicted of every such offence, and from time to time to apprise us thereof. Given under our seal this 7th Dec. 1859.

"E. BURSTALL, Secretary."

It was contended by the counsel for the appellant that by force of sects. 50 and 52 of the Thames Conservancy Act 1857, the bed and soil of the river Thames, with the fisheries and all the powers relating thereto, given to the Mayor of London, and the protection extended to his officers by 30 Geo. 2, c. 21, s. 5 and 6, were transferred and extended to the Conservators of the River Thames and their officers.

We doubted the correctness of this view, and dismissed the information, first, because it appeared to us that, assuming the powers of 30 Geo. 2, c. 21, s. 5, to be transferred to the conservators, it must also be held that the jurisdiction on appeal under sect. 11 is likewise vested in them, and the respondent, if convicted, would be without appeal, except to his prosecutors. If, to avoid this, we held that the 30 Geo. 2, c. 21, s. 11 (the appeal clause), was modified by sect. 161 of the Thames Conservancy Act 1857, then we consider we must also hold that the 30 Geo. 2, c. 21, s. 6 (the penal clause), is modified by sect. 76 of the Thames Conservancy Act 1857, and the defendant would be liable to be sued only for the reduced penalty imposed by the latter section.

Secondly, because, although the bed and soil of the river Thames, which were in the Crown, are transferred to the conservators by the 50th section of the



Q. B.]

REG. v. BRADLEY.

[Q. B.]

Thames Conservancy Act, we doubted whether the fishery, which was common to all (1 Mod. 105), was thereby transferred, and we also doubted whether the powers of the 30 Geo. 2, c. 21 (an Act having exclusive reference to the fishery), were powers with regard or relation to the conservancy, preservation and regulation of the river Thames, and as such vested in the conservators by the 52nd section of the Thames Conservancy Act 1857, all the provisions of which appeared to us to have special reference to the navigation of the river and the regulation of the port of London.

The questions of law arising on the above case for the opinion of the Court of Q. B. are, first, Are the Conservators of the River Thames authorised to appoint officers to exercise the powers given to the water bailiffs of the city of London by the 30 Geo. 2, c. 21, s. 5? Secondly, Are such officers entitled to the protection given by the 6th section of the same statute? Thirdly, Is the jurisdiction on appeal given to the mayor and aldermen by the 11th section of the same Act now vested in the Conservators of the River Thames? Fourthly, Is the 76th section of the Thames Conservancy Act applicable to the offence charged against the respondent, and is the penalty thereby imposed cumulative or substituted?

The *Solicitor-General* (Pulling and Metcalfe with him) for the appellant.—All the powers formerly exercised by the corporation of London in reference to the conservation of the river Thames are now vested in the conservators appointed under the statute the 20 & 21 Vict. c. cxlvii. The word "conservancy" implies the care of the fisheries, and in support of this argument the old statutes, 17 Rich. 2, c. 9, and 4 Hen. 7, c. 15, were referred to; and 30 Geo. 2, c. 21; and 4 Inst. 250. No express mention is made in the recent Act of fisheries, and therefore the statute 30 Geo. 2, c. 21, is still in force as to them, except so far as it is modified by the recent Act.

No one appeared to argue the case on the part of the respondent.

*Cur. adv. vult.*

Jan. 31.—BLACKBURN, J.—In this case a question of considerable difficulty arises on the construction of the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii., which by sect. 52 transferred to a newly created corporation, called the Conservators of the River Thames, amongst other things, "All the powers and authorities, rights and privileges which might be exercised by the Queen, in right of her crown, or by the mayor and commonalty and citizens of London, by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and the regulation of the river Thames," to be by them exercised in the same manner, and under and subject to the same restrictions as the same are now respectively legally exercised by her Majesty, or by the mayor, &c., save only and except so far as the same may be modified by or be inconsistent with the provisions contained in the Act. Amongst the powers of the City of London was that of holding a court for the conservation of the water and river of the Thames; and it is said in the 4th Institute, that the mayor of London for the time being hath the conservation and rule of the water and river of the Thames, &c., and authority touching permission for using unlawful nets and other unlawful engines in fishing, and to all correction and punishment there concerning unlawful nets and engines there: (4 Inst. 270.) By stat. 30 Geo. 2, c. 21, s. 5, for the better protection of the fishery, it is enacted that it shall be lawful "for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water-bailiff" and his assistants appointed by warrant under the hand and seal of the mayor, to enter fishing-boats and seize brood of fish found there. Since the passing of the Thames Conservancy Act, the appellant has been appointed assist-

ant river keeper by warrant under the seal of the Conservator of the Thames, and (as far as it can empower him), authorised to exercise the power conferred by the 30 Geo. 2, c. 21, s. 5, on the assistants of the deputy of the Lord Mayor as conservator. The first question asked us is, whether the new corporation were authorised to make such an appointment? There is certainly nothing in the provisions of the Thames Conservancy Act to show that the Legislature had their attention called to the fisheries; but there is nothing to be found restricting the very general language used in the 52nd section, and it seems to us that the powers given to the Mayor of London to appoint persons assistants in exercising the powers given to the water-bailiff as deputy of the mayor as conservator, are powers relating to the conservancy of the Thames, and are consequently transferred to the Conservator of the Thames. The next question is one of much more difficulty. The 6th section of 30 Geo. 2, c. 21, imposes a penalty of 10*l.* on any person obstructing the said water-bailiff or his assistants in the execution of that Act; and by sect. 11 there is an appeal given to the Court of Conservancy. The respondent in the present case had forcibly resisted the appellant in the execution of his duty as an assistant-keeper appointed by the Conservator of the Thames, but exercising the powers originally conferred by the 30 Geo. 2 on the water-bailiff and his assistants, appointed by the mayor. He was summoned before the justices, who refused to impose on him the penalty of 10*l.* under sect. 6 of the 30 Geo. 2, c. 21; and we think the justices were right. The officer appointed by the Conservator of the Thames has, as we think, all the powers and authorities, rights and privileges of the former officer appointed by the mayor, as conservator; and any one obstructing him must take the consequences which at common law would follow from obstructing a person having lawful authority. But it seems to us that the penalties under the common law, which were imposed on those who obstructed the former officers, cannot be extended by mere implication to those obstructing the new officers. In fact, it seems very plain that the question as to what was done with regard to the fisheries was not present to the minds of those who framed the Act, who very naturally thought only of the navigation and conservancy of the Thames, and there are no words in the Thames Conservancy Act that have the slightest tendency to express such an intention. If the Legislature had meant the penal clause to extend to the new officers they would certainly have made some provision as to the appeal which is now made inoperative. It requires something to show that the Legislature intended so to extend them. But we think that the officer employed in exercising the powers originally conferred by the 30 Geo. 2, but which he puts in execution only by virtue of the Thames Conservancy Act, in a person employed in the due execution of that latter Act within the meaning of sect. 76 of that Act, and consequently that the justices had jurisdiction in such a case to impose the penalty of 5*l.* under that Act, subject to the appeal given to the court of quarter sessions. What we have above written disposes of all the questions put to us, and with that expression of our opinion the case should go back to the justices.

Monday, Feb. 11.

REG. v. BRADLEY.

*Municipal corporation—Election of aldermen—Voting papers—Form of.*

In the voting papers of the councillors for the election of aldermen of a municipal corporation, it is a sufficient compliance with the 7 Will. 4 & 1 Vict. c. 78, s. 14, if the Christian name of the candidate for whom the councillors vote be written with a known and understood contraction thereof. The mere initial letter of the christian name is not

[Q. B.]

REG. v. BRADLEY.

[Q. B.]

sufficient. If the place of abode of the candidate be omitted, the vote is vitiated.

If at the trial of a *quo warranto* information against a person for exercising a municipal office, issued on the ground that he had not a majority of good votes, it is intended to set up more than one of the defeated candidates as the person who ought to have been declared elected, the whole matter should be opened by the prosecutor in the first instance to the jury.

Information in the nature of a *quo warranto*, calling upon the defendant to show by what authority he exercised the office of an alderman of the borough of Sheffield. The issue raised was that the defendant was not duly elected.

At the trial at the last spring assizes, before Martin, B., at York, it appeared that on the 9th Nov. 1859 the town council of the borough of Sheffield proceeded to elect seven aldermen in the place of the seven who were retiring from office; that at the close of the poll the mayor declared six persons who had the greatest number of votes duly elected, and the validity of their election was not disputed. The next two candidates highest on the poll were the defendant and a person named Carr, who had each nineteen votes, whereupon the mayor gave the casting vote to the defendant, and declared him duly elected. The affirmative of this issue lying on the defendant, his counsel made out a *prima facie* case by showing that he was declared by the mayor at the election to have been duly elected, whereupon the prosecutor's counsel proceeded to impeach the election, and he produced the voting papers on behalf of the defendant, and took exception to the mode in which the name of the defendant William Bradley and his address were described in the voting papers of the six following persons:—

#### Voters.

Brittan .....	No place of abode
Elliott .....	No place of abode
Eyre .....	W. Bradley
Staniforth .....	Wm. Bradley
Unwin .....	Wm. Bradley
Jones .....	Willm. Bradley

The counsel for the defendant then proceeded to object to three of Carr's votes:

#### Voters. Name of candidate for whom he voted.

Beckett .....	John Carr
Holland .....	John Carr
Cammell .....	No place of abode

The 7 Will. 4 & 1 Vict. c. 78, s. 14, enacts that the election of aldermen by the council shall be in the following manner; that is to say, every member of the council entitled to vote in that election may vote for any number of persons not exceeding the number of aldermen then to be chosen, by personally delivering at such meeting to the mayor or chairman of the meeting, a voting paper containing the Christian name and surname of the persons for whom he votes, with their respective places of abode and description, such paper being previously signed with the name of the member of council voting; and the mayor or chairman of the meeting, as soon as all the voting papers have been delivered to him, shall openly produce and read the same, and immediately afterwards deliver them to the town-clerk to be kept among the records of the borough, and in case of equality of votes among those entitled to vote, the mayor or chairman shall have a casting vote, whether or not he may be entitled to vote in the first instance.

The learned judge overruled the objections, and the verdict was entered for the defendant, with leave reserved to the prosecutor to move.

A rule nisi having been obtained for a new trial, on the ground of misdirection on the above ruling,

*Manisty* showed cause.—No doubt it has been held in this court that the 7 Will. 4 & 1 Vict. c. 78, s. 14, is obligatory, and until overruled that decision must be held binding, and it must be considered law that the voting papers must contain the Christian name and surname of the party for whom the voter votes, and his place of abode and description. It is admitted, therefore, that two of the defendant's votes, Brittan's and Elliott's, are bad, as they omit the place of abode. The next vote is Eyre's, and the objection is, that there is no Christian name. The letter is "W," with a mark over it, which the defendant contends stands for "m." *R. v. Hartlepool*, 21 L. J. 71, Q.B., is an authority to show that the initial letter of a Christian name is sufficient.

WIGHTMAN, J.—This case is distinguishable from *Reg. v. Deighton*, 5 Q.B. 896. There no place of abode was given; but here you do not altogether omit the Christian name, but you contract it. Here it is like "Wr."

*Manisty*.—It could not mislead; it is only a badly-written "Wm."

HILL, J.—The question is, does this contain the Christian name?

*Manisty*.—It does. It must be taken that the jury thought it was Wm. If it was a case of bad writing, it was for the jury. If it was unintelligible to ordinary persons, it would have been bad.

HILL, J.—But would a stranger read it William?

*Manisty*.—I think so, from its mode of junction with the letter B.

WIGHTMAN, J.—It looks more like Walter. The difficulty is that it looks like Wr.

*Manisty*.—Then the court hold that it is worse than though it was only W.?

WIGHTMAN, J.—Yes, that is so.

*Manisty*.—Then we have three bad votes; but we say that Staniforth's, Jones' and Unwin's are good, being Wm. and Willm.

WIGHTMAN, J.—Yes; those would seem to be good.

*Manisty*.—Then there are three bad votes on the other side. The voting papers for Carr were handed to the jury, and they said one was "Curr," and that the other was written "Cam," and the third had no place of abode. If the other side destroyed three of Bradley's votes, I have destroyed three of Carr's. There is a second objection. They say they ought to have been allowed, when their votes were reduced, to have been at liberty to have shown that Bradley was below Holland. When I had impeached the votes of the other side, I said it ought then to end, and so the judge thought.

CROMPTON, J.—They impeached a number of votes, and there they ended. That would seem to be final.

*Overend*.—I said, after they had impeached my votes, that Holland, who had seventeen votes, was in a majority over Bradley.

CROMPTON, J.—Then you opened a new case. You didn't offer fresh evidence to impeach Bradley.

*Overend*.—We said there was another who had more good votes than Bradley—namely Holland.

*Manisty*.—That was never opened. But the judge said, as you did not go into that in the first instance, you must not go into it now. Besides, two of Holland's votes have no place of abode.

CROMPTON, J.—It was not a surprise, it was a distinct defence, which should have been opened. You should have said, "Carr is above Bradley, and if not, Holland is above him." This additional case does not arise out of the case on the other side.

*Overend*.—Holland and Atkinson had each seven-teen. We said Bradley was badly elected. He was badly elected with reference to Holland.

HILL, J.—When you impeached Bradley you ought to have shown the votes of both Carr and Holland.

Q. B.]

REG. v. PERRY.

[Q. B.]

You could not be entitled, after not succeeding with Carr, to say, "I will now go and set up Holland."

*Overend.*—I relied upon defeating Bradley with Carr. I opened that Bradley was badly elected as regarded several others. It was a case of convenience, like a scrutiny in the House of Commons.

CROMPTON, J.—But it was not such a scrutiny. If that course had been agreed to, it might have been so.

*Overend.*—Then I must have gone into each case of seventeen votes.

CROMPTON, J.—You need merely have shown that they were seventeen on the poll. That would have put the other side to have shown that the votes were bad.

*Manisty.*—Just so. They had all the voting papers there, and only selected six or seven.

CROMPTON, J.—This arises upon your own case.

*Overend.*—Not till Carr's votes were disposed of, for he had nineteen votes and the others only seventeen. I need not have troubled myself about others.

CROMPTON, J.—By striking off three votes you set up all who had seventeen; but that arises from your own evidence.

*Overend.*—However, it is now contended Bradley had six bad votes. The question is, what is a signature of the Christian name? The condition of voting is that he must give a voting paper with the Christian and surnames. (He referred to the judgment in *Reg. v. Avery*, 21 L. J. 428, Q. B.) There are cases, however, in which initials will do: but where the Legislature says he must write the Christian name, it is trifling with words to say that initials will be sufficient. Wm. may mean Wyndham, Wilbraham and others.

HILL, J.—Have you ever known Wilbraham written Wm.?

*Overend.*—I cannot say I have.

HILL, J.—Does the Christian name require anything more than to be written so as to be commonly known?

*Overend.*—Wm. means any name which begins with a W. and ends with an m. He referred to 15 M. & W. 283, and *Nash v. Calder*, 5 C. B. 178, to show that W. cannot be a name of baptism. The reason for strictness is that an alderman is in for six years.

CROMPTON, J.—The less you say about the reason of the thing the better. The reason seems to be the other way when all the voters are present, and here the mayor read out the names.

*Overend* referred to *Allen v. Greensill*, 4 C. B. 100. It was not intended that an abbreviation of the Christian name should suffice, but that there should be the Christian name itself. It is not he shall "sign his name," in which case it would be sufficient. But here the Christian name is not given, therefore all the six votes are bad. Wm. is as bad as W.: (3 Bing. 296; 1 Dow. & Ry. 150.)

CROMPTON, J.—There is a well-known contraction of William. Suppose a cockney was to write it "Villiam," would that vitiate the vote?

WIGHTMAN, J.—I am opinion that, as to three of the votes for Bradley, which have been objected to by the prosecutor, the objection cannot be sustained, viz., as to the three votes in which the Christian name is written with a contraction, and not merely with the initial letter. Now, if these contractions are well known and understood as contractions of the Christian name "William," it is quite consistent with the intention of the Legislature, if we hold that they are sufficient for the purposes of the Act, and that it is not necessary to write the Christian name in the voting papers at full length. It certainly appears to me that "Wm." and "Willm." are sufficient to indicate the Christian name "William," and that the three votes to which this objection applies are good. But the mere initial "W." may so far tend to mislead for another name

that I think the vote to which this applies is bad; and the votes in which no place of abode was mentioned are bad also, so that there are three of Bradley's votes bad. But then there are three of Carr's votes bad also; which leaves the parties in an equal position and Bradley has the casting vote. Then as to the setting up of Holland's claim, who is alleged to have a majority of one over Bradley. On looking at two of Holland's voting papers I find that they are open to the same objection, of having no place of abode mentioned, and this would reduce Holland's votes to fifteen. It would be idle therefore to grant a new trial as to this case, as no good could result from it. Then Mr. Overend contends that he has a right to insist on the claims of other candidates, who were higher than Mr. Bradley, but it does not appear that there was any definite proposal made by him to go into the other cases at the trial. It seems to me, therefore, that as far as Holland's case is concerned, which was the only case pressed on the judge's attention at the trial, it would be useless to go to a trial, because he has equally objectionable votes, which would reduce his good votes below both Carr's and Bradley's. The rule must therefore be discharged.

CROMPTON, J.—I am of the same opinion. The statute requires that the voting papers should contain the Christian and surnames of the party. It has been held that this is to be treated as imperative; and that decision is not to be impeached in this court. I think that means that there shall be something in writing to show everybody what the Christian name of the party is. A contraction does not prevent them from knowing that. A single initial letter might stand for several names, but "Wm." and "Willm." are contractions which are known ordinarily to mean "William." A misspelling of the Christian name would not vitiate the vote. In my opinion the judge at the trial acted rightly in rejecting the evidence as to the claims of the other candidates. The prosecutor if he had intended, to rely on them, ought to have put in all the poll in the first instance. It was really an attempt to set up a new case in answer to that made by the other side.

HILL, J.—I am of the same opinion. I think that although the initial letter of the name is not sufficient, yet a known contraction of a Christian name which could not be mistaken, is the Christian name within the meaning of the statute, just as much as if it had been written at full length. As to the other point, I think that it was a matter for the discretion of the judge at the trial. The prosecutor ought in the first instance to have gone into the whole case, and if he declined to do that, then it was a matter for the discretion of the judge as to whether or not he would allow Holland's case to be set up. If he had exercised an unwise discretion we might have corrected it and granted a new trial, if the ends of justice required it; but in this case that is not so, for the voting papers show that a new trial is not required.

*Rule discharged.*

Feb. 6 and 12.

REG. v. PERRY.

*New Parish Act.*—Appointment of churchwardens—1 § 2 Will. 4, c. 38, s. 16—6 § 7 Will. 4, c. 85, s. 38—6 § 7 Vict. c. 37, ss. 15, 17—19 § 20 Vict. c. 104, ss. 11, 14.

A new district church was built and endowed, and had a district assigned to it, and a fund provided for repairs, under 1 § 2 Will. 4, c. 38; in 1840 the bishop, under the provisions of the 6 § 7 W. 4, c. 85, granted his licence and authority for the publication of banns and solemnisation of marriages there, and for taking the usual fees, to which the fees for christenings, baptisms and burials were afterwards added. This licence is revocable by the 32nd section

Q. B.]

REG. v. PERRY.

[Q. B.]

of the Act. The 16th section of 1 & 2 Will. 4, c. 38, provides for the appointment of two churchwardens, one to be chosen by the incumbent, the other by the pew-renters. The 19 & 20 Vict. c. 104, s. 14, provides that when banns of matrimony, marriages, &c., are authorised to be published and performed in any church or chapel to which a district shall belong, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as contemplated by the 15th section of 6 & 7 Vict. c. 37, and all the provisions of that Act relative to new parishes shall apply; and the 17th section of the last-mentioned Act provides that one churchwarden shall be elected by the incumbent and the other by the inhabitants:

*Held, that the authority contemplated by the 14th section of the 19 & 20 Vict. c. 104 was not a revocable licence by the bishop, but an irrevocable authority under an order of the commissioners under the 11th section of the Act, and that the church in question was therefore not one in which banns of matrimony, marriages, &c., were authorised to be published and performed within the 14th section of 19 & 20 Vict. c. 104, and therefore the appointment of churchwardens remained in the incumbent and pew-renters.*

This was a *mandamus* directed to Frederick Perry, clerk, minister and incumbent of the church or parish of Christchurch, Rotherhithe, in the county of Surrey. It recited that the parish of St. Mary, Rotherhithe, is an ancient parish, and the church thereof a rectory within the diocese and subject to the jurisdiction of the Bishop of Winchester; that in the year 1839 the population of the same parish then amounting to more than 3000 persons, and the existing churches and chapels within the same parish not affording accommodation for more than one-third of the inhabitants thereof for the attendance upon Divine service, according to the rites of the United Church of England and Ireland, a certain additional church called and known by the name of Christchurch (the site whereof had been duly conveyed to the commissioners for building new churches), was erected within the said parish, under and by virtue of the provisions contained in the statute 1 & 2 Will. 4, entitled "An Act to amend and render more effectual an Act passed in the seventh and eighth years of the reign of his late Majesty, entitled 'An Act to amend the Acts for building and promoting the building of additional churches in populous parishes,'" and which said additional church was afterwards, that is to say, on or about the 26th June 1839, duly consecrated by Charles Richard Lord Bishop of Winchester for the performance of Divine service according to the rites of the said United Church of England and Ireland, the same having been theretofore endowed with a sum of 1000*l.* secured upon money in the funds, in addition to the pew rents and profits intended to be taken and to arise from the same church, and a fund having also been provided for the repairs of the said church to the amount and in the manner required by the said statute, and one-third at least of the sittings in the said church having been also set apart and appropriated as free sittings according to the said statute, that afterwards, that is to say, on the 7th April 1840, the said Lord Bishop of Winchester, under and by virtue of the said statute, by a certain indenture by him duly executed under his hand and seal, assigned a separate and distinct district to the said church called Christchurch and caused a description of the boundaries of the said district so assigned to be registered in the episcopal registry of his diocese, such district then forming part of the said parish of St. Mary, Rotherhithe; and in and by the said indenture the said bishop, under and by virtue of the statute of the 6 & 7 Will. 4, entitled, "An Act for marriages in England," and with the consent of the patrons and the rector or incumbent of the said church or rectory of the said parish of St. Mary,

Rotherhithe, then duly testified under their respective hands and seals, granted his licence and authority for the publication of banns of matrimony and the solemnisation of marriages in the said church called Christchurch by the minister or incumbent thereof for the time being, of persons residing within the district so assigned to the same church as aforesaid, and he also and with the like consent ordered and directed that all such accustomed fees, dues and other emoluments as would have been otherwise paid or payable for or in respect of such banns and marriages to the said rector or incumbent of the said rectory and church of St. Mary, Rotherhithe, aforesaid, should thenceforth be paid and payable to the minister or incumbent of the said church called Christchurch; and the bishop also then caused his said order and direction as to the several offices to be performed in the said church called Christchurch as aforesaid to be registered in the said episcopal registry of the said diocese; that by a certain indenture dated the 6th April 1840, and then made by and between the Rev. Edward Blick, clerk, then being the rector or incumbent of the said rectory or church of St. Mary, Rotherhithe, of the first part, the said Lord Bishop of Winchester of the second part; the Master, Fellows and Scholars of Clare-hall in the University of Cambridge, the patrons of the said rectory or church of St. Mary, Rotherhithe, of the third part, and the Rev. John Saunders, then being the minister and incumbent of the said church called Christchurch, of the fourth part, and duly executed by the said parties respectively under their respective hands and seals, reciting amongst other things that the said church called Christchurch had been so erected, and that a district had been so assigned to it as aforesaid, but that the same church was not intended to become, under or by virtue of the statute passed in the 58th year of the reign of King George 3, for building and promoting the building of additional churches in populous parishes, the parish church of a district parish, the said Edward Blick, under and by virtue of the said statute so made in the Parliament holden in the said first and second years of the reign of King William 4, as aforesaid, and by virtue of any other statutes, or of any other powers by which it was competent for him so to do, and, with the consent of the said bishop and of the said master, fellows and scholars of Clare-hall respectively, granted and declared that one equal fourth part of all such Easter offerings and oblations as should from time to time become due or payable, or, but for the same indenture, would become due or payable to or for the benefit of the rector or incumbent of the said rectory or church of St. Mary, Rotherhithe, and also that all fees, dues and emoluments for or in respect of the churchings, baptisms, marriages and burials as had been theretofore due to or received by the said Edward Blick as such rector or incumbent as aforesaid, and should from time to time thereafter become due or payable from or by any person or persons whomsoever for or in respect of any services, ceremonies, or duties performed in the said church called Christchurch, or in any burial-ground belonging thereunto, should be for ever thereafter annexed to the said church called Christchurch, and should from time to time thereafter be receivable and received by or on behalf of and for the sole and exclusive use and benefit of the minister and incumbent for the time being of the same church; and the said fees, dues, offerings and emoluments respectively were by the said bishop, in and by the said indenture, duly assigned to the said minister and incumbent of the said church called Christchurch, who, under and by virtue of the said indenture and the statute aforesaid, then became and was entitled to the same for his own sole and exclusive use and benefit, without any reservation thereout; and every such minister and incumbent hath ever since, and is hereby so entitled to the same; which said indenture was

duly registered in the episcopal registry of the said bishop. That by means of the several premises aforesaid, the said church called Christchurch, before and at the time of the passing of the Act of Parliament made and passed in the nineteenth and twentieth years of her present Majesty, c. 101, entitled "An Act to extend the provisions of an Act of the sixth and seventh years of her Majesty, for making better provision for the spiritual care of populous parishes, and further to provide for the formation and endowment of separate and distinct parishes," had become and was within the meaning of the said Act, a consecrated church to which a district belonged, and wherein banns of matrimony and the solemnisation of marriages, churchings and baptisms, according to the laws and canons in force in this realm, were authorised to be published and performed (the district aforesaid not being, at the time of the passing of the same Act, a separate and distinct parish for ecclesiastical purposes), and the incumbent of which, by such authority, entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, and whereby and by means of the said last-mentioned Act, immediately after the passing thereof, the said district became and was, and now is, a separate and distinct parish for ecclesiastical purposes, as is contemplated in the 15th section of the statute made in the sixth and seventh years of the reign of her present Majesty, entitled, "An Act to make better provision for the spiritual care of populous parishes;" and the said church called Christchurch, being the church of the said district, then became and was, and now is, the church of such parish; that all and singular the provisions of the said last-mentioned statute (as then amended) relative to new parishes on their becoming such, and to the matters and things consequent thereon, became and were, and now are, under and by virtue of the said Act of the nineteenth and twentieth years of the reign of her present Majesty, extended and made applicable to the new parish of Christchurch, and by reason thereof two fit and proper persons duly qualified in that behalf, as required by the said statute so made in the sixth and seventh years of the reign of her present Majesty, ought in every year to be chosen churchwardens of the same parish, one being chosen by the minister and incumbent of the same parish and the other by the inhabitants residing therein, and having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the said parish of St. Mary, Rotherhithe, and such election ought to take place at the usual period of appointing parish officers, at a meeting summoned in such manner as the minister and incumbent of such parish of Christchurch shall direct. That although one churchwarden for the said parish of Christchurch, Rotherhithe, has been duly chosen by the said Frederick Perry, being the minister and incumbent of the same parish as aforesaid, nevertheless no other churchwarden for the same parish has been chosen by the inhabitants residing therein, and having the qualification aforesaid, and that no meeting of such inhabitants for the purpose of choosing such churchwarden has been duly summoned by the said Frederick Perry as such minister and incumbent as aforesaid according to the said statutes, but that on the contrary thereof the said Frederick Perry, though requested as such minister and incumbent as aforesaid by divers of the said inhabitants to convene and hold such a meeting of the said inhabitants so qualified to vote as aforesaid for the purpose of choosing such other churchwarden according to the said statutes in that behalf, has wholly neglected and refused, and still does neglect and refuse so to do, whereby the said parish of Christchurch, Rotherhithe, has been and is wrongfully deprived of the benefit of having such other church-

warden, and the inhabitants of the said parish have been and are prevented from choosing a fit and proper person to fill the said office of churchwarden, although the usual period of appointing parish officers and a proper time for so choosing such as aforesaid to fill the said office of churchwardens has long since elapsed, to the great prejudice and injury of the said parish and of the said inhabitants thereof. The writ then commanded the said Frederick Perry, being such minister and incumbent as aforesaid, to convene and hold a proper meeting of the inhabitants of the said parish of Christchurch, Rotherhithe, duly qualified according to law as aforesaid to vote at the election of churchwardens for the said parish for the purpose of electing a fit and proper person to serve the office of churchwarden for the said parish of Christchurch, Rotherhithe, for the current year, or such part thereof as may remain unexpired, so that such person may be then and there duly elected to serve the said office according to the laws and statutes in that behalf made and provided, or that he show cause to the contrary thereof.

To this writ the said F. Perry duly made his return, which stated that the said church called Christchurch had not at the time of the passing of the said Act passed in the Parliament holden in the nineteenth and twentieth years of the reign of her present Majesty in the said writ mentioned, become, nor was it within the meaning of the said Act, a consecrated church to which a district belonged, and wherein banns of matrimony and solemnisation of marriages, churchings and baptisms according to the laws and canons in force in this realm, were authorised to be published and performed, or the incumbent of which was by such authority entitled for his own benefit to the entire fees arising from the performance of such without any reservation thereout. That the said district did not by means of the said last-mentioned Act of Parliament become a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the statute made in the sixth and seventh years of the reign of her present Majesty in the said writ mentioned. That before and at the time of the passing of the said Act of Parliament made in the nineteenth and twentieth years of the reign of her present Majesty, the said district of Christchurch had and enjoyed, and now has and enjoys, the special right and privilege that the churchwardens for the church or chapel of Christchurch should and shall, at the usual period of appointing parish officers in every year, be chosen one by the incumbent of the said church or chapel for the time being, and the other by the renters of pews in such church or chapel, and that such special right, privilege and liability was not, nor is the same taken away, altered, or in anywise affected by the said last-mentioned Act, but still exist in full force and effect, and that on the 12th April 1860, being the usual period of appointing parish officers, two churchwardens were duly chosen in such manner as aforesaid, one by the said Fredk. Perry, and the other by the pew-renters of the said chapel or church of Christchurch, to act as churchwardens for the same for the then current year which is not elapsed, and that they have since then acted and now act as such churchwardens as aforesaid, under such special right, privilege and liability as aforesaid.

To this return the prosecutors demurred.

The prosecutors' points were:—First, that the return made to the writ is wholly insufficient, as it shows no compliance with the writ, nor any valid excuse or reason for noncompliance; secondly, that the return, while it admits the facts set forth in the writ whereby the district of Christchurch, Rotherhithe, became a separate parish for ecclesiastical purposes under the statute 19 & 20 Vict. c. 104, ss. 14 and 15 by merely denying that it did so become such separate

Q. B.]

REG. v. PERRY.

[Q. B.]

parish, traverses a conclusion of law necessarily resulting from the facts so admitted, without showing any other facts which obviate or even qualify that conclusion; thirdly, that the alleged right of the renters of pews in the church of Christchurch to choose a churchwarden, as stated in the said return, is not a "special right, privilege, or liability" of the said parish or district of Christchurch, within the meaning of the 29th section of the said statute, and if such right existed at the time of the passing of the said statute, it has wholly ceased to exist ever since the said statute was passed, being utterly inconsistent not only with the letter, but also with the spirit and object of the said statute; fourthly, that the return is inconsistent and repugnant, inasmuch as it admits facts which show a public right vested in the general body of the parishioners, but alleges a supposed private right vested in a few individuals who are not even shown to be and may not be parishioners at all, incompatible with such public right; fifthly, that the return is further inconsistent and insufficient, inasmuch as it admits facts which show a right, vested in the parishioners by the rules of the common law, as well as by the said statute of the 19 & 20 Vict. c. 104, but alleges no legal custom or usage which controls or affects that right, nor explains by reference to any rule of the common law, or to any canon, or to any statute, the existence or origin of any supposed "special right, privilege, or liability" on which reliance is placed as an answer to the writ.

The defendant's points were:—First, that if the writ is to be understood to allege the matters traversed by the return as conclusions of law, the writ is insufficient, inasmuch as no such conclusions of law result from the other matters to afford any ground for the defendant's complying with the requisition of the writ; secondly, that if the writ is to be understood to allege the matters traversed by the return by way of substantive allegations of fact, the writ is sufficiently answered by the traverse; thirdly, that on either of these suppositions the return is sufficient in law; fourthly, that the return shows a special ground of exemption within the meaning of statute 19 & 20 Vict. c. 104; fifthly, that the record shows other valid reasons for the defendant's not complying with the requisition of the writ.

*Badeley (Hawkins, Q.C. with him) for the prosecutors.*—The question here arising is, are the pew-renters entitled to elect churchwardens, or the parishioners at large, as provided by the common law and by statute? It is not the right or privilege of a parish, district, or place which is here claimed, this right might be confined to a few, who need not necessarily be inhabitants, but even if it were such a right it is not one protected by the 29th section, for here there is other provision made. But without that the right and incidents of a parish became incident to this parish as soon as it was created. It was clearly the intention of the Legislature that the two Acts should be read together, and their scope and spirit show that it was intended whenever a new parish was formed that the election should be with the parishioners and not in pew-renters: (1 & 2 Will. 4, c. 38, s. 16; 6 & 7 Will. 4, c. 84; 6 & 7 Vict. c. 37, s. 15, 16, 17; and 19 & 20 Vict. c. 104, ss. 14, 15, 29, were referred to.) This is not a chapel authorised to celebrate marriages, &c., in the sense of the 14th section of the 19 & 20 Vict. The word "authorised" has a particular statutable meaning. [CROMPTON, J.—But you must deny it in its general meaning.] It is denied. When the 19 & 20 Vict. was passed this was a chapel wherein marriages might be performed. Then is it a separate parish? If it is the appointment fails.

Dr. Phillimore (F. Ellis with him) contra.—The churchwardens were chosen under 1 & 2 Will. 4, c. 84, s. 10. This is not a district chapel, it is a district *au generis*. It is not a chapel authorised under the 14th

section of 19 & 20 Vict. c. 104. The authority contended for by the prosecutors is only a revocable licence; that referred to in the Act is that which is mentioned in 6 & 7 Vict. c. 37, s. 9. The authority of the ecclesiastical commissioners, by order of council, that is the authority referred to in all these instances. The Act refers to a permanent authority, and not to a revocable licence, and that not a licence to the chapel but a personal licence to the minister. This chapel has never been so authorised: (1 & 2 Will. c. 84, s. 4, 10; 19 & 20 Vict. c. 104, ss. 2, 9, 11, 14; 6 & 7 Vict. c. 37; 6 & 7 Vict. c. 85, s. 26.)

*Badeley.*—The incumbent was authorised to perform marriages in this place, and even if revocable it had never been revoked, and that is within the words of the Act, and the *mandamus* so recites.

*Cwr. adv. vult.*

Feb. 12.—WIGHTMAN, J.—We are of opinion that the defendant is entitled to our judgment upon this demurrer. It is clear that unless the district of Christchurch has become a separate and distinct parish for ecclesiastical purposes, by virtue of the provisions of the 19 & 20 Vict. c. 104, the *mandamus* cannot be supported, and we think that the district of Christchurch had not at the time of passing that Act the requirements necessary to convert it into a parish of itself by virtue of that statute. The new church called Christchurch was built and endowed, and had a district assigned to it, and a fund provided for the repairs of the church, in the years 1839 and 1840, under the provisions of the 1 & 2 Will. 4, c. 38, and in 1840 the bishop, under the provisions of the 6 & 7 Will. 4, c. 85, granted his licence and authority for the publication of banns and solemnisation of marriages in the new church called Christchurch, and for taking the same fees in respect thereof as were taken in the mother church by the minister or incumbent thereof for the time being, to which the fees for christenings, baptisms and burials were afterwards added. The bishop's licence may, however, as expressly enacted by the 32nd section of the last-mentioned Act, be revoked by the bishop with the consent of the archbishop, and by the proviso at the end of the 26th section of the same Act, marriages could only be solemnised in the new district church until the licence should be revoked. By the 16th section of 1 & 2 Will. 4, c. 38, under which the new district church, called Christchurch, was built and endowed, two churchwardens are to be chosen, one by the incumbent of the new church, and the other by the renters of pews in the church. The church and district of Christchurch having been thus created under the provisions of 1 & 2 Will. 4, and publication of banns and the solemnisation of marriages having been authorised by the bishop, under the 6 & 7 Will. 4, as before mentioned, things remained in the same state, the renters of pews choosing one of the churchwardens, until the present question was raised; and it was said that immediately upon the passing of the 19 & 20 Vict. c. 104, the district of Christchurch became a separate and distinct parish by the force and operation of the 19 & 20 Vict. c. 104, sect. 14, by which it is enacted that wheresoever, or as soon as, banns of matrimony, and the solemnisation of marriages, churchings and baptisms, according to the laws and canons in force in this realm, are authorised to be published and performed in any consecrated church or chapel to which a district shall belong (such district not being at the time of the passing of that Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled, for his own benefit, to the entire fees arising from the performance of such offices, without any reservation thereof), such district or place should become and be a separate and distinct parish for

ecclesiastical purposes, such as contemplated by the 15th section of the 6 & 7 Vict. c. 37, and all the provisions of that Act relative to new parishes, upon their becoming such, should apply to the said parish as if it had become a new parish under the 6 & 7 Vict. c. 37. By the 17th section of the last-mentioned Act, one of the churchwardens of the new parish is to be elected by the incumbent and the other by the inhabitants. It was said for the prosecution that the bishop having authorised the publication of banns and the solemnisation of matrimony in the new church called Christchurch, the condition required by the 14th section of the 19 & 20 Vict. c. 104, was fulfilled, and that the district became a distinct parish immediately upon the passing of that Act. We are, however, of opinion that the authority contemplated and intended by that section of the Act was not a revocable licence by the bishop, but an authority under an order of the commissioners under the 11th section of the Act, which expressly empowers the commissioners, if they think fit, to authorise the publication of banns and the solemnisation of matrimony and baptisms, churching and burials, and all the fees payable for such offices to be paid to the incumbent of the district. This authority, if it had been granted by the order of the commissioners, would be of a permanent and irrevocable character, but it has not been granted, and we are of opinion that the revocable authority or licence of the bishop is not enough to bring this district within the 14th section of the 19 & 20 Vict. c. 104. We may observe that the 15th section of the 6 & 7 Vict. c. 37, does not appear to us to be applicable to this case, of a district not constituted under that Act, but under the 1 & 2 Will. 4, c. 38, with a licence by the bishop under the 6 & 7 Will. 4, c. 85. Upon the ground, therefore, that the new church called Christchurch was not one in which banns of matrimony and the solemnisation of marriages, churchings and baptisms, were authorised to be published and performed within the meaning of the 14th section of the 19 & 20 Vict. c. 104, we think that the *mandamus* cannot be maintained, and that the defendant is entitled to succeed upon this demurrer. Another point arose upon the effect to be given to the 29th section of the Act, upon which we do not think it necessary to give any opinion, as upon the other ground we think there should be judgment for the defendant, with costs. *Judgment for defendant with costs.*

### EXCHEQUER CHAMBER.

Reported by C. J. B. HENSTLEY, Esq., Barrister-at-Law.

APPEAL FROM A DECISION OF THE QUEEN'S BENCH.  
Nov. 27 and 28, and Jan. 12.

(Before MARTIN, B., WILLES, J., CHANNELL, B.,  
KRATING, J. and WILDE, B.)

REG. on the prosecution of DIMSDALE v. THE  
SADDLERS' COMPANY.

*Corporation—City company—Charter—Assistant—Mandamus to restore—Admission—Misrepresentation—Insolvency—Notice of removal—Validity of removal—Bye-law—Validity of—Construction. Mandamus to the Saddlers' Company to restore the prosecutor to the office of assistant of the company. The writ recited the charter incorporating the company, which (amongst other things) gave power to appoint assistants by election and admission, to remove them for ill-conduct, and to make bye-laws. The defendants returned that the charter was not fully or correctly set forth in the writ, and that it contained a provision that elections of assistants contrary to its provisions should be void; that the prosecutor was not duly qualified or elected an assistant; that he had ill-conducted himself and was not entitled to hold office; that the company had considerable property; and that according to the usual course an*

*assistant would be called upon to hold the office of renter-warden and other offices of greater trust; that a bye-law had been passed pursuant to the powers given by the charter, by which it was resolved, "That no person who has been a bankrupt or become insolvent, shall hereafter be admitted a member of the court of assistants, unless it be proved to the satisfaction of the court that such person, after the bankruptcy or insolvency, has paid and satisfied his creditors the whole of his debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the court;" that the prosecutor procured his election and admittance by fraudulently representing himself solvent, whereas he was in fact insolvent and a bankrupt, and that thereupon at a meeting of the court duly convened he was removed.*

*Pleas.*—1. *Traversing the allegations in the return.*  
2. *That the prosecutor was not summoned to, nor had he any notice of the meeting at which he was removed.*

*A special verdict found that the prosecutor after his election, but before it was communicated to him, in answer to a question of the clerk of the company, represented that he was solvent, that thereupon he was summoned to attend a court, and was sworn in, and acted, and that he was afterwards adjudicated bankrupt.*

*Held (reversing the decision of the court below), that the bye-law was valid, inasmuch as under the circumstances of the company and of the offices of trust to which an assistant might be admitted, bankruptcy or insolvency was not an unreasonable disqualification;*

*That it did not restrict the class eligible for assistants, but only ascertained a criterion of fitness;*  
*That the bye-law was good, although it had not been approved in pursuance of stat. 19 Hen. 7, c. 7;*  
*That a bye-law is to be construed so as, if possible, to make it good and effectual; that so viewing it, the bye-law in question meant that a person should be excluded from becoming a member by any of the means conducive thereto, whether by election, admittance afterwards or otherwise; and that read in this sense the present bye-law rendered the prosecutor's election and admittance invalid;*

*That the prosecutor was, from the beginning, disqualified by the bye-law, under which the court of assistants was bound to expel him, and that, therefore, he was not entitled to a peremptory mandamus to restore him;*

*That the effect of his admittance was defeated by the falsehood whereby it was obtained, because, since the bye-law was valid, the statement of solvency was material, and not the less material from the fact that at the time the prosecutor did not know of his election, and that the admittance was made void by fraud;*

*Held, further, that on the first plea, prosecutor was entitled to have the verdict entered for him on the traverse that the charter was not correctly set forth, and the traverse as to his having been duly elected; but that as to the residue of that plea, and as to the second plea, the defendants were entitled to judgment. Form of special verdict.*

This was a *mandamus* directed to the wardens and assistants of the Saddlers' Company, commanding them to restore the prosecutor Kay Dimsdale to the place of an assistant upon the court of the company.

The writ recited the charter of King Charles the Second, incorporating the company, which gave, *inter alia*, power to appoint future wardens and assistants by election and admittance, both of which proceedings are expressly mentioned in the charter; power to remove assistants for "ill-government, or ill-conducting them-

selves, or for any other just or reasonable cause;" and a power to make such bye-laws as should seem good, useful, honest and necessary, according to their sound discretion, for the good rule and government of the wardens, or keepers, and freemen and commonalty of the mystery or art, and officers and ministers of the same mystery for the time being, and to declare in what way or order the aforesaid wardens, or keepers, freemen, and commonalty, and other men of the mystery should use and conduct themselves in the office, ministry, artifice and business of their said mystery or art, and otherwise for the public good, and general utility, and safe and quiet government of the said mystery and art, which bye-laws were to be observed so as they should not be repugnant nor contrary to the laws and statutes of the kingdom of England, nor the provisions of the charter, nor to the custom of the city of London, nor the liberties, jurisdiction, or privileges of the mayor and commonalty and citizens of the said city.

The writ further recited that the prosecutor Kay Dimsdale was duly qualified to be, and on the 20th Oct. 1849 was, duly elected and admitted as an assistant, and was afterwards by the defendants wrongfully removed.

The return in substance alleged that the charter was not fully nor correctly set forth in the writ, and that it contained a provision that elections of assistants of the said corporation contrary to the direction or restriction of the charter should be void and of no effect to all intents and purposes whatsoever; that this prosecutor was not duly qualified to be elected an assistant, and that he was not duly elected, nominated, or constituted an assistant; that he had ill-conducted himself, and was not duly in or entitled to hold his office of assistant; that there was just and reasonable cause for his removal therefrom before and at the time of the alleged removal, and for which he was removed; that he was not wrongfully or unlawfully, or contrary to the tenor of the said letters patent, or without just cause, removed, or wrongfully or unlawfully kept removed or dispossessed; that the said corporation has considerable property, real and personal, and the care and distribution of various charity and other estates; that the wardens are elected annually by ballot by the court of assistants, and from the members of such court; and that, according to the usual course and custom, a person coming upon the court would be elected to the office first of renter-warden—an officer who is treasurer of the company, and has the receipt of the rents, and the charge and custody of them and other moneys and property of the company, and performs the duties of the office *bona fide* and in person, and receives into his hands, and has the sole custody or charge of all the rents, dividends, plate, linen and other effects belonging to the said corporation, accounting to the auditors therefor; next that of quarter warden—an officer who receives the quarterage, which he pays over to the renter-warden; afterwards that of key-warden, who has the care of the common seal and archives of the company; and finally that of prime warden or master, who presides at meetings of the court, and has a casting vote, after which the member falls back with the court; that the assistants manage the affairs of the company and control the expenditure, and the grant of pensions and relief to decayed members, and have the general government of the corporation and the trade, possessing and exercising, *inter alia*, a right of search for, and seizing of deceitful wares; that the election of assistants, in case of vacancy, is made from the livery according to seniority; in case of solvency and good character and repute the office is held for life; but that in case of any misconduct causing unfitness or other sufficient cause, or receiving parochial aid, or petitioning the court for relief, the assistant would no longer receive a summons to attend the court; that should an assistant come to decay and

petition for relief out of the company's funds, he is considered, as a matter of course, to cease to be a member of the court upon the receipt of his first quarter's pension; and the vacancy so caused is at once filled up, and the decayed member falls back with the livery, and that the same course has been pursued in the case of misconduct amounting to unfitness or incompetency; that on the 23rd April 1799 a bye-law was made in pursuance of the power in the charter, which bye-law has since remained in force, and is in these words: "Resolved, that no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the court of assistants of this company, unless it be proved to the satisfaction of the court that such person after his bankruptcy or insolvency has paid and satisfied his creditors the whole of their debts, and shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the court or the majority of them;" and that such bye-law remained in force; that the prosecutor procured his election and admittance by falsely and fraudulently representing himself to be solvent and able to pay his creditors 20s. in the pound, whereas he was in fact insolvent, and unable to pay his creditors 20s. in the pound or any dividend, as he well knew, and his creditors have never received payment except of a dividend of 2s. 8d. in the pound under his bankruptcy; that he afterwards was adjudicated a bankrupt in respect of a debt existing at the time of his false representation of solvency, which bankruptcy remains in force; and that he was at a subsequent meeting of the court duly convened and held on the 20th Dec. 1849, and whilst he was a bankrupt and before the issuing of the *mandamus*, lawfully removed and discharged from being an assistant, and that for these reasons he ought not to be restored.

The prosecutor pleaded to this return two pleas: the first traversed the statement in the return as to the letters patent being insufficiently set forth, it also alleged in effect that the prosecutor was duly qualified, duly elected, nominated and constituted an assistant, and that he had not misconducted himself as in the return alleged; that he was duly in and entitled to the office, that there was no just or reasonable cause for his removal therefrom before or at the time of his alleged removal; that the removal was wrongful and unlawful, and contrary to the tenor of the letters patent, and without just or reasonable cause; and that he is wrongfully and unlawfully kept removed and dispossessed; that no such bye-law was made or in force at the times when, &c.; that the prosecutor did not make the false and fraudulent statement alleged; that he was duly elected and admitted, and not through any fraud; that the meeting of the court on the 20th Dec. 1849 at which he was removed, was not duly convened, and that he was not removed, and did not cease to be, but at the time of the teste of the writ was, and still is, an assistant of the said art or mystery, and entitled to be admitted thereto. The second plea alleged that the prosecutor was at the time of the holding of the court at which he was removed an assistant and entitled to be summoned, but that he was not summoned thereto and had not notice nor any opportunity of attending thereat. Upon these pleas the defendants took issue.

The return, in so far as it stated the manner and routine in which the wardens are elected, their duties with respect to the moneys of the company and the insolvency and bankruptcy of the prosecutor, was not traversed, and those statements, if material, were therefore to be taken as admitted for the purposes of this cause.

At the trial a special verdict was found for the plaintiff, the material points of which may be stated as follows:—It finds the charter, a copy of which



in the Latin is annexed, and also the bye-law in the terms stated in the return. It states that a person holding the office of assistant might by reason of his being in such office be elected to the office of renter-warden, which last-mentioned office was an office of trust, and the person for the time being holding the said last-mentioned office might by virtue of such office receive large sums of money belonging to the said wardens or keepers and assistants, and which moneys had to be applied for charitable purposes and otherwise. It further appeared from the verdict that the prosecutor was on the 23rd April 1849 in due form elected an assistant by a preliminary resolution which was in due form confirmed on the 25th July following; that on the 24th Sept. he made a representation to the clerk and agent of the company that he was solvent; that in consequence of such statement he was on the 16th Oct. informed of his election and summoned to attend a court on the 20th of the same month, which he did accordingly, and was then sworn in and acted and received his fee as an assistant, and that he was again summoned to attend and attended a court on the 6th Nov., when he also received his fee and acted as an assistant; that on the 30th of the same month he was adjudicated bankrupt; that on the 28th Dec., at a meeting of assistants, held without any summons or notice to the prosecutor, or opportunity of his attending, but in other respects regular, he was expelled. As to the qualification of the prosecutor for the office, the verdict found that at the time of the first resolution for his election, and from thence continually up to and at the time of his alleged removal, the said Kay Dimsdale was in insolvent circumstances, and unable to pay his creditors 20s. in the pound, and during all such time the said Kay Dimsdale then owed large sums of money, on judgments and otherwise, to divers persons, which debts have always remained unpaid and unsatisfied, but he was in other respects duly qualified to be elected an assistant. As to the alleged fraud, the verdict finds that the prosecutor did, after the passing of the resolution of the 23rd April, but before it was communicated to him, to wit, on the 24th Sept. 1849, in answer to an inquiry which Giles Clarke, then being the agent in that behalf of the defa., made of him as to his solvency, represent and state to the said Giles Clarke, then being the clerk and agent as aforesaid of the defa., that he was then quite as solvent as any man of the court, and able to pay his creditors 20s. in the pound, whereas in truth he then was, and thence hitherto has been insolvent, and he was then largely indebted to divers persons in large sums of money, and was wholly unable to pay his creditors 20s. in the pound, as he then well knew; and the said creditors never were paid their said debts, or any part thereof, except a small dividend of 2s. 8d. in the pound, which, and no more, after great delay, was paid to the creditors under the bankruptcy mentioned in the return; and that by means of the said false and fraudulent representations, the said Kay Dimsdale induced and procured the said then wardens or keepers and assistants to admit him to the said office aforesaid. That the said Giles Clarke, as such clerk and agent as aforesaid, after the making of the said representations, and in consequence thereof, caused the prosecutor to be summoned to attend the meetings which it is alleged he attended, and caused the fact of the election to be communicated to him. That the said representations were not communicated by the said Giles Clarke to the court of the company until the 28th Oct. 1849, which was the first court held after they were made, and was the court at which the prosecutor was admitted. Upon this special verdict, the Court of Q.B. gave judgment for the prosecutor, and awarded a preceptory *writ mandamus* to issue. Whereupon the case was brought into this court by writ of error.

*Knowles, Q.C.* for the appa.—The first question is, is the bye-law, as set out, a reasonable bye-law? The court below appears to have acted upon the case of *Rez v. The Mayor of Liverpool*, 2 Burr, 723. There it was held that bankruptcy was not a cause of amotion from the office of a common councilman; and Lord Mansfield said (p. 732), "A man may be able to pay above 20s. in the pound, notwithstanding his being in strictness a bankrupt." That case, therefore, is not applicable to this bye-law, and it may be questioned whether the decision in that case is now law, for the 5 & 6 Will. 4, c. 76, s. 52, makes bankruptcy or insolvency a disqualification for continuing to hold the office of mayor, alderman, or councillor; that enactment is sufficient to show the reasonableness of this bye-law. The case of *Rez v. The Mayor of Liverpool* was not taken to a court of error, and the object of the present writ of error is to have the judgment of this court whether the judgment of Lord Mansfield in that case is to be held as law, seeing that the Legislature has acted contrary to that decision; but even were that not so, that judgment might well stand, and yet not affect the present question; and with reference to the observation of Lord Mansfield above referred to, the bye-law provides for that. It is found that everyone is liable to hold office as a renter-warden, whose duty it is to receive all the rents and moneys of the corporation. Here is a body of tradesmen having power to make bye-laws to regulate themselves and their corporation. What can be more reasonable than that they should say that no one should hold office who could not pay 20s. in the pound? Surely they are the persons best able to judge. They think that a man who is insolvent is not an independent agent, and not so desirable as a member as one who is solvent, and there is nothing unreasonable that they should object to put him in a position to receive and deal with large sums of money. Then it is said that you cannot limit the number of parties out of whom the person eligible shall be elected. It is true a bye-law cannot exclude a class or section of the constituency, but bye-laws continually impose disqualifications which limit the number of persons eligible; for example, it would not be unreasonable to disqualify a blind man, if the duties of the office required that he should see. Any disqualification of this sort is reasonable if founded on common sense: (*Green v. The Mayor of Durham*, 1 Burr. 127; *Rez v. The Masters and Wardens of the Company of Surgeons*, 2 Burr. 892; *Rez v. The President of the College of Physicians*, 7 T. R. 282. [MARTIN, J. referred to the case of *R. on the prosecution of M. Scales v. The Mayor and Aldermen of London*, 3 B. & Adol. 255.]) The effect of the cases is, that a bye-law which merely restricts the right to be elected is good. Now to apply that rule to the issues before the court. Dimsdale, it is said, was not summoned to the meeting at which his election was declared void; but in fact he never was elected at all, for his election was absolutely null and void, and therefore he had no right to be summoned. If the bye-law is good the prosecutor was never in office, and therefore the defa. are entitled to judgment, notwithstanding the verdict on the issue as the fifteenth plea that the prosecutor was not summoned. Then as to the first issue raised, that the letters patent are truly set forth in the writ, and that no material portion thereof is omitted; the proviso that every election "contrary to the direction or restriction in these presents in that respect mentioned shall be void and of no effect, to all intents and purposes" is not set out in the writ. The words are very material, and that issue therefore ought to have been found for the defa. As to Dimsdale's qualification, the bye-law does not mention the election of an assistant, only his admission; and looking at the charter, it is clear that it meant that no person should be admitted contrary to the charter. The prosecutor was elected

[EX. CH.]

REG. v. THE SADDLERS' COMPANY.

[EX. CH.]

contrary to the charter, because as soon as a bye-law is passed it becomes part of the charter. *Tucker v. Rez*, 3 Bro. Ch. Ca. 310. The second and third issues, therefore, ought to be found for the defts. As to the fourth issue, that the prosecutor had not conducted himself as alleged, this ought to be found for the defts., because before the prosecutor knew of his election, and before he accepted the office, he made the false statement which obtained him admission. Moreover issue is not joined in the language of the return, and this might bind the defts. hereafter, if they were advised to proceed against Dimsdale in any other manner. The manner of his removal must not be confounded with the question of his qualification. There may have been ample reason for removing him, but the defts. may have proceeded badly to remove him by omitting to give him notice. A man is not considered in until he has been finally admitted by taking the oaths, and he was not sworn in until after the fraudulent statement, and if the election is void he is not entitled to hold. If it be contended that the election can only be questioned by information in the nature of a *quo warranto*, that assumes a void election. The charter contemplates removal for ill-conduct and other reasonable cause, "by the warden and assistants," not by *quo warranto*. As to the seventh plea, it is admitted that there was good cause for removal; the false and fraudulent statement was sufficient misconduct. The eighth and ninth issues depend on the manner of the removal without a previous summons, which it is admitted made it informal. The great question is the validity of the bye-law. If that be a good bye-law and incorporated with the charter, and the expression "admitted" means "admitted to claim title," that is the principal question. [MARTIN, B.—Suppose we hold the bye-law good, and that there was a false representation subsequent to the election, still the prosecutor having been elected, the fraud does not arise till afterwards. Can you exclude him without giving him notice, even though the election be void? The word "void" means void when it has been ascertained in a proper manner.] The fraud was after the election, but before he was sworn. If he were not duly elected, there was no occasion to summon him. [MARTIN, B.—The fraud being after the election, would not affect it, though it might the admission. CHANNELL, B.—Is he not entitled to be heard on that point?] If, being disqualified, he is elected, he can have no claim to be summoned. The election is void, and the law does not recognise him in the office. *Adjourned.*

*Nor. 28.*—*Gibbons (Lush, Q.C. with him) contra.*—The bye-law is bad by reason of its imposing that as a disqualification, which is not a disqualification either in law or reason. First, as to the law of the case; the case of *Rez v. Liverpool* is precisely analogous with the present case; that case has remained to the present day unquestioned in a court of law, and has always been acted upon. [WILDE, B.—Your difficulty is that that decision does not go the whole length of the present case.] The judgment then is applicable to this case, and has been acted on since 1759. It is said that an assistant might be appointed renter-warden, and so have the receipt and appropriation of the funds of the corporation. It is true that might be so, but it is not so of necessity: he might be passed over; there is nothing in the charter to prevent it. In the case of *Reg. v. Owen*, 15 Q. B. 476; 19 L. J. 490, Q. B., the clerk of a County Court had been removed, and on a *quo warranto* information the jury found that the alleged inability on the part of the clerk, for which he had been removed, consisted solely of great pecuniary embarrassment and want of money to pay his debts; and in his judgment Erle, J. said: "The full effect of the finding is, that neither in respect of mental qualities nor bodily powers had there been any disability; but circumstances existed which made it

probable that such might be the case;" and further, his Lordship said: "I cannot say that by the mere fact of insolvency his faculties are rendered in such a state, and his principles so impeached, as to lead us to decide that he has in consequence forfeited his office. I cannot say that, because a man is in an extremely embarrassed pecuniary state, he should therefore be deprived of every office in the discharge of which sound sense and firm integrity are required." As to the effect of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, the case of *Rez v. Chitty* was decided on that Act, and that case is that an uncertificated bankrupt is not disqualified from being elected a councillor for a borough, and holding the office, unless he became bankrupt while holding; that is a very significant case to show how the court interpreted that statute. [MARTIN, B.—That was a decision on the statute, and according to its terms.] Then as to the reason of this case. It would be as reasonable to object to a man because he had red hair. There was in the city of London a bye-law that no brewer should be a member of the common council, because they were believed to be rude and violent men. Would that be held a good bye-law? [MARTIN, B.—Suppose a bye-law said a convicted felon should not be an assistant.] That would be good: (*Bagge's case*, 6 Coke Rep. 11, 98 a.) [MARTIN, B. that was after election.] The plt. had an inchoate right; the act here complained of was after election. [WILDE, B.—But he was insolvent at the time of his election.] *Reg. v. Tuppenden*, 3 East, 186, 191, is a case in point; this bye-law imposes a qualification not required by the charter. In *Rez v. Atwood*, 4 B. & Ad. 481, 502, Lord Denman said, "The other point taken, namely, that the body elected from is narrowed, would undoubtedly be fatal to any bye-law;" here by the present bye-law the body is narrowed. *Reg. v. Powell*, 3 E. & B. 377, 390; 23 L. J. 199, Q. B., is another authority to the same effect. [MARTIN, B.—The case I have already put, of a convicted felon being ineligible, might go to narrow the body elected from.] *Sir Thomas Earle's case*, Carth. 173. The case of *Green v. The Mayor of Durham*, cited for the defts., is not applicable, there there was no right to be elected; here there was an inchoate right, and a vested right, which cannot be divested. In the case of *R. v. The College of Surgeons* the requirement was reasonable, having regard to the learned character of the body; but in the present case all that is necessary is that the members should be saddlers. In the case of *R. v. The College of Physicians* there was no inchoate right; all those cases differ from the present. Then as to the issues. A person applying for a *mandamus* is not bound to set out the charter; it is in the custody of the company, and if anything is omitted it is for them to set it out in their return. There is nothing to show that this election was void; that bye-law is not a part of the charter, and if the election were bad according to the bye-law, still it is good according to the charter. The return that the prosecutor was not duly elected is bad, it is too general: (*R. v. Lyme Regis*, 1 Doug. 79.) The bye-law was meant to apply to the election, not to the admission; and here inquiry was not made into the prosecutor's circumstances until after his election. The election gives him a right to the office, and the admission gives him a right to execute the duties of the office, and any disqualification must be an entire disqualification. The only method of ousting the prosecutor, if he be wrongly in, is by *quo warranto*. The alleged fraud was an answer given to a question by the clerk of the company, and can have no effect. If the bye-law is bad, a gratuitous statement cannot affect him: (*Vernon v. Keys*, 12 East, 632.) The ground of that decision was, that the man was not under any obligation to disclose the truth. So here, if the company were induced to admit him in consequence of that

statement, it was their own fault for not making other inquiries: (*Feret v. Hill*, 15 C. B. 207; *White v. Gardam*, 10 C. B. 919; *Stewart v. Ashton*, 8 Ir. C. L. Rep. 35; 19 Hen. 7, c. 7.)

*R. Clarke*, by the permission of the court, replied—This is a reasonable bye-law, and *R. v. Liverpool* is not in point. Then 20s. in the pound was not paid. The rule with respect to diminishing the number of persons eligible to be elected means that you shall not exclude a class. As to the misrepresentation, it must be made with reference to an existing fact, to avoid a contract: (5 Rep. 63 b; 6 Rep. 531 b; Com. Dig. "Bye-law," c. 1; 11 Coke, 54 b.) The bye-law is not necessarily bad because it is not signed; if the corporation neglect to get their bye-laws confirmed, they are liable to a penalty; the word "admitted" in the bye-law is to be read as "allowed:" (*R. v. Azbridge*, 2 Cowp., was also cited.) *Cur. adv. vult.*

Jan. 12.—*MARTIN, B.*, after stating the writ, return, pleas and special verdict, proceeded:—The first and great question is as to the validity of the bye-law. The objections made to it were, first, that it was beyond the power of the court of assistants; secondly, that it was void because of the provisions of the 19 Hen. 7, c. 7; and, lastly, that if not, it was bad in form, as being directed against admittance only, and not election. The first objection, if valid, must be so either because of the bankruptcy or insolvency of a freeman being in itself an unreasonable ground of disqualification for the office of assistant, or because of a violation of the charter in unduly limiting the class from whom the selection of assistants is to be made. Upon full consideration, however, we are of opinion that the bankruptcy or insolvency does not constitute an unreasonable ground of disqualification for the office of assistant. Not only is the office in itself one of trust and confidence, but it leads almost as a matter of course to the office of reuter-warden, the holder of which is the treasurer and keeps the purse; and it seems to us but reasonable that persons interested in the prosperity and honour of the company should desire that the custody of its money should be not only trustworthy, but safe, beyond the risk of temptation, and that the conduct of its affairs should not be in the hands of those who have shown themselves to be presumably incompetent to the prudent management of their own. It is true that persons do sometimes become bankrupt and insolvent without misconduct, and even without imprudence, but the great mass of bankruptcy and insolvency is to be traced to one or other of these causes; and bye-laws must be considered as subject to the general maxim that laws ought to be adapted to meet cases of ordinary occurrence, and ought not to be pronounced bad because in rare and exceptional instances they may work a hardship. With respect to the authorities cited on this point they do not, in our opinion, touch it. That of *Rez v. The Mayor of Liverpool* arose upon the common law and not upon a bye-law, which must necessarily superadd something to the common law, otherwise it would be idle. Indeed, bankruptcy was unknown to the common law, and is the creation of comparatively modern statutes. The other cases turned upon the construction of particular statutes, relating one of them to municipal corporations, and the other to County Courts, and they have equally no application. Next, as to the question whether the bye-law unduly restricts the eligible class in violation of the provisions of the charter, we must observe that there is a distinction in this respect between bye-laws which exclude a class of persons from an office to which by the charter they are eligible, and those which only ascertain a criterion of fitness, such as, having regard to the object of the charter, is a just and reasonable one. The former class is void, the latter valid; and it is within this class that the bye-law in

question, in our opinion, falls. The law in this respect is correctly stated in Mr. Frazer's learned note to the case of Corporations, 78 a: see also *Green v. The Mayor of Durham*, 1 Burr. 127; *Rez v. The College of Physicians*, 7 T. R. 282. The second objection, founded upon the stat. 19 Hen. 7, c. 7, is disposed of by reference to the decisions upon the construction of that statute, stated in 2 Kyd, 108, from which it appears that although a penalty may be incurred by the persons who make a bye-law without the approval therein directed to be obtained, yet the bye-law itself made without such approval is not invalid. We proceed to consider whether the last objection pointed to the form of the bye-law is fatal. That objection is, that the bye-law professes to invalidate the admittance only, and therefore impliedly permits the election, by which it is alleged that the right of admittance is vested, and after which it is said that the admittance is merely ministerial. The whole weight of this argument rests upon the assumption that the bye-law uses the words "be admitted a member of the court of assistants" in the same restricted sense in which the phrase "*ad executionem officii sui admittatur*" is employed in the charter as pointing to an admittance after election. Now, assuming, for argument sake, that the bye-law, if so read, would be inoperative (as to which we give no opinion), still the question whether it is to be so read depends upon whether any other reasonable construction can be put upon its language so as to make it operative; and if so, whether the court ought to construe a bye-law like a plea in estoppel, or whether we ought not to put upon it such a construction as, if possible, to make it effectual. Now, the bye-law is certainly capable of a different construction from that put upon it by the prosecutor's counsel; for, according to the ordinary use of language, a law that a person shall not "be admitted a member" means that he shall be excluded from becoming so by any of the means conducive thereto, whether by election, admittance after election, or otherwise. Indeed, when it is considered that in this case the functions of election and admittance are performed by the same body, it seems unreasonable to draw a distinction between a rejection thereby at the election, and a refusal thereby of admittance after election; both processes taken together constituting, in fact, the person being "admitted a member." It is sufficient, however, to say that the construction above suggested is one of which the bye-law is capable, and which it ought to receive according to the familiar rule of construction, that instruments should be so construed as that they may stand good rather than be defeated. That this rule is applicable to bye-laws sufficiently appears from the case of *The Poulterers' Company v. Phillips*, 6 Bing. N.C. 314. The bye-law, read in the sense thus explained and enforced, rendered invalid both the election and admittance of the prosecutor, by reason of his insolvency; and if this were a proceeding against him by *quo warranto*, we must have given judgment for the Crown, by reason of such his disqualification. It was, however, argued, that the question raised by the present proceedings was different from that which would have arisen upon a *quo warranto*, because the prosecutor had actually been admitted, and had seisin of the office before his removal, and that, inasmuch as the removal took place without his having an opportunity of being heard in his own defence, it was inoperative, and so that he is entitled to be restored, and can only be removed, if at all, either by *quo warranto*, or by a regularly constituted meeting of the court of assistants, at which he may have an opportunity of being heard. We assent to this argument in so far as it asserts that the proceedings at the meeting of the 20th Dec. were inoperative to remove the prosecutor, as for a corporate offence adjudicated upon by dismissal, pursuant to the charter. We also

think that the learned counsel for the prosecutor was well founded in his contention that a corporate offence not constituting a disqualification *de facto*, committed after election, could not be relied upon in the return to a *mandamus* to restore without showing an expulsion in consequence of such offence after the prosecutor had had an opportunity of being heard. This is obviously reasonable; because the person accused might, if heard, put forward an excuse which the court of assistants, proceeding to consider the question, it may be less vigorously than would a strictly judicial tribunal, might in their judgment deem sufficient; or he might prove such circumstances as would induce them to overlook the offence and abstain from removing him. Such a course of reasoning is, however, inapplicable to a case like the present, in which the prosecutor appears to have been from the beginning disqualified by a bye-law forming as much a part of the constitution of the company as does its charter, and where the court of assistants could not, consistently with their duty, waive that disqualification, or do otherwise than expel him. The distinction between such a case and that first put is obvious. It is also plainly distinguishable from that which arises where, upon a *mandamus* to elect, the corporation returns that the office is already full so as to put it upon the applicant to try the question in a proceeding against the person really interested. We should be very slow to allow the prerogative writ of *mandamus* to issue, ordering the restoration to office of a person not qualified to hold it, or to discharge its duties, who ought never to have been elected, and who never would have been elected but for a mistake of fact on the part of the electors. It might well be held, and not inconsistently with any authority cited, that the maxim *error facti non nocet* governs the case, and decides it in favour of the defts. It is, however, unnecessary to dispose of the case on this ground, because the only circumstance which could be plausibly relied upon as making a proceeding by *quo warranto* necessary, was the admittance *de facto*, it being clear that the insufficiency after election would be a good answer to a *mandamus* to admit, even if it be not so to a *mandamus* to restore (as in the case of *Rez v. Williams*, 8 B. & C. 681); and in our opinion the argument for the defts. was successful to show that any effect of the admittance in this case was defeated by the falsehood whereby it was obtained. To this argument several answers were put forward on the part of the prosecutor. First, it was said that the misrepresentation was a mere falsehood as to something collateral or immaterial. This depends upon whether the bye-law was valid, and it is disposed of by our decision in the affirmative. In each of the cases referred to under this head, except *Stewart v. Aston*, the court held that the misrepresentation was not of a *fact dantis causam contractus*, but of collateral matter. In the case of *Stewart v. Aston*, the marginal note of which is incorrect, a consideration had actually passed and was retained by the defts., so that he was not in a position to avoid the deed upon the ground of fraud: (see *Clarke v. Dickson*, 1 E. & B. 148.) In the present case, as the bye-law was valid, the statement of solvency was relevant and material to the question of admittance, and was the direct cause and occasion thereof. Next it was said, that the finding in the special verdict that the admittance was procured by means of a representation which the verdict designates as "false and fraudulent," ought not to be acted upon, because at the time of making it the prosecutor did not know of his election. To this, however, the answer is plain, that he knew he might be elected, and made the statement, knowing it to be false, to the agent of the electoral body, and that when that statement was reported to them at the court of the 20th Dec., when he was admitted, he accepted and acted upon the admittance, which, as he must then

have known, proceeded upon the faith of his statement being true. These circumstances simply warrant the conclusion that he procured his admittance by falsehood and fraud. Lastly, it was argued that, even assuming the admittance to have been procured by fraud of the prosecutor, yet the office became vested in him, and could not be divested by reason of the fraud. For this proposition were cited the cases of *Feret v. Hill*, where the misrepresentation was held to be collateral, and not to go to the root of the contract; and *Stewart v. Aston*, where, as already pointed out, it was impossible to place the parties in *status quo*. In neither of those cases was it decided that fraud may not invalidate a transfer of land equally as one of goods, where the parties can be put in *status quo*, by simply avoiding the transaction, and the election to avoid it is made by the party defrauded within a reasonable time after the discovery of the fraud, and before a right has been created in any third party; and in whatever manner the question thus stated ought to be decided, there is a wide difference between a conveyance of land which by the policy of law must be vested in some one, and the creation of a personal right incapable of transfer, such as the office of assistant. A much closer analogy is found in the case of judgments, and other proceedings in courts of justice obtained by fraud upon the court. These might be treated as void, in a collateral proceeding, without any writ of deceit, where that process existed, and without any application to the court to set them aside. Instances of this will be found, as to a fine, in *Fermor's case*, 3 Rep. 77a; as to a judgment, *Philipson v. Lord Egremont*, 6 Q. B.; and as to a decree, *Lord Bandon v. Beecher*, 3 Cl. & F. 479. We are therefore of opinion that the objection as to the effect of the admittance is not open to the prosecutor; and in so deciding we act upon the plain principle that "it is not reasonable that a man should take advantage of his own wrong, and if the law should give him such power, the law would be the cause and occasion of such wrong." We have thus disposed of all the questions affecting the merits of the case, and it only remains for us to direct how the verdict should be entered upon the issues in point of form. It is right here to notice that the special verdict is drawn in the old form, with much unnecessary prolixity, instead of in a simpler and more compendious form, after finding the facts, stating that the jury are ignorant how, upon such facts, the issues ought to be found, praying the advice of the court, and stating that they find, according to its judgment; or if it be decided to narrow the question for opinion of the court, the form adopted in *Lord Londesborough v. Mowatt*, 4 E. & B. 1, may be resorted to. We impute no blame to the gentlemen who prepared the special verdict in the present form, for which there are no doubt common precedents; but we trust that in future a shorter form will be adopted in practice. As to the first plea, the substantial part of it must, according to our judgment, be found for the defts. The traverse as to the charter being insufficiently set out in the *mandamus* ought to be treated as a distinct issue in denial of the charter, and found for the prosecutor. So ought the traverse as to the prosecutor having been duly elected, because upon these pleadings the issue as to the election is simply whether it was done in point of form; the disqualification of the prosecutor being the subject of distinct averment in the *mandamus*, return, and plea. We must, for this purpose, treat the issue as divisible; for the second C. L. P. A. puts the pleadings in *mandamus* after the return upon the same footing as those in an ordinary action. As to the residue of the first plea, the judgment of Lord Wensleydale in *Lusk v. Russell*, 5 Ex. 203, is conclusive to show that, in our view of the substantial question, the finding must be for the defts. As to the second plea, it is either substantial in point of law on the ground that the prosecutor was an assistant and

entitled to attend the meeting of the wardens, or as an implied traverse of that part of the return which we have held to be an answer to the *mandamus*, and as that averment is disproved the plea fails; or if that averment is not to be so construed, the plea is insufficient in point of law, and then in order to entitle the prosecutor to a verdict thereupon, it was necessary to prove all the averments. In either view the verdict upon that issue must be for the defendants. The result is, we reverse the judgment of the Q.B., and give judgment for the defendants.  
*Judgment reversed.*

### HOUSE OF LORDS.

Reported by JAMES PATTERSON, Esq., of the Middle Temple,  
Barrister-at-Law.

Thursday, Feb. 21.

EVANS v. McLOUGHLAN.

*Habeas corpus—Excise Act, 7 & 8 Geo. 4, c. 53, ss. 33, 79—Statutory power to arrest, detain and take before a justice—What is a reasonable detention—Jurisdiction—Certiorari.*

*M. being found assisting in illicit distillation was arrested in the evening by E. an excise officer and two police constables. E. left M. in charge of the police, and went to find a justice of the peace before whom the prisoner could be taken, under 7 & 8 Geo. 4, c. 53, s. 33. Several justices refused to act, but at length, on the second day after the arrest, one was found, who, after hearing the charge, convicted M. There was no information or conviction, but only a warrant of commitment granted to E., after the prisoner failed to pay the fine imposed. M. having moved for his discharge on the ground of the detention by the police having been illegal:*

*Held (reversing the judgment of the Court of Session in Scotland), that E. was justified, under sect. 33, in leaving M. in charge of the police while seeking a justice; and whether there was unreasonable delay or not in taking the prisoner before a justice (and semble, there was none), the justice had jurisdiction, and the Superior Court could not interfere, as the writ of certiorari, &c., was taken away by the 79th section; that the arrest was an immediate arrest, and no information in writing was necessary; and there was no substantial irregularity in the proceedings.*

This was an appeal from the Court of Session in Scotland, the court having discharged the respondent under a writ of *habeas corpus*, on the ground that he was illegally convicted of illicit distillation under the Excise Act, 7 & 8 Geo. 4, c. 53, s. 33.

The circumstances of the arrest and detention were as follow:—The respondent, Mr. Loughlan was a miner, living near Airdrie, and was apprehended by the appellant, an excise officer and two police constables, on the evening of 22nd March 1858, near Airdrie, beside a still, which was running spirits or low wines. The prisoner and other men were engaged in superintending the running of the spirits or low wines when they were apprehended. The excise officer and the police officers, after the apprehension, conveyed the prisoner to the police-office at Airdrie. After lodging him there, the excise officer immediately proceeded to endeavour to find a justice of the peace to hear the cause. He first applied to—Kidd, Esq., justice of peace in Airdrie, on 22nd March 1858, and requested him to hear the case. Mr. Kidd declined to do so, and referred the excise officer to Mr. Watt, the justice of peace clerk at Airdrie. The officer applied to Mr. Watt to procure a justice to hear the case, but that gentleman stated that it could not be done on the evening of the 22nd, and requested the officer to attend next morning, when a justice would be procured. In these circumstances the prisoner was de-

tained, along with the other persons apprehended, during the night of the 22nd, in the county police-office. The officer attended next morning at Mr. Watt's office, and again requested that the case should be taken up. He was informed that it would be so taken up during the course of the day, when a court which was then being held by the sheriff-substitute was over. The officer waited till said court was over, and again applied for a hearing, but he was informed by the Procurator-Fiscal, Mr. Steel, that none of the magistrates present would hear the case, because the officer had not exhibited informations and served summonses upon the prisoners; which things were not necessary. The officer then proceeded to his superior officer, the supervisor at Hamilton, and informed him of the circumstance. The supervisor came in with the officer from Hamilton to Airdrie, on the morning of the 24th March, and having seen Mr. Thomas Torrance, justice of the peace, the supervisor induced him to hear the case on the 24th March. Up to the time of hearing, the prisoner and the other persons apprehended were kept in the county police-office.

The excise officer laid before the magistrate the statute above quoted, and then made an oral complaint against the prisoner, to the effect that he discovered him in and about a private and unentered place, at the time and place mentioned in the warrant of commitment, where there was in the course of manufacture spirits from a still, which was at the time running the said spirits, and where there were certain materials in preparation for manufacturing such spirits, and that the prisoner was knowingly aiding, assisting, and concerned in the manufacture of such spirits, contrary to the said Act 7 & 8 Geo. 4, c. 53, sect. 33.

Evidence on oath in support of the complaint was then given, namely, that of the officer Robert Evans, being one credible witness in terms of the statute. After hearing the officer's evidence, the justice of the peace convicted the prisoner of the offence charged against him in terms of the statute, and imposed the penalty set forth in the warrant of commitment. No conviction was written out or signed by the justice, as it is not, and has never been, the practice in any part of the United Kingdom, to write out convictions for offences under this section of the statute when the penalty is not paid. The only writing which is then signed or issued is the warrant of commitment, and that warrant was so signed and issued in the following terms, the penalty not being paid:—

“County of Lanark, to wit.—To Mr. Robert Evans, and to the keeper of the house of correction at Airdrie, in the county of Lanark.—Whereas John M'Loughlan, of Coathill, in the county of Lanark, is and stands convicted this day before me, Thomas Torrance, Esq., one of Her Majesty's justices of the peace in and for the said county of Lanark, for that one Robert Evans, being an officer of excise, did, on the 22nd day of March in the year of our Lord 1858, at Bell's Stone, in the said county of Lanark, discover and find, in a certain private and unentered place, manufacturing, and in the course of manufacturing, certain goods and commodities for and in respect whereof a duty of excise is imposed, to wit, a still which was running spirits and certain materials and preparations for manufacturing such goods and commodities, to wit, low wines, and did at the same time discover, in and about such private and unentered place, the said John M'Loughlan knowingly aiding, assisting and concerned in the manufacturing of such goods and commodities, contrary to the form of the statute in that case made and provided, whereby the said John M'Loughlan hath forfeited and lost the sum of 30*l*. And whereas the said John M'Loughlan hath refused and neglected to pay the said sum of 30*l*. into the hands of the said Robert Evans, being such officer of excise as aforesaid, and who conveyed the said John M'Loughlan before

H. OF L.]

EVANS v. McLOUGHLAN.

[H. OF L.]

me in pursuance of the said statute, charged with the offence aforesaid. These are therefore to require you, the said Robert Evans, to convey the said John McLoughlan to the House of Correction at Airdrie, in the said county of Lanark, and to deliver him to the keeper thereof, together with this warrant. And I do hereby command you, the said keeper, to receive the said John McLoughlan into your custody in the said house of correction, there to remain and to be kept to hard labour for the space of three calendar months, to be reckoned from the date hereof, or until (during the said three months) he shall have paid the said sum of 30*l*., and for so doing this shall be your sufficient warrant. Given under my hand, at Airdrie, in the said county of Lanark, the 24th day of March in the year of our Lord 1858.

(Signed) "THOMAS TORRANCE, J.P."

The statute 7 & 8 Geo. 4, c. 53, s. 33, enacts as follows:—"That when any officer of excise shall at any time find, in any private or unentered place, manufacturing, or in the course of manufacturing, any goods or commodities for or in respect whereof any duty of excise is or shall be imposed, or any materials or preparations for manufacturing any such goods or commodities, and shall at the same time discover in or about such private or unentered place any person knowingly aiding, assisting, or in anywise concerned in the manufacturing of such goods or commodities, every person so discovered shall forfeit and lose the sum of 30*l*. over and above all other penalties to which the proprietor of the same, or the person in whose custody or possession the same shall be found, or by whom the manufacturing of such goods or commodities may be carrying on, is or may be subject and liable; and it shall be lawful for any officer of excise, and all persons acting in his aid and assistance, to arrest and detain every person so discovered, and to convey him or her before one or more justice or justices of the peace for the county, shire, division, city, town, or place wherein such person shall be so discovered as aforesaid; and it shall be lawful to and for such justice or justices of the peace, on confession of the party, or by proof on the oath of one or more credible witness or witnesses made of such offence, to convict every such person so discovered as aforesaid, and every person so convicted shall, immediately on such conviction, pay the said sum of 30*l*. into the hands of the officer who shall have conveyed such offender before such justice or justices of the peace, to be paid to the commissioners of excise, or the commissioner or commissioners and assistant commissioners of excise in Scotland or Ireland respectively, or to such person or persons as they may respectively appoint, to be applied in such manner as other excise penalties are by this Act directed to be applied; and on any such offender refusing or neglecting to pay the said sum of 30*l*. the justice or justices so convicting as aforesaid shall and may, by warrant or warrants under his or their hand or hands, commit the said offender to the house of correction, or other prison for the said county, shire, division, city, town, or place respectively, there to remain and to be kept to hard labour for the space of three calendar months, to be reckoned from the day of such conviction; and the person so convicted and committed shall not under any pretence or by reason of any authority or order other than as hereinafter mentioned be discharged until he or she shall have paid the said sum of 30*l*., or until the expiration of the said three months," &c.

By sect. 79 it is also enacted, "That no writ of *certiorari* or other writ or process shall be issued at the suit of any def. out of any of his Majesty's courts of record in England, Scotland, or Ireland, nor shall any bill of suspension, advocacy, or reduction, be passed, nor shall any letter or letters of suspension, advocacy, or reduction, or any other proceeding, be issued out of

[MAG. CAS.]

the Court of Session or Court of Justiciary in Scotland to supersede, sist, stay, remove, or in anywise affect any information or judicial proceeding before the Commissioners of Excise or Commissioners of Appeal in this Act after mentioned, or before any justice or justices of the peace in the United Kingdom in pursuance of this Act, or any other Act or Acts of Parliament relating to the revenue of excise, or any judgment thereupon, and that every such information shall be tried and determined, and every such judicial proceeding shall be had and completed, and every such judgment executed, any such writ of *certiorari* or other writ or process or letter or letters or bill of suspension, advocacy, or reduction, or other proceeding notwithstanding: provided always, that nothing herein contained shall extend, or be deemed or construed to extend, to any writ of *certiorari*, sued or issued in such cases in behalf of his Majesty out of his Majesty's Courts of Exchequer in England, Scotland, or Ireland respectively."

The prisoner, after being in prison, applied to the Court of Session for a suspension of the sentence and liberation, equivalent to a writ of *habeas corpus*. The Court of Session held the conviction bad, on the ground that the justice had no jurisdiction, inasmuch as this was not the case of an immediate arrest, there having been a break in the custody by reason of the prisoner being committed to the custody of the police and kept in prison forty-eight hours, which the statute did not warrant. The excise officer now appealed against that decision.

The *Lord Advocate* (Moncreiff), *Welsby* and *F. Russell*, for the app., contended that the jurisdiction of the Superior Court was entirely taken away by sect. 79 of the Excise Act, 7 & 8 Geo. 4, c. 53, in all cases where there was jurisdiction in the justice who convicted. Here there was jurisdiction, for the prisoner was found aiding in the illicit distillation. The statute, sect. 33, gave power to the excise officer, and all persons aiding him, to arrest, detain and carry such offender so discovered before a magistrate. The power to detain must mean to detain a reasonable time until a justice could be found. It was true that here the excise officer had given the prisoner in charge to the police constables while he went in search of the justice, and some time elapsed before a justice could be found; but the time which so elapsed was not caused by any unreasonable delay of the officer, but by the circumstance of one justice after another refusing to act. The delay was not due to the negligence of the excise officer. Not only the excise officer had power to detain, but all persons assisting him, and here the police constable, in keeping the prisoner, was acting in aid of the excise officer, and therefore under the authority of the statute. There was no unreasonable delay therefore, and even if there had been, still the justice would have had jurisdiction. Thus, in *Van Boven's case*, 9 Q. B. 669, though a week had elapsed, this was held to be so. It could make no difference here that the police officer kept the prisoner in a cell, as it would have been equally an imprisonment or detention if the prisoner had been kept in an inn or a private house. The justice had nothing to do with the delay in bringing the prisoner before him, but the offence and the arrest gave him jurisdiction, and there was one continuous detention throughout. As to the objections urged, there was no necessity for an information in writing, as the statute did not require it.

*M. Chambers*, Q. C. and *Nesbitt*, for the resp., contended that the jurisdiction of the Superior Court to interfere by *habeas corpus* was not taken away by the 79th section, for it was the right of the subject in all cases of illegal imprisonment to apply for his discharge. There was no jurisdiction in the justice, as it was only in cases of summary or immediate arrest that the excise officers could proceed as they had done. The

usual course was to apply for leave of the Excise Commissioners to proceed by information against the prisoner under the 61st section, and the privilege of proceeding under the 33rd section was confined to cases where the offender was taken immediately, that is, without any delay, before a justice. Here there was a breach in the detention by the excise officer committing the prisoner to the custody of the police, which he had no authority to do. His powers under the 33rd section must be strictly interpreted, and he had no right to commit the offender to prison before taking him to a justice of the peace. The illegal custody commenced the moment the prisoner was handed over to the police.

[LORD CHELMSFORD.—Could not the excise officer have left the prisoner in a room under the charge of somebody while he went in quest of a magistrate, and then returned and carried him before the magistrate?] No, he could not leave the prisoner in a room, but might carry the prisoner about with him.

[LORD CHELMSFORD.—Surely, if a man is apprehended in this country so late that he cannot be taken before a magistrate, he may be detained till next morning; that is reasonable, and it has been decided.] Yes, but though the prisoner may be detained, he cannot be put in an ordinary prison.

[LORD CHELMSFORD.—Call it a lock-up house, or a cage; it is in fact a gaol. The prisoner might have been re-arrested, under 4 & 5 Will. 4, c. 51, s. 25, but could not be detained in the manner he was. The LORD CHANCELLOR.—The whole question turns on this, whether the excise officer was not all the while *bond fide* pursuing the object of the Act, in bringing the party before the magistrate, and whether there was any unreasonable delay.] The first duty of the magistrate was to ask if there had been any delay in bringing the prisoner before him; if there was, he had no jurisdiction, under the 33rd section of the statute, and he ought to have declined to hear the case. In *Hay v. Linton*, 2 Ir. 333, a Scotch case, under the Reformatory Schools Act, 17 & 18 Vict. c. 74, a girl was put in the police cell by the magistrate till they could make inquiry about her, and it was held the magistrate had no right so to detain the child in that manner, for that was not in pursuance of the Act. There are other objections to this conviction. There was no written information, as there ought to have been. There was no record of the conviction; the justice ought to have taken notes of the evidence: (Paley on Convictions, 84, ed. 1838.)

The LORD CHANCELLOR.—My Lords, notwithstanding the able argument which we have heard at your Lordships' bar from the counsel for the resp., I must say that I entertain a clear opinion that the decree appealed against, which was pronounced in the court below, ought to be reversed, but not at all on the ground that the Court of Session has no jurisdiction over such matters. The Court of Session had jurisdiction over such matters, and no Act of Parliament has been passed to deprive that high tribunal of the jurisdiction which it once enjoyed. And although the Scotch Court of Ex. would have co-ordinate jurisdiction in such a matter, it does not at all follow that when it was brought into the Court of Session it would have been *coram non judice*. If this proceeding could have been impeached on the ground that the justice had no jurisdiction over the offence with which the resp. was charged, I am of opinion that in that case the Court of Session would have had jurisdiction, and would have been fully entitled to hear the objections that were raised. But, upon looking at the Act of Parliament, it appears to me quite clear that the 79th section takes away any jurisdiction from the Court of Session in this case. It lies upon the resp. to show that the writ of *habeas corpus* was regularly sued out. By the 79th section of the 7 & 8 Geo. 4, c. 53, it is enacted, "That no writ of *certiorari* (that would apply

to England) or other writ or process shall be issued at the suit of any def. out of any of his Majesty's courts of record in England, Scotland, or Ireland, nor shall any bill of suspension, advocacy, or reduction be passed, nor shall any letters of suspension, advocacy, or reduction, or any proceeding be issued out of the Court of Session or Court of Justiciary in Scotland to supersede, sist, stay, remove, or in anywise affect any information or judicial proceeding before the Commissioners of Excise, or Commissioners of Appeal in this Act after mentioned, or before any justice or justices of the peace in the United Kingdom in pursuance of this Act." Therefore, if the justice before whom M'Loughlan was brought was acting in pursuance of the Act, and had jurisdiction in the matter, the suspension was incompetent and the Court of Session had no jurisdiction. Now it seems to me that the learned counsel for the resp. have utterly failed in showing that the justice had not jurisdiction. For it is enacted by the 33rd section of the same Act that created the offence that it "shall be lawful for any officer of excise, and all persons acting in his aid and assistance (and in this case I know not whether the officer of police might not be considered as acting in aid and assistance of the officer of excise if it were necessary to consider that), to arrest and detain every person so discovered, and to convey him or her before one or more justice or justices of the peace for the county, shire, division, city, town, or place wherein such persons shall be so discovered as aforesaid." Here there is power given to the excise officer, and to all who are acting in his aid, to arrest, detain and convey the offender before a justice. Then come the words which give jurisdiction to the justice: "And it shall be lawful to and for such justices of the peace, on confession of the party, or by proof on the oath of one or more credible witness or witnesses made of such offence, to convict every such person so discovered as aforesaid." Now it is not at all disputed that the magistrate who acted in this case would have had jurisdiction if he had been the magistrate to whom the resp. was taken in the first instance, on the 22nd March, in order to make the complaint before him. If the resp. had been immediately conveyed before that magistrate, and that magistrate had proceeded to hear and decide, no question could have been made about the jurisdiction. But it so happens that the arrest being on the 22nd March (I believe there is some doubt about the date), it was not, according to the statement in this case, till the 24th March that the hearing took place. And it is said during that interval the resp. could not be considered as having been detained under the authority of the Act. Now it is allowed by the counsel for the resp. that all that is reasonable may be done by way of detention for the purpose of having the matter adjudicated. And it is not disputed, I presume, that if M'Loughlan had been taken to the house of a justice, and the justice had been at dinner, he might lawfully have been detained in the hall, or introduced into the drawing-room, or into a picture-gallery, to amuse himself until the repast was over, and the matter might then be heard. Indeed, it is admitted that the excise officer might have taken the prisoner to his (the officer's) house and detained him there. But the objection is that, instead of being in the officer's house, he was taken to a prison, and a police officer was asked to take care of him. Well, I say again, referring to these sections of the Act of Parliament, that the police officer in doing that might be considered as acting in the aid of the excise officer; at all events he was acting for the excise officer, and the excise officer must be considered as the party who is detaining him: *qui facit per alium facit per se*. Here the excise officer did detain him, and it is allowed that there was no detention whatsoever beyond what was essentially necessary for the matter



H. OF L.]

EVANS v. McLOUGHLAN.

[H. OF L.]

being adjudicated. There was no malice, no violence, no harsh treatment, and no time at all was wasted. The excise officer does his best to find a justice to hear the case. He goes first to one man and then to another, and then he consults the officer who represents the Government at Airdrie, and he advises him, I think, to go to Hamilton. He goes to Hamilton. He does his best to find a justice down to the 24th, when Mr. Torrance is found, and the proceedings are consummated. Now those being the facts of the case, it seems to me quite clear that it must be considered that there was a continuity of detention, and that it was always either by the excise, or by some person acting in aid of the excise officer; and there is no doubt that if a justice could have been found sooner the detention would have been abridged. It was said by the counsel for the resp. that this was not in the heart of the Highlands—that Airdrie is a very populous place, and that there are a great number of magistrates there. But if it be admitted that in the heart of the Highlands where magistrates are rare, the resp. might have been detained till a magistrate could be found, then, if in any other part of the country there are twenty magistrates applied to, and each of them improperly refused to hear the case, it is clear that the man must be detained till some magistrate is found who will administer the law. Under the circumstances it appears to me that Mr. Torrance had jurisdiction, just as much as if he had been present at the time when the unlawful distillation was discovered, and had sat at the outset of the proceedings to hear and adjudicate. *Van Bowen's* case is, I think, in point, because it shows that even although the detention be for an unreasonable time, that does not affect the case. I do not think that the detention in the present case was for an unreasonable time, and if a jury had had to try that question, I think any jury would have said that there was no detention for an unreasonable time. One noble and learned lord has intimated his opinion, in commenting on *Van Bowen's* case, that that would not have interfered with the jurisdiction of the justice when the hearing actually took place. In that case the Act of Parliament gave power to detain for a reasonable time, and the jury expressly found that he had been held in custody for an unreasonable time, but still the determination was that that did not interfere with the jurisdiction of the magistrate. That being so, all other questions disappear. The Court of Session having no jurisdiction to suspend the proceedings before the justice, because the justice had jurisdiction in the matter, and the suspension being incompetent, the other questions that have been discussed at the bar do not arise. I am almost ashamed to refer to some of the objections that have been made, such as that there was only one witness examined, for the Act of Parliament says that the proof of one witness shall be sufficient; and again, that the officer filled up a blank warrant. Although those objections received a certain countenance from the Lord Ordinary, I must say that they seem to me to be wholly frivolous, and sorry that they should have received countenance in that quarter. The only further objection that I think it right to take notice of is, that there was no written information, and that consequently there was not any jurisdiction. If this had been a proceeding under a different clause of the Act of Parliament—not where there has been an arrest and an immediate procedure for obtaining an adjudication and the infliction of a penalty—I think there might have been good reason for such an objection; but it is quite clear that the Legislature meant that this *festinum remedium* of arresting parties taken in *flagrante delicto*, and having an immediate conviction, contemplated that it should be done without the formality of a regular conviction. Those steps may be necessary, and often are necessary and proper, when there is a regular proceeding which is supposed to

take place before a magistrate; but this is a special proceeding to be adopted for the purpose of putting down an offence which it is very difficult to meet, namely, the offence of unlawful distillation; and it seems to me that if parties were allowed to raise such objections as these, the very object of the Act would be defeated. All that it appears to me judicially necessary for us to decide is, whether this suspension was competent or not. I say that it was incompetent. I must advise your Lordships that the decision of the Court of Session should be reversed.

LORD CRANWORTH.—My Lords, I entirely concur with my noble and learned friend. The 33rd section of the statute in question makes it the duty of any officer of excise, upon finding a person in *flagrante delicto* engaged in illicit distillation, to arrest and detain him, and bring him before one or more justice or justices of the peace, in order that he may there be dealt with. And the duty then imposed upon the justice is to hear and determine the case and to fine the party 30*l.* if he is convicted, either upon his own confession or by the evidence of one witness, and in default of his payment, then to commit him for a certain period to prison. Now, what happened here was this: The officer of excise, Evans, did find Mc'Loughlan engaged in illicit distillation, did arrest him, did detain him, and bring him before a justice of the peace; and the first point that was argued was, that it was the duty of the justice of the peace to inquire whether he had been brought up *quam prius* before him. Now, in my opinion, the justice of the peace not only had no obligation to make such an inquiry, but he would have been doing that which he would not have been justified in doing had he stopped to make such an inquiry. He might just as well have inquired whether the arrest had been unnecessarily harsh, as to have inquired whether the detention had been unnecessarily long. The justice of the peace had no duty to perform, except to proceed upon the case as a case of a person taken *flagrante delicto* having been arrested and detained by the officer and brought before him. That, therefore, I think, disposes altogether of the question about unreasonable detention. But I must say that, looking at it as a question of fact, if I had to decide it only as jurymen, I should say that there was no unnecessary detention at all. The man was taken, and for aught that appears would have been immediately brought before the justice that same evening if a justice could have been found. But, for some reason not explained, the officer of excise goes first to one justice of the peace and then to another, and none of the justices chooses to entertain the jurisdiction, till at last forty-eight hours after the man had been taken the excise officer does find a gentleman of the name of Torrance who does entertain the jurisdiction and convicts him. It appears to me, therefore, that this unreasonable detention, which seems to have been the only ground on which the Court of Session proceeded, entirely falls to the ground. It was not a question that could come into contest before the justice even if the facts had warranted it; and in truth the facts would not warrant it if it had come before the justice. That may be considered as a question of substance: all the other questions are questions really and entirely of form. I had at one time a doubt whether the conviction was drawn up in the proper form; but I think that what was pointed out by my noble and learned friend is unanswerable on that subject, namely, that the substance being right, the authority of the Court of Session to inquire into the form is taken away by the 79th section of the statute. That the court had jurisdiction to inquire into such matter if it had appeared on the face of the proceedings that the justice was acting without jurisdiction, I can entertain no doubt. I do not think that the statute meant to give exclusive jurisdiction to any justice of the peace



or to any tribunal, to imprison one of her Majesty's subjects, without its being distinctly shown on what ground he was imprisoned, and that he was lawfully imprisoned; but all the rest being entirely a matter of form, the right of suspension is taken entirely away. Upon the whole, therefore, I think that the Court of Session have certainly come to an erroneous conclusion, and that the decision must be reversed.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend upon the woolsack, that the general jurisdiction of the Court of Session is not taken away by any of the provisions of the Acts to which reference has been made. If, therefore, the magistrate had been acting without any jurisdiction, I apprehend that it would have been competent to the Court of Session to have entertained these proceedings. But supposing the magistrate has jurisdiction, then, according to the opinion of my noble and learned friend upon the woolsack, in which I entirely agree; the 79th section of the 7 & 8 Geo. 4, c. 53, took away from the Court of Session the power of granting a note of suspension. Therefore, in this case, the real substantial question is, whether the magistrate had or had not jurisdiction under the circumstances over the particular case. Now I confess that, upon the question of the magistrate's jurisdiction, I am unable to agree either with the conclusion at which the Court of Session arrived, or with the reasons which they have given for that conclusion. They thought that the proceeding under the 33rd section of the 7 & 8 Geo. 4, c. 53, was incompetent, in consequence of what they regarded to be an illegal detention of the resp. because he was not brought before the justice in the manner prescribed and authorised by the statute; that it ceased to be a proceeding, an immediate arrest under the Act, from the nature of the detention, the resp. not being conveyed before the justice by the excise officer, but being brought up as a prisoner in the hands of the gaoler. It is to be observed that, upon this single point, upon which the Court of Session decided, the Lord Ordinary seemed rather to be of opinion that the detention or imprisonment, or whatever it is to be called, was not sufficient in itself to make out the conviction bad; and I think it is perfectly clear that it could not have that effect. For, let us look to the object and to the words of the 33rd section of the Act, upon which the question turns. The object of that section of the Act was to provide for the immediate apprehension of offenders who were likely to escape from justice. And, accordingly, it empowers the officer, where any person is discovered assisting in the illegal manufacture, that is the illicit distillation of spirits, to arrest and detain every person so discovered, and to convey him or her before one or more justice or justices, &c.; so that the officer is empowered to arrest and detain. Arrest and detention are here in a certain sense synonymous terms. But inasmuch as the officer is to convey the offender before a magistrate, there must necessarily be some detention following the arrest, in order to enable him to perform his duty in that respect. Now, detention is of various kinds. It may be by the officer keeping hold of the person that he has so arrested and detaining him in that manner. It may be by locking him up in a room under the charge of some persons who are intrusted to watch over him, while the officer goes for the purpose of finding some justice of the peace. And it is admitted on the part of the resp. that such detention would be lawful in every case where the room, or the parties who were watching that room, were under the control of the officer. But it is said that in this particular case, the man having been lodged in a gaol, from that moment the detention ended in the sense of the Act of Parliament, and that the new species of custody in the nature of an imprisonment changed the character of the detention, and made the party no longer under the

control of the officer. Now, it appears to me that you cannot, by using the term incarceration or imprisonment, alter the nature of the thing. It may still be detention, although the detention is in a gaol or lock-up house, and not in a private house, in which it is admitted that the detention would be lawful under the Act of Parliament. Because, after all, the persons have the control over and the custody of the offender. It is not a change of custody as long as they are holding him upon the authority of the officer and further purpose of detaining him under the Act of Parliament. Now, when the party under these circumstances is brought before the magistrate, I quite concur with my noble and learned friend (Lord Cranworth) that the magistrate has nothing to do with the mode in which the party has been dealt with after he has been arrested. When he is discovered, and immediately arrested by the officer, then the jurisdiction of the magistrate would attach, and it would be no part of the duty of the magistrate to inquire, when he found that there had been a delay, as in this instance, of two days, why it was that the party arrested *flagrante delicto* was not immediately brought before him. The whole of his duty is to ascertain whether the offence has been committed, whether the party was discovered assisting in the illegal distillation, and if he were so discovered, and immediately arrested, that is quite sufficient to give the magistrate jurisdiction, and the magistrate has no duty to inquire further or to ascertain whether since his arrest he has been actually in the immediate keeping of the officer, or whether he has been in some other custody, but still under the charge of the officer, and under his control. This case was likened by the Lord Justice Clerk to the Scotch case of *Hay v. Linton*, and yet it is impossible to conceive any one thing more distinguishable from another than the case of *Hay v. Linton* from the present case. What was the case of *Hay v. Linton*? It was a proceeding under an Act of Parliament which authorised constables to bring before a magistrate any child under fourteen of years of age found wandering in the streets without any home, proper guardianship, or visible means of subsistence, and the magistrate was authorised, if no person appeared after intimation being given to provide for the child and find security to that effect, to order such young person forthwith to be transmitted and received at any reformatory school. Now, when a destitute child is brought before a magistrate under the provision of that Act, it is quite clear that when intimation has been made, the child is to be taken care of in the mean time until it can be ascertained whether any person will appear and give the requisite security. But in that case, instead of taking care of the child in that manner, the magistrate granted a warrant to detain the child in the cells of the police office. Therefore, when the child was brought up after the period of intimation had expired, it was insisted, or rather it was afterwards insisted, when the child had been sent to the reformatory, that the jurisdiction of the magistrate had ceased, because the character and condition of the child had altogether changed; and so the Lord Justice Clerk puts it very clearly. When the order was afterwards pronounced, the child was no longer before the magistrate in the position contemplated by the statute—that is, brought before him immediately upon being found in the streets in a state of destitution—but, on the contrary, was brought up as a prisoner from the cells of the police. Now, what possible analogy can there be between that case and the present? The character of the immediate arrest changed in this case by reason of the subsequent detention. Is there any change in the evidence to prove that the party was discovered in the act of illicit distillation? It is clear that the analogy between the two cases altogether fails, and that there was nothing whatever in the circumstances of the detention,

V.C. S.]

CARDINALL v. MOLYNEUX.

[V.C. S.]

even supposing it had been an illegal detention, which would take away from the magistrate that jurisdiction which attached to him under the Act by reason of the discovery which was made of the party and the immediate arrest upon that discovery. I wish that it may be understood that I do not intend to express any opinion which might countenance the delay which took place upon the present occasion in carrying the offender before a magistrate. My noble and learned friend (Lord Cranworth) thinks that there was no unnecessary delay, and we may be right in that respect. But I am bound to say that, even if there was an improper delay, the officer was placed in a situation of great difficulty and embarrassment in consequence of the refusal of one or more of the magistrates to hear the case. However, I am so perfectly clear with regard to the question as to the jurisdiction of the magistrate not being taken away, that I could not have entertained any doubt whatever upon the subject, if it had not been for the very high respect which I entertain for the judgment of the learned judges of the Court of Session who have decided this question. With regard to the other objections which have been raised, in my opinion they are really very frivolous. I entirely concur with the opinion which has been expressed by my noble and learned friends, and I think that upon the present occasion the decision ought to be reserved. *Decision reversed.*

App's agents, *Holmes and Co.*Resp's agent, *J. Timm.*

### V. O. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-Inn, Barrister-at-Law.

Wednesday, March 13.

CARDINALL v. MOLYNEUX.

*Scheme for fitting up the interior of a church certified to and approved by the court—Incumbent ordered to take and concur in proceedings for obtaining a faculty—Injunction.*

*The deft. M., who was the incumbent of a perpetual curacy, without the consent of the churchwardens or parishioners, and without having obtained a faculty, employed the deft. G., a builder, to remove the pews, sittings, and a gallery from the parish church. This was effected by the deft. G. on the 30th March 1859. On the same day another deft. (R., an auctioneer) advertised the materials so to be taken out of the church for sale on the following day. A bill for an injunction was filed by the plt., one of the churchwardens, on behalf of himself and all the other parishioners, on the 31st March; and an injunction was obtained and served on the defts. the same day. On the 4th April a supplemental bill was filed by the plt. against the incumbent M. and the deft. G., stating that the deft. G. was now proceeding to take up the floor of the church, and to place brickwork there, with the view of substituting chairs and benches for pews. On the 21st April the motion came on for hearing, but was adjourned. On the same day, a number of chairs, about 200, were placed in the church, and divine service was resumed on the 24th April. On the 12th May an injunction was granted, restraining the defts. from altering the floor, &c., with liberty to both parties to lay proposals before the judge in chambers, for filling up the interior of the church, and providing proper accommodation therein for the minister and parishioners, such proposals to be subject to the approbation of the bishop and archdeacon of the diocese. Proposals were sent in by both parties, and returned with the bishop's observations. The bishop said he had the strongest objection to chairs. The whole papers were sent to the chief clerk, who pre-*

*pared a scheme, which was approved by the bishop and archdeacon, and finally by the judge:*

*On motion to make the injunction perpetual, a perpetual injunction was granted; the defts. were decreed to take and concur in all necessary proceedings for the purpose of obtaining a faculty; and the costs of the suits were ordered to be paid by the defts.*

This was a motion on behalf of the plt. for a perpetual injunction against the defts. the Rev. John William Henry Molyneux and George Grimwood to the effect prayed by the first and second paragraphs of the original bill, and by the second paragraph of the supplemental bill; and that the defts. in the two suits, or some or one of them, might pay the costs of the two suits respectively.

The original bill was filed by George Cardinall on behalf of himself and all other the parishioners of the parish of St. Gregory, in the borough of Sudbury, against the Rev. Mr. Molyneux, William Rowland Rolfe and George Grimwood. The statements in the original bill were to the following effect:—The plt. Mr. Cardinall was one of the churchwardens of the parish of St. Gregory, Sudbury, which was a perpetual curacy, of which Mr. Molyneux was the incumbent, the number of inhabitants being more than 1000. About nine months before the filing of the bill, Mr. Molyneux caused the church to be closed for the purpose of effecting certain repairs in the roof. This proceeding was taken without the consent of the plt. or of the parishioners, and without the immediate authority of the bishop. The bishop's surveyor afterwards reported the repairs, and it was then considered that Mr. Molyneux was no longer acting without the bishop's authority. On the 30th March 1859 Mr. Molyneux caused the pews of the church, and also a large gallery at the west end, to be cut down, severed, and removed. For this purpose he employed the deft. George Grimwood, who was a builder; and on the same day the deft. Mr. Rolfe, who was an auctioneer, published a placard in Sudbury advertising for sale on the following day a quantity of building materials, consisting of doors, door-frames, sashes, casements, two staircases, panneling, &c., arising from the repairs of the church of St. Gregory. Mr. Cardinall and other parishioners on the morning of the 31st March served Mr. Grimwood with a notice addressed to all three defts., not to remove, sell, or dispose of the pews and sittings, or the materials thereof, and that it was his intention to apply for an injunction. The bill was filed on the same day.

It prayed (para. 1 and 2) that the defts. Molyneux and Grimwood, and their respective agents, &c., might be restrained by injunction from further destroying, cutting down, severing, or removing the pews and sittings of or in the said church, or any of them, or the gallery of the said church, or any of the other internal fixtures and fittings of the said church, or any of the materials or pannelled work forming the said pews, sittings, gallery fixtures and fittings respectively, or of which the same respectively are or were composed; and that the said defts. might be restrained from selling, or disposing of, or putting up, or exposing, or offering for sale, or holding any sale by auction, of the building materials and pannelled work mentioned in the said published notice or advertisement or particulars of sale before mentioned, or any of them, or the said pews, gallery fixtures and fittings respectively, or any of them, or any of the materials or pannelled work of which the same respectively was composed.

An injunction restraining the sale was granted by Stuart, V.C. on the same day, the 31st March. In the afternoon of that day a telegraphic despatch, containing notice of the order, was served upon Mr. Rolfe, at about half-past four o'clock, whilst he was actually selling lot 84 on the Market-hill, at Sudbury. The plt.'s evidence went to show that Mr. Rolfe disregarded the

V.C. S.]

CARDINALL v. MOLYNEUX.

[V.C. S.]

notice, and went on with the sale for about half an hour afterwards; also that George Grimwood was standing by; that he knew of the contents of the dispatch, but nevertheless assisted to continue the sale. Mr. Grimwood denied that he knew of any telegraphic message whatever having been sent till seven o'clock in the evening. Mr. Rolfe said he did not believe that lot 84 contained boards from the church. He said he did not know the contents of the paper till he had sold lot 84, and that none of the other lots, which were ten in number, contained any materials from the church. Regular notice of the injunction was served on all the defts. in the course of the evening, but there was some conflict of evidence as to the time of service. Mr. Drew, the clerk, whose evidence was confirmed by Mr. Gooday, the plt.'s solicitor, said he served it on Grimwood at a quarter past five, on Mr. Molyneux at about twenty minutes to six, and on Mr. Rolfe about eight. Mr. Grimwood said that no notice was served on him until at least half-past six. Notice of motion on the 4th April ensuing, to commit the defts. Grimwood and Rolfe for contempt, was served on them the same evening.

On or about the 4th April 1859 the plt. George Cardinall filed a supplemental bill on behalf of himself and all the parishioners of St. George's Sudbury, against the Rev. Mr. Molyneux and George Grimwood. It stated that, notwithstanding the order of the 31st March, Mr. Molyneux having removed the pews and sittings, was then taking or pulling up the floor of the church, and placing brickwork there with the intention of raising portions of the floor, and substituting chairs and benches for pews, and was, in fact, so altering the floor of the church and the materials of which it was formed, as to render the same unsuitable for pews. Mr. Molyneux was also about to remove the west window of the church and to place a new window in lieu thereof. He was also causing a hole to be cut in the brickwork of the outer wall on the south side of the church for the purpose of effecting some alteration the nature of which was unknown to the plt. The deft. Grimwood was the person employed in carrying out these alterations, which were being made without the consent of the plt. as one of the churchwardens, without the consent of the parishioners, or of the bishop, and without any licence or faculty in that behalf. The supplemental bill prayed that the defts., their agents, &c., might be restrained from taking up or altering, or causing to be taken up or altered, the floor of the said church, or altering or causing to be altered, any of the walls or brickwork of or in the said church, or executing or causing to be executed any works or alterations affecting the floor, walls, or brickwork of the said church, or affecting the internal arrangement or structure of the said church or any of the pannelled work, fixtures, or fittings pertaining thereto (and further by amendment on the 26th May 1860), "until a faculty for the purpose had been duly obtained."

The supplemental bill also prayed (par. 2) that the defts., or one of them, might be decreed to account for and pay to the parishioners of the said parish or the churchwardens of the said parish, for and on account of the parishioners, the value (to be ascertained in such manner as the court should think fit) of the said pews, sittings, gallery fixtures and fittings so destroyed or removed as aforesaid, and of all and every other the materials and effects belonging or pertaining to the said church which had been destroyed, removed, or taken away by or under the direction of the defts. or either of them, and should replace or restore, or pay the costs and charges of replacing and restoring the said pews, sittings, gallery fixtures, fittings, materials and effects.

On the 20th April an interim order for an injunction against the two defts. Mr. Molyneux and Grim-

wood in the terms of the first paragraph of the prayer of the supplemental bill, i.e. restraining them from altering the floor of the church, &c., was granted until the following day; and on the 21st April the injunction was enlarged till the 5th May, and the motion on behalf of the plt. to attach the defts. Grimwood and Rolfe for contempt of the injunction of the 31st March, was also ordered to stand over to the same date.

From the evidence it appeared that on the same day, the 21st April, Mr. Molyneux and Mr. Hasell his churchwarden issued handbills to the effect that, notwithstanding the incomplete state of the repairs of the church, in order to carry out the original intention, and to prevent disappointment to the parishioners, it was determined to use the church in the afternoon in its present rough and disordered state. On the same day a large number of chairs, about 200, were placed in the church; and divine service was held in the church in the afternoon of Easter Sunday, the 24th April following.

The two motions again stood over from the 5th to the 12th May. On the latter day the V.C., after hearing the evidence, granted an injunction restraining the defts. Mr. Molyneux and Grimwood in the terms of the first paragraph of the prayer of the supplemental bill, and ordered that the plt. and defts., and any of the churchwardens of the parish, should be at liberty to lay before the judge in chambers proposals for filling up the interior of the church and providing proper accommodation therein for the ministers and parishioners of the parish, for the performance of divine service, such proposals to be subject to the approbation of the bishop and archdeacon of the diocese of Ely.

On the motion to attach the defts. Grimwood and Rolfe, his Honour, after observing that there appeared to have been no deliberate intention to break the injunction, and remarking upon the conflict of evidence as to the time of service, said, that the conduct of the defts. had been improper, and in contempt of court; and ordered the defts. Messrs. Grimwood and Rolfe to pay 15*l.* each towards the costs of the motion; and as their expressing their contrition, made no further order on the motion.

In compliance with the above order, the plt. and the defts. each sent in proposals. The main point of difference was as to the pews. The plt. proposed that the pews which had been removed should be replaced. The defts. proposed to find benches for seating the congregation, as far as the present seating by chairs and benches was insufficient. As to the gallery also, at the west end of the church, the plt. proposed that it should be replaced on a plan to be approved by the bishop, and the organ restored therein. The defts. proposed to erect the organ at the east end of the north aisle, and to open and glaze the west window, which was partially bricked up. These proposals were laid before the bishop, who made several observations thereon. As to the pews, he said he had the strongest objection to chairs. He was not averse to a gallery with an organ therein, but not having a plan of the church before him, he could form no opinion whether it should be on the old site. He repeatedly and strongly urged that nothing could be carried into effect without a faculty. Further replies were sent by the plt. and observations returned by the bishop, and the whole of the documents were laid before the chief clerk. The matter stood over for a time to enable Mr. Molyneux to apply for a faculty.

In May 1860 the deft. Mr. Molyneux and James Hasell, churchwarden, presented a petition to the chancellor of the diocese of Ely, praying for a faculty to perform the works set forth in the petition; and a citation was issued under the seal of the chancellor of the diocese. It recited the petition, alleging that the following further works were required to complete the restoration of the church: the floor of

V.C. S.]

GRUBB v. THE INCLOSURE COMMISSIONERS.

[C. B.]

the church to be completed, the pulpit to be re-erected in its former position, and the sounding-board to be removed; a new reading-desk to be erected; the font to be placed at the north-west end of the nave; the organ to be placed at the east end of the north aisle. In addition to the present accommodation, to complete the seating of the church with benches similar to the best of those now in the church, the bricks which at present block up part of the west window to be removed, and glass substituted, and the windows of the church generally repaired, and where necessary re-glazed, and the walls repaired. The petition alleged further that a meeting of the incumbent, churchwardens, parishioners and inhabitants of the parish was held in vestry on the 10th May 1860, at which the said proposed works were approved; and that the cost, estimated at £70*l.*, was intended to be raised, and was for the most part already raised, by voluntary subscription, without a church-rate. The citation then recited the prayer for a faculty, and cited the parishioners to appear and show cause against the faculty before the surrogate at St. Mary's Church, Cambridge, on the 26th May.

The "present accommodation" referred to in the petition was the providing of loose chairs instead of benches or pews.

The court was adjourned until the 9th June. On the 7th June Mr. Gooday, the plt.'s solicitor, as he deposed, called with the plt. George Cardinall upon Mr. Molyneux, for the purpose of endeavouring to come to some terms or arrangement respecting the fitting up of the church, but Mr. Molyneux declined any such arrangement. On Saturday the 9th June Mr. Gooday attended the hearing of the application for the faculty on behalf of the plt. and other inhabitants. He stated in his affidavit that he opposed the granting of such faculty, except in strict accordance with the decision and approval of the bishop. Mr. Molyneux also attended, and refused to modify or alter his application. Thereupon, after hearing both sides, the Court refused to decree the faculty, on the ground, as Mr. Gooday alleged, that the deft. "did not propose to carry out the refitting of the said church in accordance with the bishop's suggestions and approval."

The chief clerk made his certificate, dated the 3rd Dec. 1860, whereby he certified that, in pursuance of the order of the 12th May 1859, the plt. and the deft. Mr. Molyneux had each laid before the judge proposals for fitting up the interior of the church and providing better accommodation, &c.; and that it would be fit and proper that such interior should be fitted up, and such accommodation provided according to the plan thereto annexed; which plan had been approved of by the bishop and archdeacon of the diocese of Ely, as was admitted by the plt. and defts. The plan was as follows:—"1. The church to be properly floored and fitted up with single pews, according to the plan of pews in modern churches, or with open benches. The question of the general style and character of the pews or benches to be settled in the proceedings requisite for obtaining a faculty. 2. The font to be placed at the west end of the church. 3. The pulpit to be lowered, and a new reading-desk erected, as shown on plan; and the sounding-board to be removed. The pulpit and reading-desk to be in character with the general fittings of the church. 4. The organ to be placed as shown on the plan (i.e. between the north aisle and the chancel). 5. The west window of the church to be opened, and properly glazed."

The V. C. approved the certificate on the 10th Dec. Bacon, Q.C. and T. H. Terrell now supported the motion in the terms above mentioned.

Mahne, Q.C. and Surrage appeared for the defts.—The only question remaining was as to the costs of the suits. They contended that Mr. Molyneux's proposals were reasonable in themselves, and were supported by

the views of a large portion of the inhabitants of the parish.

The VICE-CHANCELLOR said he thought he could not refuse the plt. his costs. There would be one order in both suits. The injunction to be made perpetual in the terms of the notice of motion. The defts. must be decreed to take, and concur in, all necessary proceedings for the purpose of obtaining a faculty for repairing and restoring the church, according to the scheme set forth in the schedule to the chief clerk's certificate, with liberty to all parties to apply. The costs of the suit, other than the costs of the motion to commit, must be paid by the defts.

Solicitors: for the plaintiff, *Chilton and Burton*, agents for J. F. S. Goodey, Sudbury; for the defts., *Drew*.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs.  
Barriers-at-Law.

Wednesday, Jan. 30.

GRUBB v. THE INCLOSURE COMMISSIONERS.

*Inclosure—Setting out private roads over lands allotted by Inclosure Commissioners, no mention of such roads being made in the provisional order.*

*The Inclosure Commissioners having by their provisional order apportioned certain lands to the plaintiff, the valuer proceeded to set out a private road over part of it, which was objected to by the plaintiff, who contended that the valuer had no right to do so, as no mention was made in the provisional order of such road:*

*Held, that under sect. 68 of 8 & 9 Vict. c. 118, and sect. 4 of 11 & 12 Vict. c. 99, the valuer had power to set out such road, notwithstanding there was no mention of it in the provisional order.*

This was a rule called on the plaintiff to show cause why a prohibition issued out of the Petty Bag-office against the Inclosure Commissioners, ordering them to cease operations in the inclosure of lands in the parish of Hughenden, in the county of Buckingham, should not be set aside. The commons and waste lands being about to be inclosed, by the provisional order certain lands were allotted to the plaintiff, over which the valuer set out a private road, and the question was whether under the Inclosure Acts the valuer had such power, no mention of the road having been made in the provisional order.

*Lush, Q.C. (Couch with him)* showed cause.—The question is, as to whether the commissioners in setting out this road have exceeded their jurisdiction and acted in violation of the provisional order. I maintain that, inasmuch as no mention was made in the provisional order which allotted this land to the plaintiff of any road to be made over such land, the valuer had not power to set it out.

*Bovill, Q.C. (White with him)* appeared in support of the rule.—The 68th section of 8 & 9 Vict. c. 118, and the 4th section of 11 & 12 Vict. c. 99, give the valuer discretionary powers in setting out roads, and he has done no more than these sections authorise him to do.

*ERLE, C. J.*—I am of opinion that the rule to set aside this prohibition should be made absolute, as I do not think, as has been contended for, that the commissioners have exceeded their authority by setting out a private road over the close allotted to the plaintiff, he having taken the close subject to the provisions of the Inclosure Acts. The 8 & 9 Vict. c. 118, seems to have contemplated the setting out of private ways, and has given the commissioners power to do so, when in their discretion they may consider that they are required. In sect. 34 it is said that the instructions to the valuer are to be "not inconsistent" with the provisional order; sect. 61 also provides that what is done by the valuer is

not to be inconsistent with the conditions and instructions hereinbefore mentioned; and sect. 62 says that the valuer shall and may, before making allotments of the land to be inclosed in pursuance of, or in any manner not "inconsistent" with the instructions given to such valuer, as aforesaid, set out and make public roads and ways; but in sect. 68, which relates to the power of the valuer to set out private roads, the words "not inconsistent" are omitted, the words being "as he shall think requisite for the use of the persons interested in such lands or any of them." I am of opinion that the plaintiff has had this allotment assigned to him subject to these provisions. The words in sect. 4 of 11 & 12 Vict. c. 99, giving the valuer power to set out private roads, are very wide, and give the commissioners a jurisdiction which I do not consider they have exceeded.

WILLIAMS, J.—I am entirely of the same opinion, and as at present advised, giving the true construction to the provisional order, I think that the commissioners had power under sect. 68 to subject this allotment to have a private road made over it. It is said that the valuer has not acted according to the provisional order, but I do not think so, and I see nothing in the order which precludes him from dealing with this allotment in the same way as with the others. It has been said that the valuer having so much power he might do something which would be unjust, but we must deal with this case in the same way as the case of *Stockdale v. Hansard*, 8 Dowl. 669, and assume that he would not abuse his power.

KRATING, J.—I also am of opinion that the commissioners have not exceeded their jurisdiction in setting out this private road. It is of great importance that the terms of the Act should be strictly adhered to; and as to this provisional order, I think the meaning of it is, that the plaintiff was to take the lands allotted to him subject to the provisions of the Act, and therefore this rule must be made absolute. *Rule absolute.*

Attorneys for defendants, *White and Borrett.*

Jan. 25 and Feb. 25.

THE TRUSTEES OF THE MERSEY DOCKS v. CAMERON. *Non-liability to pay poor-rate by reason of the occupation not being beneficial—Exemption is a ground of appeal, and an action in respect of a levy made to enforce the rate cannot be maintained.*

*Where property has been rated to the poor-rate, and it has been decided that such property is exempted by reason of the occupation not being beneficial, the party so rated cannot maintain an action of replevin for a levy made to enforce such rate, but he must seek his remedy by an appeal to the quarter sessions.*

This was an action of replevin brought by the plts. against the defts. for the taking and detaining of certain goods and chattels of the plts., and by the consent of the parties a case was stated for the opinion of the court, which, however, it is not necessary to set out, as the main question, which was whether the plts. had such a beneficial occupation of the dock estate as to render them liable to be rated to the relief of the poor, has been already decided by the court in the negative in the case of *The Mersey Docks and Harbour Board v. Jones*, 3 L. T. Rep. N. S. 212.

Another question was, however, left to the court, viz., whether if the plts. were not liable to be rated they could maintain their action.

On behalf of the defts. it was contended that, even if the plts. were not liable to be rated by reason of their occupation not being beneficial, this exemption furnished only a ground of appeal to the court of quarter sessions against the rate, and not for an action in respect of a levy made to enforce the rate.

Sir F. Kelly (Quain and Parker with him) appeared for the plts., and cited *Harrison v. Woolcot*, 1 H. Bl. 9; *Lord Amherst v. Lord Somers*, 2 T. R. 372;

*Labourin v. Marshall and another*, 3 B. & Ad. 440; *Fletcher v. Williams*, 6 E. 283; *R. v. Morpyn*, 2 A. & E. 618; *George v. Chambers*, 11 M. & W. 149; *Jones v. Johnson*, 5 Ex. 862; *Newbold v. Colman*, 6 Ex. 189; *Morrell v. Martin*, 3 Man. & Gr. 581; *Marshall v. Pitman*, 9 Q. B. 595; *The Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868; *Reg. v. Bradshaw*, 2 L. J., 176, M. C.

Mellish (Hutton with him), for the defts., cited *The Metropolitan Board of Works v. The Vauxhall Bridge Company*, 26 L. J. 253, Q. B.; *Reg. v. Bradshaw*, 29 L. J. 126, M. C.; *Earl of Radnor v. Beauchamp*, 2 Bos. 391; *Governors of the Poor of Bristol v. Weyte*, 1 A. & E. 264.

ERLE, C. J.—When the case of *The Mersey Dock Trustees v. Jones*, 8 G. B. 114, was before us, we thought ourselves bound by the authority of the decision of *Reg. v. The Inhabitants of Liverpool*, 7 B. & C. 61. The present case involves the same point, and if no other question had been raised we should have deferred giving our judgment until the Court of Ex. Ch. should have affirmed or reversed our decision. But a second point has been raised on the part of the defts., viz., that even if the plts. are not liable to be rated by reason of their occupation not being beneficial, this exemption furnishes only a ground of appeal to the quarter sessions, and not for an action in respect of a levy made to enforce the rate. In support of this contention the cases of *The Overseers of Birmingham v. Shaw*, 10 Q. B. 868; *Reg. v. Bradshaw*, 29 L. J. 176, M. C., were cited. It cannot be denied that these deliberate decisions of the Court of Q. B. are directly in point in favour of the defts., and we think it is our duty to defer to them, and to leave all further argument respecting them for the consideration of a court of error. Possibly the two points may resolve themselves into one, viz., whether there can ever be an exemption from the liability to rate where there is an actual occupation by the person rated; in other words, whether the true ground on which an occupation for public purposes has been held an exemption be not that in such cases the occupation was that of the public, and there was not an occupation at all by the person rated, and whether, therefore, the principle is not inapplicable whenever there is an actual occupation notwithstanding he derives no individual benefit from his occupation. If this be so, the actual occupation may well be regarded as bringing the case within the statute of Elizabeth, so as to render an appeal to the sessions the only proper mode of disputing the propriety of the rate; but if the exemption be regarded as based on the doctrine that the word "occupier" in the stat. Eliz. which gave powers to raise money of every occupier of land ought to be construed to mean "beneficial occupier," then it is certainly more difficult to understand the principle on which the decision in *Birmingham v. Shaw* proceeded; because, if this be so, the statute may be read as if the words of it were "every beneficial occupier;" how then can a valid rate be made on an occupier who is not a beneficial one? Surely, there can be no distinction in such a construction of the statute between a man not an actual occupier of any rateable property who clearly is not put to an appeal, and a man not a beneficial occupier, seeing, that if the statute be so read, one is just as much out of the reach of it as the other. *Judgment for defendants.*

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HARTLEY, Esqrs., Barristers-at-Law.

Tuesday, Feb. 12.

REG. v. LEATHAM.

*Evidence—Close to document—Privilege of protection—Corrupt Practices Act—Appeal.*

Q. B.]

REG. v. LEATHAM.

[Q. B.]

*If a confession of a crime be improperly obtained so as to be inadmissible in evidence, yet if in the course of such confession a clue is given to other evidence which will prove the case, such latter evidence is admissible.*

*Where a document cannot be produced by reason of privilege, independent secondary evidence of it is admissible.*

*On an inquiry before commissioners under the 15 & 16 Vict. c. 57, to examine as to corrupt practices at an election for a member of Parliament, a letter was produced, written by A., the party suspected of bribery, to his agent, in answer to one from the agent, asking for an account of sums advanced; this letter was produced by the agent. On an information being subsequently filed against A., this letter was called for and produced by the secretary to the commissioners, in whose hands it had remained, and on the letter of the agent to which it was an answer being called for, and not being produced, secondary evidence of it was tendered and admitted:*

*Held, that such evidence was properly admitted, and that the provision in 15 & 16 Vict. c. 57, s. 8, that "no statement made by any person in answer to any question put by a commissioner, shall, except in cases of indictment for perjury, committed in such answers, be admissible in evidence in any proceeding, civil or criminal," was not applicable, and did not prevent the admission of such evidence.*

*There is no appeal from the decision of this court on a rule for a new trial of an information at the suit of the Attorney-General.*

This was an information at the suit of the Attorney-General against the defendant, for certain offences against the Corrupt Practices Act, alleged to have been committed at the Wakefield election. It was tried before Martin, B. at York, when a verdict was returned for the Crown. Subsequently a rule was obtained to set aside that verdict, and for a new trial, on the ground that there was no evidence of a payment being made to a person named Gilbert in support of the first count of the information, and that the contents of a certain letter, written by a person named Wainwright, an agent of the defendant, to the defendant, and the defendant's letter in answer to Wainwright, had been improperly admitted in evidence.

*The Solicitor-General, Overend, Q.C., Monk, Q.C., and Cleasby now showed cause.*—[The Crown having determined to enter a *nolle prosequi* on the first count, the question as to the admission of the letters in evidence alone remained.] The two letters in question were dated respectively the 4th and 5th April 1859. The first was written by Wainwright to the defendant, asking for an account of sums advanced by him for election purposes, and was put in evidence in order to explain what the defendant's letter of the 5th Ang. was an answer to. This last-named letter was in the following terms:—"Hemsworth-hall, Pontefract, Ang. 5, 1859. Dear Sir,—In reply to your inquiry I beg to hand on the other side the sums of money which were advanced by myself and friends for election purposes, &c. Signed, W. HENRY LEATHAM;" and then followed a list of sums amounting in all to about 4461l. 18s. 8d. The defendant had been summoned to attend before the commissioners on the Wakefield election, and questions were then put to him which he answered. He was also summoned to produce papers, &c. in his possession. His examination took place in October, and in November following Mr. Wainwright, who was also summoned as a witness, sent in the defendant's letter of the 5th Ang. to Mr. Dew, the secretary of the commissioners, who produced it on the trial of this information, and it was then found to be in defendant's handwriting. The other letter of the 4th Ang. defendant had notice to produce, but not having

[MAG. CAS.]

done so, secondary evidence of it was received in the usual manner.

Sir F. Kelly, Q.C., Edward James, Q.C., Price and Quain were called on in support of the rule.—The 15 & 16 Vict. c. 57, introduced a principle and practice unknown before. The 6th section provides for inquiry into the existence of corrupt practices at elections; and such commissioners are to report to her Majesty, and their reports are by the 7th section to be laid before Parliament. The 8th section enacts that it shall be lawful for such commissioners by summons under their hand and seal, or under the hand and seal of any one of them, to require the attendance before them of any persons whomsoever, whose evidence in the judgment of such commissioner or commissioners may be material to the subject-matter of the inquiry to be made by such commissioners, and to require all persons to bring before them such books, papers, deeds and writings as to such commissioners or commissioner appear necessary for arriving at the truth of the things to be inquired into by them under the Act. It then enacts that all such persons shall attend such commissioners, and shall answer all questions put to them by such commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds and writings required of them and in their custody, or under their control, according to the tenor of the summons. It then provides "that no statement made by any person in answer to any question put by such commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding civil or criminal." The 9th section enacts, for the more effectually prosecuting any inquiry under the Act, that every person who has been engaged in any corrupt practice at or connected with any election of a member of Parliament, and gives evidence touching such corrupt practice before the commissioners, and who upon such examination makes a true discovery to the best of his knowledge touching all things to which he is so examined, shall be freed from all penal actions, forfeitures, punishments, disabilities and incapacities, and all criminal prosecutions to which he might have been or might become liable or subject at the suit of her Majesty for anything done by such person or persons in respect of such corrupt practice; and that no person shall be excused from answering any question put to him by such commissioners on the ground of any privilege, or on the ground that the answer to such question would tend to criminate such person. The 10th section enacts that when any witness is so examined as aforesaid, he shall not be indemnified under the Act unless he receive from the commissioners a certificate in writing under their hands, stating that he has upon his examination made a true disclosure touching all things on which he was so examined; and that if any action, information, or indictment shall be at any time pending in any court against any person so examined as a witness for any corrupt practice at any election to which the inquiry made by such commissioners has reference, such court shall, on the production and proof of such certificate, stay the proceedings in any such action, information, or indictment, and may in its discretion award to such person such costs as he may have been put to by such action, information, or indictment. The 11th section gives the power to the commissioners to examine witnesses on oath; and the 12th section contains provisions for compelling the attendance of witnesses, and to compel them to answer questions and produce documents. The proviso in the 8th section, that no statement shall be admissible in any proceeding applies to statements in writing as well as verbal statements, and any document produced under that Act is a "statement" which cannot be admitted in evidence. [BLACKBURN, J.—The written document in question was written prior to the statement made

Q. B.]

REG. v. WILMOT.

[Q. B.]

to the commissioners, and was evidence prior to that statement. Is there anything in the Act which says that that which was evidence before shall cease to be evidence?] The defendant's letter was not evidence before he was examined and made his statement; its existence was not known, and could not have been known but for this act; its existence was found out by the examination of the defendant. If the court should be of opinion that this rule should be discharged, I shall ask leave to appeal. [CROMPTON, J.—What in a criminal matter? The Act giving an appeal does not apply to criminal cases. It is clear there is no appeal. HILL, J.—The way in which this question arises should be distinctly understood. The defendant's letter was not given, sent, or produced by Leatham to the commissioners—it was produced by Wainwright; then, as to the other letter, notice was given to Leatham to produce it, and he did not do so, and then secondary evidence of it was properly received.] The privilege and the protection must be equally large; wherever, if the privilege had been claimed, the evidence would have been excluded, the protection extends. Whenever a man is compelled to answer and produce, he is protected; here the first clue to the letter proceeded from the defendant. [CROMPTON, J.—Suppose you, by threats and promises, obtained a confession of murder which would not be admissible, but you also obtain a clue to a place where a written confession may be found, or where the body of the person murdered is secreted; could not that latter evidence be made use of because the first clue to it came from the murderer? It matters not how you get it; if you steal it even, it would be admissible in evidence. [BLACKBURN, J.—I never heard of a case where a man served with a *subpoena duces tecum* claimed his privilege. I know it is so laid down in Taylor on Evidence, but the cases do not bear it out.] It is also so laid down in Starkie and Phillips. [BLACKBURN, J.—How often are documents taken out of a prisoner's pocket and produced against him; you would say he might claim his privilege.] There they are obtained by physical force; but suppose the man was in the witness-box and said he had such a document in his pocket, but declined to produce it, as it would criminate him; he would be protected. The same rule applies to written and oral testimony in construing this statute.

CROMPTON, J.—I am of opinion that this rule ought to be discharged. The matter is important; but I entertain no doubt as to the meaning of the Act of Parliament. The court has no means of sending the case to a higher court, but it is not a case of doubt and difficulty to make it necessary. It seems to me clear that the letter in question was not "a statement" made by the defendant in answer to a question by a commissioner so as to be within the proviso of the 8th section of the Act [his Lordship read the proviso]; that applies to statements made, and not to documents produced, which may be proved *aliunde*. It is the duty of the court to give full effect to the protection of the statute, and not to allow statements made to be given in evidence against the defendant. If it had been the intention of the Legislature, it would have been easy for it to say that no document should be given in evidence if the clue to its existence had been found by what a witness said on his examination. It is a maxim that no statement made by a prisoner can be given in evidence if it has been improperly obtained by threats or a promise; but nevertheless it is permitted to give in evidence the discoveries to which such statements might lead, such as the discovery of stolen property, or of a body. Suppose the defendant said that a letter would be found in his house; that statement would not exclude the document if it was found there. I think the proviso does not, by implication, exclude a document merely because it was referred to in the examination. [His Lordship said that Wightman, J.,

who had left the court, but who had heard the chief part of the argument, was of the same opinion.]

HILL, J.—I am of the same opinion. The rule might have been disposed of on the narrow ground that the letter of the 5th Aug. was not produced before the commissioners by the defendant, and therefore no privilege could attach; it was produced by Wainwright in obedience to the mandate of the commissioners. As to the letter of the 4th Aug., its contents were given in evidence without objection, and it was only put in evidence out of fairness to the defendant himself, to show to what his letter of the 5th was an answer. But even if objection had been taken to the admission of the letter of the 4th Aug. on the ground of privilege, the rule is that where a document cannot be produced by reason of privilege, independent secondary evidence is admissible. I do not, however, think there was any objection to the reception of the original. The court must look at the words of the Act of Parliament, and the object which the Legislature had in view; and unless there is something in the Act repugnant thereto, they ought to construe the words in their plain grammatical meaning. The 8th section says witnesses are to attend and answer questions, and produce documents; and the proviso says that no statement made by any person in answer to any question shall be given in evidence, but it says nothing about documents or books: it leaves them as they were before. The court would be making, not construing an Act of Parliament, if they were to put upon it the construction now contended for.

BLACKBURN, J.—I am also of the same opinion. The meaning of the Act was, that there should be a full and complete investigation. [His Lordship went through the several sections.] Then it is said that a document is not to be received against him, if a clue to it has been obtained from the witness; but it would require a great straining of the words to put such a construction on them; and if that were so I think the Act would rather tend to encourage than to stop corrupt practices. Therefore, putting such a construction on the Act, we must introduce words which, even if we thought it desirable, we have no power to do.

Rule discharged.

Monday, April 22.

REG. v. WILMOT.

*Habeas corpus—Possession of Government stores—Fine and imprisonment—Appeal.*

*Under the 40 Geo. 3, c. 89, ss. 18-20, a party may be subjected to a fine or imprisonment, at the discretion of the convicting magistrate for having unlawful possession of Government stores.*

*Where a person has been convicted and taken to prison under a warrant of commitment the entering into recognisances to prosecute an appeal does not operate as a suspension of the committal, and the person has no right to his discharge upon bail during the pendency of the appeal.*

Rule nisi calling upon the keeper of the gaol of St. Augustine, near Canterbury, to show cause why a writ of *habeas corpus* should not issue to bring up the body of Wm. Wilmot, a prisoner, in order to his discharge upon the ground that he had been illegally committed to prison, or why the said prisoner should not be admitted to bail.

It appeared that the prisoner, a marine store dealer at Chatham, had been convicted by the acting superintendent of her Majesty's dockyard at Chatham under the 18th section of the 39 & 40 Geo. 3, c. 89, of unlawfully having in his possession certain property marked with the Admiralty mark known as "the broad arrow" and sentenced by him to three calendar months' imprisonment with hard labour.

The power of convicting offenders of such offences was formerly exercised by commissioners of the navy

Q. B.]

REG. v. WILMOT.

[Q. B.]

and justices of the peace, but such jurisdiction is now exercised by the superintendents of her Majesty's dockyards as well as by the justices: (2 Will. 4, c. 40, s. 11.)

The deft. after he was taken to prison on the usual warrant, gave notice of his intention to appeal to the quarter sessions under the 21st section, and having entered into recognisances at Canterbury, before a justice of the county, to prosecute his appeal, applied at chambers, to Blackburn, J., and afterwards to Wightman, J., to be admitted to bail, in order that he might prosecute and try his appeal, but some difficulty being experienced in granting that application the present rule was obtained either to discharge the prisoner on *habeas corpus* or to liberate him on bail.

The following are the material enactments applicable to the case:—

The 40 Geo. 3, c. 89, "An Act for the better preventing the embezzlement of his Majesty's naval, ordnance and victualling stores."

Sect. 18. And whereas it might tend to prevent the commission of offences if power were given to the commissioners of his Majesty's navy, ordnance and victualling, and his Majesty's justices of the peace out of sessions, to hear and determine offences in a summary way in cases where the stores found are of small value, and to fine or otherwise punish the offenders accordingly; be it therefore enacted, by the authority aforesaid, that from and after the passing of this Act, it shall and may be lawful to and for any principal officer or commissioner of the navy, ordnance, or victualling for the time being, or any justice of the peace for any county, division, city, town corporate, liberty, or place within this kingdom, to hear and determine any complaint against any person or persons (not being a contractor or contractors, or employed as aforesaid) for unlawfully selling or delivering, or causing or procuring to be sold or delivered, or for receiving or having in his, her, or their custody, possession, or keeping, or for concealing any stores of war, or naval, ordnance, or victualling stores, or goods marked with such marks respectively as are hereinbefore mentioned, of any value in the whole not exceeding 20s., which said commissioner or justice respectively is hereby authorised and required, upon any information exhibited, or complaint made in that behalf, at any time within three calendar months next after any such offence shall have been committed, to cause the party or parties accused to be apprehended and brought before him, or if he, she, or they shall have absconded or cannot be found, then to be summoned to appear before such commissioner or justice by a notice or summons left at his, her, or their last or usual place of abode, and also to cause the witnesses on either side to be summoned, and such commissioner or justice shall examine into the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party or parties, or by the oath of one or more credible witness or witnesses (which oath the said commissioner or justice respectively is hereby authorised to administer), give judgment or sentence accordingly, and in case the party or parties accused shall be convicted of such offence, then it shall and may be lawful to and for such commissioner or justice of the peace respectively to inflict a fine of 10*l.* upon him, her, or them, for such his, her, or their offence, which said fine so inflicted shall be divided and distributed one moiety thereof to the informer or discoverer of the offence, and the other moiety thereof (the necessary charges for the recovery thereof being first deducted) to the treasurer of his Majesty's navy or ordnance as the case may be, to be by him applied in such manner as hereinbefore mentioned with respect to the produce of boats, barges, or other craft seized or sold under the authority of this Act, and to award and issue out his warrant under his hand and seal for levying such fine so adjudged on the goods of the offender or offenders,

and to cause sale to be made thereof for payment of such fine and reasonable charges of distress (to be adjudged of by such commissioner or justice respectively) in case they shall not be redeemed within six days, rendering to the party the overplus, if any, and where sufficient goods of the party cannot be found to answer the said fine, to commit the said offender or offenders to the common gaol of the county, division, city, town corporate, liberty, or place for the space of three calendar months, unless such fine shall be sooner paid; or, in lieu of such fine, to cause such offender or offenders to be imprisoned and kept to hard labour in the house of correction for the space of three calendar months, as to such commissioner or justice of the peace respectively shall be thought fit; and every such commissioner or justice shall cause the amount of every such last-mentioned moiety of fine which he shall so receive, and also the moiety of every sum arising from the sale of any barge, boat, or other craft sold under the authority of this Act, and paid into his hands as aforesaid, to be paid into the hands of the said treasurer of the navy or ordnance within thirty days after the expiration of the year in which such fines shall be received by him, or in default thereof such commissioner or justice respectively shall forfeit the sum of 50*l.*, to be recovered with double costs of suit by any person or persons who shall sue for the same by action of debt, bill, plaint, or information in any of his Majesty's courts of record at Westminster, or Court of Exchequer in Scotland, wherein no essoin, protection, or wager of law, nor more than one imparlance shall be allowed; one moiety of which last-mentioned fine shall go to his Majesty, his heirs and successors, and the other moiety thereof to him or them who shall sue for the same as aforesaid.

Sect. 20. Provided also and be it enacted, that in case such commissioner or justice of the peace shall, upon the hearing and determining of such complaint as aforesaid, adjudge the offender or offenders, in lieu of a fine, to be imprisoned and kept to hard labour as aforesaid, that then the informer or person or persons who shall have discovered such offender or offenders shall have and receive as a reward for such his, her, or their discovery, the sum of 5*l.* for every such offence so discovered, and the principal officers and commissioners of his Majesty's navy, ordnance, or victualling, as the case may require, shall cause the said reward of 5*l.* to be paid by the treasurer of the navy or ordnance respectively for the time being out of any public money in his hands, upon such informer or other person producing to them a certificate under the hand and seal of the commissioner or justice of the peace who shall have convicted such offender or offenders as aforesaid, certifying such conviction and the punishment which he hath inflicted on the offender or offenders, and the name or names of the person or persons who in his judgment is entitled, and in what proportion or proportions to such reward, which certificate the said commissioner or justice of the peace respectively is hereby required to give without fee or reward, and the money paid by any such treasurer on account of such last-mentioned reward shall be allowed in his accounts, and he shall be discharged thereof accordingly, any law, custom, or usage to the contrary thereof in any wise notwithstanding; provided also that no such summary proceeding as before mentioned shall be had before any justice of the peace under the authority of this Act without the consent in writing of the principal officers or commissioners of his Majesty's navy, ordnance, or victualling for the time being, or one of them, for that purpose first had and obtained, and that every adjudication or sentence to be had or given without such consent as aforesaid shall be null and void to all intents and purposes whatsoever.

Sect. 21. And be it further enacted, by the authority



[Q. B.]

REG. v. WILMOT.

[Q. B.]

aforsaid, that if any person or persons shall find himself, herself, or themselves aggrieved by the judgment of any such commissioner or justice touching or concerning any such stores as last aforsaid under the value of 20s., then he, she, or they shall or may, upon entering into a recognisance to his Majesty, with one or more surety or sureties, to the satisfaction of such commissioner or justice, to the amount of treble the value of such fine, appeal to the justices of the peace at their next general quarter sessions of the peace for the county, division, city, town corporate, liberty, or place wherein the offence was committed, who are hereby empowered to summon and examine witnesses upon oath, and to finally hear and determine the same, and in case the judgment shall be affirmed, it shall be lawful for such justices of the peace to award the person or persons so appealing to pay such costs occasioned by such appeal, as to them the said justices shall seem meet, and to enforce payment thereof, according to the course and practice of such court.

The 2 Will. 4, c. 40, ss. 10, 11, substitutes superintendents for commissioners at the dock yards, and empowers them to administer oaths and exercise the duties, powers and authorities of justices in all places whatever, and in all matters relating to the naval service, and in all other cases in which any commissioner of the navy or victualling is empowered to act as a justice.

*Collier (West with him)*, on behalf of the Admiralty, showed cause.—It is contended for the prisoner that the superintendent had no power to inflict imprisonment, but was bound in the first instance to impose a fine, and then, in default of payment or satisfaction by distress, imprisonment. The question depends upon the construction of sects. 18 and 20 of 40 Geo. 3, c. 89. It is submitted that the right construction is, that the convicting magistrate has the alternative power of inflicting imprisonment with hard labour, or a fine, according as in his judgment the case may be a serious or trifling one. That has been the construction that has been acted upon by the authorities for a long time past. Secondly, there was no appeal in this case, as the appeal clause is only applicable where a fine is inflicted. Thirdly, the recognisances to prosecute the appeal were entered into before the wrong magistrate. Sect. 21 enacts that they are to be entered into before "such" commissioner or justice, i. e. the committing one, and that was not done in the present case: (*Reg. v. Brooke*, 2 T. R. 190.)

*Prentice* in support of the rule.—The 40 Geo. 3, c. 89, s. 18, is a penal enactment, and is to be construed in favour of the liberty of the subject. This section only gives the same power as is found in all similar enactments, viz., in the first instance to impose a fine, and then, in default of satisfaction, to imprison. And this view is supported by *Jervis' Act*, 11 & 12 Vict. c. 43, ss. 19, 27. As to the discharge on the ground of the prisoner having appealed. [*CROMPTON, J.*—The appeal does not operate as a suspension of the commitment. *Buller, J.*, in *R. v. Brooks*, says that the magistrate would have no right in a case like this to commit after the appeal has been heard.] It is submitted that he would have under sect. 27 of 11 & 12 Vict. c. 43. It is unjust that a prisoner should have to undergo the sentence while an appeal is pending.

*COCKBURN, C. J.*—I am of opinion that this rule must be discharged. It is certainly no easy task to construe an enactment like sect. 18. The more reasonable construction appears to me to be, that the superintendent has the alternative power either to impose a fine and imprisonment in the absence of goods of the offender whereon the fine may be levied, or, without imposing a fine at all, to sentence the offender to three calendar months' hard labour. The introductory words of the enactment look as if the justice was to have power to fine the offender, and in the event of that

not being levied to imprison him; but the subsequent part of the enactment raises considerable difficulty in the way of this construction. The words "or in lieu of such fine" look as if there was to be a fine in the first instance, and then imprisonment if that could not be levied. On the other hand, it seems difficult to understand why the justice should have power to inflict in lieu of the fine imprisonment with hard labour, while he has power to imprison merely without hard labour where a fine has been imposed, and sufficient goods of the party cannot be found to answer the said fine. Upon the whole, therefore, I think the Legislature meant to give the alternative power to the magistrate, and that he should exercise his judicial discretion upon the case as to whether it was a case in which he should impose a fine, or imprison the party with hard labour, without regard to any fine. This rule further asks the court to discharge the party out of custody on entering into recognisances to prosecute the appeal. Upon this point the first difficulty is, that it is not plain that sect. 21 gives any appeal at all in this case. Possibly, under the words "treble the amount of such fine," when imprisonment is substituted for a fine, the party would be entitled to appeal, but it is not necessary to decide whether or not that is the true construction; for it may be that the party has a right to appeal but still what power has this court to discharge him on entering into a recognisance to prosecute the appeal? The 11 & 12 Vict. c. 43 (*Jervis Act*) gives no such power; and sect. 27 only enacts that when an appeal against any conviction shall be decided in favour of the resp. the justice who made the conviction may issue his warrant for execution of the same. In this case the warrant has already been issued, and the man is in custody under the warrant of commitment. That section does not apply to a case like this. The rule must therefore be discharged.

*CROMPTON, J.*—I am of the same opinion. The conviction seems to me to be good. On looking at the clauses of 40 Geo. 3, c. 89, that have been referred to, I am clearly of opinion that the statute intended to give the alternative power to the magistrate of punishing either by fine or imprisonment. "In lieu of such fine" should be read "in lieu of inflicting such fine;" and then the construction is clear. It would be absurd to say that, where no sufficient goods of the party are found, there was to be imprisonment merely, and that imprisonment with hard labour might be imposed in lieu of a fine. The 20th section seems extremely strong to show that, on the hearing of the offence, the magistrate is to come to a decision, whether a fine or imprisonment shall be imposed. The only answer given to this view is the appeal clause, which brings us to the second question, whether there is an appeal or not in this case. I am inclined to think that there is an appeal in both cases, where either a fine or imprisonment is imposed. Then, supposing that a right of appeal exists in this case, have we any power to discharge the party on entering into recognisances to prosecute the appeal? The authorities are clear that a warrant of commitment once made is not suspended by an appeal being lodged. It may be a hard thing to keep a party in prison while an appeal is pending, but the law is well established, that an appeal does not of itself suspend a warrant of commitment: (*Kendall v. Wilkinson*, 4 E. & B. 680.)

*HILL, J.*—I am of the same opinion, and for the same reasons.

*BLACKBURN, J.*—I am of the same opinion. In sect. 18, after the words, "to inflict a fine of 10l. for such his, her, or their offence," the following words down to "or in lieu of such fine" should be read as one long parenthesis, and then the grammatical construction is plain, and shows that it was intended to give the alternative power either to fine or im-  
prison.

C. B.]

WHITEHOUSE v. FELLOWES AND OTHERS.

[C. B.]

son. If so, the conviction is good. I am also inclined to think that the statute does give a right of appeal in this case, but I cannot find that that operates as a suspension of the commitment: (*Kendall v. Wilkinson*.) I doubt whether Jervis's Act applies at all to a conviction before a commissioner.

*Rule discharged.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, ESQs.,  
Barristers-at-Law.

Feb. 11 and 12.

#### WHITEHOUSE v. FELLOWES AND OTHERS.

*Injury to property arising from works done by the trustees of a turnpike-road—Limitation of time for bringing action under sect. 147 of 3 Geo. 4, c. 126—When cause of action accrues.*

*The defts. were the trustees of a turnpike-road, and the plt. alleged that they so negligently made and maintained certain catchpits for carrying off the water from the road, that large quantities of water ran into his land and collieries, whereby he was greatly damaged. The plt. first complained in July 1859, and the defts. made some alterations; he was again damaged, and complained in December of the same year, and eventually brought this action. On behalf of the defts. it was contended that the action was not brought in time, inasmuch as it was not brought within three months after the act complained of was committed, as enacted by sect. 147 of the Turnpike-road Act, 3 Geo. 4, c. 126:*

*Held, that the action was in time, as no cause of action arose to the plt. so long as the works of the defts. caused him no damage, and that the cause of action first accrued when the plt. received actual damage.*

*It was also contended that, according to the case of Sutton v. Clarke, the defts. being trustees were not liable, and that the learned judge did not leave the question properly to the jury to say whether the defts. had been guilty of negligence:*

*Held, that the learned judge was right in asking the jury whether they considered the defts. had been guilty of negligence, and that they having found in the affirmative, that then the defts. were liable for such negligence.*

This was an action brought against the deft. as clerk to the trustees of the Sedgeley roads, and the declaration, after reciting the title of the Act of Parliament under which the trustees acted, stated, that the said trustees so negligently, carelessly, wrongfully and improperly conducted themselves in and about improving, maintaining and keeping in repair a certain turnpike-road leading from Cann-lane to the town of Bilston, in the county of Stafford, to wit, by making manifestly insufficient catchpits for carrying off the water accumulating and running in and along the said road, and by improperly cutting divers outlets from the said roads into the adjoining land, that by means of such negligent, careless, wrongful and improper conduct large quantities of water ran from such road into the land and collieries of the plt., whereby the said land and collieries have been damaged, and the plt. has been prevented from working the said collieries and lost large gains, &c.

Plea, not guilty by statute 3 Geo. 4, c. 126, s. 147.

This action was brought to recover damages for alleged negligence on the part of the trustees of the road for not providing catchpits sufficiently large for carrying off the water from the road, and in making outlets from the road, by reason of which the plt.'s land and colliery became flooded. The first complaint made by the plt. to the trustees was in July 1859, and the surveyor by their direction made

some alterations to remedy the evil complained of. On the 6th Dec. 1859 the plt. again made a complaint by letter to the surveyor, and stated that legal proceedings would be commenced, unless measures were taken to the satisfaction of his agent to prevent the escape of water. Three other letters were sent by the plt. to the surveyor respectively dated the 12th, 19th, and 23rd Dec., after which the writ was issued.

The cause was tried at Stafford before Byles, J., when a verdict was found for the plt., leave being reserved to move to enter a nonsuit on three grounds—first, that the action was not brought within three months after the act complained of was committed, as enacted by sect. 147 of the Turnpike-road Act, 3 Geo. 4, c. 126; secondly, that the learned judge did not leave the question properly to the jury to say whether the defts. had been guilty of negligence; and thirdly, that the verdict was against the weight of evidence.

A rule having been obtained on a former day, Gray (*Holl* with him) now showed cause.—The damage done in this case is owing to the defts. allowing the catchpits to remain in this state. The continuance is the cause of action, and therefore the continuance is the thing done, and therefore the action is brought in time. It would be absurd to say that the plt. should be precluded from his remedy because he did not bring an action within three months of the commencement of the injury, when the damage done was very slight, and when there were grounds for supposing that the trustees would of their own accord rectify the evil. This case differs from that of *Bonomi v. Backhouse*, Ell. & Bl. 622, for there the damage flowed from a single act. Here is an act of omission, and as soon as any damage occurs from such omission then the cause of action arises: (*Roberts v. Read*, 16 E. 215; *Gillon v. Boddington*. Ry. & Mood. 161; *Howell v. Young*, 5 B. & C. 259; then the case of *Nicklin v. Williams*, 10 Ex. 259, was one entire act of commission.) [WILLIAMS, J. referred to *Holmes v. Wilson*, 10 Ad. & El. 503; *Hudson v. Nicholson*, 5 M. & W. 437; *Thompson v. Gibson*, 7 M. & W. 456; *Battishill v. Reed*, 18 C. B. 696; *Oakley v. Kensington Canal Company*, 5 B. & A. 138.] Then there is no distinction between a private person and a public body of commissioners; and the latter are liable to an action against them for negligence, and they can reimburse themselves out of the rates. *The Southampton and Itchin Bridge Company v. Local Board of Southampton*, 98 L. J. 41, Q. B.; *Ruck v. Williams*, 3 H. & N. 308.] [WILLIAMS, J.—The case of *Boulton v. Crouther*, 2 B. & C. 703, is the leading case on the point, where it was decided that trustees are not liable to an action for consequential injury arising from an act which they are authorised to do, unless they have acted arbitrarily, carelessly, or oppressively.] The trustees in doing this work were bound to use proper care: (*The Grocers' Company v. Donne* 3 Bing. N. C. 34; *Violet v. Simpson*, 27 L. J. 139, Q. B.; *Jones v. Bird* 5 B. & Ald. 844; *Lloyd v. Wigdale*, 6 B. 489; *Tindal v. King*, 17 C. B. 483; *Ward v. Lee*, 7 El. & Bl. 426, were also cited.)

*Pigott*, Serjt. (*Phipson* with him) contended that, according to the case of *Sutton v. Clarke*, 6 Taunt. 29, the trustees are not liable. [WILLIAMS, J.—In *Sutton v. Clarke* it was the duty of the trustees to do a particular act, but in the present case they were to keep the roads in repair.] We have not turned the water out of its natural course; all we have done is, instead of open drains we have made covered ones, and this is just as much our duty as it is to mend the roads, and it does not follow that because what we did has produced the effects complained of by the plt., that therefore we have been guilty of negligence: (*Harris v. Baker*, 4 M. & W. 27; *Gibbs v. Trustees of the Liverpool Dock Company*, 3 H. & N. 257.)

C. B.]

WHITEHOUSE v. FELLOWS AND OTHERS.

[C. B.]

Then I say that the action is too late; and that it ought to have been brought as soon as the cause of action arose. (He referred to and reviewed the cases already cited.)

WILLIAMS, J.—This rule has been obtained upon three grounds—two based upon points of law, and the other on the ground that the verdict was against the weight of evidence. Now the points of law are, first, whether the declaration is answered by the plea relying upon sect. 147 of the Turnpike Act, 3 Geo. 4, c. 126, which says that “if any action shall be commenced against any person or persons for anything done in pursuance of this Act, then and in every such case, such action or suit shall be commenced or prosecuted within three months after the fact committed, and not afterwards;” and, secondly, on the ground that the learned judge was wrong in not leaving the question to the jury to say directly whether the defts. had been guilty of that description of culpable negligence which would make them liable in this action. I think it would be more convenient if I address myself to the second ground first. Now there is a great difference between the acts of trustees and those of private individuals, and a great many cases have been referred to upon this point, but several of them do not appear to me to have any application at all to the subject in hand. The case which has been most relied on is that of *Sutton v. Clarke*, but that only bears upon the cases where the trustees were authorised by Act of Parliament to do some special act, as in the case of *The Governor and Company of the British East-India Company v. Meredith*, 4 T. R. 794, where it was held, that where the acts of commissioners appointed by a Paving Act occasioned a damage to an individual without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, were not liable; and in *Sutton v. Clarke*, and the cases similar to it, that doctrine seems to have been recognised, that where persons are authorised to do some particular act, and by doing such act they prejudice the rights or injure the property of some private individual, they are not liable for doing that act, notwithstanding that, if that act had been done by a private person, he would have been liable. So the trustees of a turnpike-road, if authorised to raise the road, would not be liable for any damage which such act might occasion, although a private individual would be if he had done the same thing; but it would be otherwise if the trustees had done their work so carelessly and negligently as to create such damage. I understand that the plt. complains that the defts., in discharging their regular duty in keeping the roads in repair, have been guilty of negligence, whereby he has been injured; and the facts appear to be, that when the trustees entered upon their duties as such trustees, they found open drains; and the objection to them was, that when a heavy fall of rain came there was a gush of water on the road, but which these open drains carried away to the canal, or it dispersed itself in such a way as to be wholly innocuous to the adjoining owners; that being so, in order to prevent the gush of water on the road, they are advised to disturb the state of things then existing and cover the drains, which had the effect of turning the water on to the adjoining owner's land, as the catchpits made to prevent that were not sufficient, and the plt. says that the trustees have been guilty of negligence and carelessness in so changing the state of things as to make the water accumulate on the adjacent lands, by reason of the catchpits being insufficient, and that they are further guilty for continuing them in such insufficient state; and I think that is a state of things upon which the jury might rightly have been asked, whether the defts. had been guilty of negligence, and I understand that it was so left to them, that supposing I found such a state of things to exist, that then

they were to say whether the defts. had been guilty of negligence, and the jury have found that they were, and in this direction I can see nothing wrong. Then as to the question whether or not the plt. is bound to rely on the negligence of the defts. when the damage first occurred, or whether he can maintain his action after three months have elapsed from the first damage, I am of opinion that where the defts. have been guilty of negligence in the management of the highway over which they have charge, and that by reason of such negligence damage has been caused, which has been accompanied by a fresh damage, such a “state of things brings the plt. within the time limited by the statute. There is no doubt that a fresh damage is no cause of action, and the case of *Fetter v. Beale*, 1 Salk. 11, is an authority upon that point. In that case an action was brought by the plt. for a blow he had received on the head, and which at the time appeared slight, and he obtained damages accordingly; but afterwards it turned out that the injury was of a more serious nature, and the plt. then brought a second action, but it was held that it would not lie, Holt, C. J. saying, “Every new dropping is a new nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages which the jury must be supposed to have considered at the trial;” but here the plt. has been again damaged by reason of the defts. neglecting their duty, and is he to have no remedy at all? It seems impossible to suppose that such was contemplated by the Act. Here it is not only the fresh damage, but the continuance of the original neglect that constitutes a new cause of action, and I think that this wrongful act may be a fresh cause of action. And I therefore am of opinion that on both points our judgment should be for the plt. And now as to the verdict being against the weight of evidence, without going so far as to say that this verdict was against the evidence, yet, looking at it in all its bearings, I think it would be more satisfactory that they should be re-investigated, on the condition that the defts. pay the costs of the former trial.

WILLES, J.—I am of the same opinion. As to the misdirection, it appears that the jury were told to find for the plt. if they were of opinion that the defts. had, by the negligent construction of the catchpits, occasioned injury to the plt. I assumed, therefore, that the jury found negligence on the part of the defts., therefore there can be no reason for granting a new trial on the ground of misdirection. Then, as to the question on the Statute of Limitations, that is a question of considerable nicety. Certain expressions have fallen from the courts, and have been used, which have not applied to the particular facts of the cases in which they were made. After what my brother Williams has said, I do not think it necessary to refer to more than one decision, and that is the case of *Bonomi v. Backhouse*. The cause of action there was in respect of injury occasioned by the support to land being taken away. There the court threw out that it did appear the support was taken away, and that the cause of action was then complete. Then compare that case with the present. Here the cause of action is the injury to the land. It cannot be said that the plt. in this case had a right to say that the trustees should not make this work on the road. In *Bonomi v. Backhouse* it was said that the plt. had a right to prevent the ground from being taken away where it would interfere with his supports. All that the plt. could do here was to demand that the works should be done in such a manner as not to injure his land; and each action was to be limited to such injury; and it appears to me that the Statute of Limitations ought to run from the time the damage was effected. With regard to the verdict being against the evidence, I need

V.C. W.]

ELLIS v. THE CORPORATION OF BRIDGNORTH.

[V.C. W.]

add nothing to what has already been said by my brother Williams.

BRYCE, J.—I shall say nothing as to the misdirection, but I wish to say a word as to the limitation of time for bringing the action. The case of *Bonomi v. Backhouse* is a decision of the Court of Ex. Ch., and is binding upon us, and clearly establishes the law that the period runs, not from the act done, but from the damage itself, but it leaves the question open—does it run from the first damage, excluding all subsequent damage? or does it not say, may not there be a case where new damage gives a new cause of action? There the damage was one act; but here the damage arises from every shower, and every time there is a storm there is a new and distinct injury. With regard to the verdict being against the weight of evidence, I do not think that that was so; but, as this is a case of great importance, I think that in justice to both parties there should be a new trial, if the defts. are willing to pay the costs of the former one.

KEATING, J. concurred.

Rule absolute.

### V. C. WOOD'S COURT.

Reported by W. H. BENNET, Esq., Barrister-at-Law.

Jan. 31.

ELLIS v. THE CORPORATION OF BRIDGNORTH.

*Injunction—Market—Local Government Act 1858—Stallage—Legal right.*

*Where the members of a corporation elect to proceed under their Local Government Act, instead of asserting their common law right as a corporation, they will be bound to proceed according to the provisions of such Act.*

*Thus, although there may be a clear right at law to change the site of a market in the corporation of a borough, if the corporation proceeds under the Act to change such site, and transfer and regulate the market, they must not exceed the powers conferred upon them by such Act of Parliament, although less extensive than their rights at common law.*

*The court will require the right of stallage to be decided at law, before granting an injunction to restrain a corporation from interfering with such rights of stallage, where the right has not been admitted by the corporation.*

Rolt, Q.C. and C. Hall moved for an injunction to restrain the defts. from establishing or holding a market in the New Market-buildings at Bridgnorth, and from interfering with the rights and privileges of the plts., as occupiers of houses in the High-street of Bridgnorth, in which the weekly market has been held from time immemorial, the case made by the bill being that certain privileges and profits from stallage on market-days have been enjoyed by the High-street householders, and that those rights will be entirely destroyed by the removal of the market. By the plts.' bill it appeared that in 1854 a company was formed under the title of the "Bridgnorth Public Buildings and Market Company (Limited)," for the purpose of erecting new market buildings in Bridgnorth. The company had erected new market buildings in another part of the High-street, at a distance of 110 yards from the old market-house, erected in 1650, but the speculation was stated to have been unprofitable, as the holders of stalls in the High-street could not be induced to remove to the new buildings. After the passing of the Local Government Act 1858 negotiations took place between the company and the local board of health, under which the company granted a new lease of the new market buildings. In Dec. 1860 notice was published in the *Bridgnorth Journal* by the clerk to the local board, that, in pursuance of the Fairs and Markets Clauses Act 1847, and the Local Government Act 1858, the local board intended to apply to Govern-

ment for the allowance of bye-laws, made for regulating the use of the market-places provided for them in Bridgnorth. The plts., feeling themselves aggrieved by the contemplated removal of the market from its ancient situation in the High-street, in violation as it was alleged of their prescriptive rights of stallage, served the local board with notice of their intention to oppose the allowance of the bye-laws, stating, among other grounds of objection, that the bye-laws ought to have been published under the Fairs and Markets Clauses Act 1847, and the application for their allowance first made at quarter sessions; secondly, that the removal of the market without the consent of the plts. (having the prescriptive right of stallage) was illegal and contrary to the provisions of the Local Government Act 1858, and the Fairs and Markets Clauses Act 1847. The plts. subsequently filed their bill, and now moved for an injunction in the terms before stated. They cited *Mayor of Northampton v. Ward*, 1 Wils. 107; S. C. 2 Strange, 1238; *Campbell v. Wilson*, 3 East, 296; *Ellwood v. Bullock*, 6 Q.B. Rep. 380; *Tyson v. Smith*, 4 Ad. & Ell. 407.

*Giffard*, Q.C. and *Roberts*, for the defts. the corporation, contended that the common law right in the corporation to remove the market still existed notwithstanding the passing of the Acts of Parliament. Even if the plts. had proved that they were within sect. 50 of the Local Government Act 1858, as persons whose rights were interfered with by the establishment of any new market, the remedy was at law. They commented upon the trifling nature of the interest asserted by the plts' bill, and the very large terms in which the prayer was framed.

Rolt in reply.

Feb. 1.—The VICE-CHANCELLOR said there was no doubt a clear case to be tried. The plts. sought to restrain the corporation from interfering with the immemorial right of every owner of a house in the High-street of placing before his door stalls, which would otherwise be an obstruction to the thoroughfare, and of exacting for the use of those stalls a rent of 10*l.* a year. If the corporation were, as had been contended, the owners of the soil, then, to their knowledge, they had been allowing these payments to be made to the owners of the houses by the persons using stalls. The market had been held from time immemorial in the High-street. It was to be observed that, in proposing to transfer the market, the defts. had not acted as the corporation, and in their corporate capacity they had a clear right at common law to transfer the market, but through a sort of combined medium of the joint-stock company and the local board of health. Though in one sense the same body, yet the local board was distinct from the corporation, and intrusted with large powers, which the corporation could never exercise. If, then, they did not choose to exercise their common law right, but availed themselves of the powers confided to them by the Local Government Act (far exceeding any power in the corporation), they must be bound by every provision of that Act in the strictest sense; otherwise there would be monstrous injustice if the defts. were allowed to avail themselves of their common law rights as owners of the market, and also to apply to the Secretary of State under the Local Government Act to sanction their bye-laws for regulating the market. They took the lease of the buildings from the joint-stock company, as the local board, and they must be considered as acting under the Act, and the Act alone. With respect to sect. 50, which provided "that no market or slaughter-house shall be established in pursuance of this section, so as to interfere with any rights, powers, or privileges enjoyed within the district by any person, chartered joint-stock company, or incorporated company, without his, her, or their consent," there was a strong intimation of an intention by the defts. to change the site and remove the market out of the High-

[Ex.]

COWLEY AND WIFE v. THE MAYOR, &amp;c., OF SUNDERLAND.

[Mid. Sex.]

street. They acted under the Act as the local board, and, looking at the circumstances, there was a strong *prima facie* case to be tried of whether the defts. were not establishing a new market within sect. 50 of the Act. As to the rights of stallage on the ancient site appurtenant to the houses, those rights could not possibly be transferred to the new site. Whether those rights had been interfered with by the establishment of a new market, remained to be determined by a jury, there being a mixed question of law and fact: first, whether the plts. had such a legal right as was contemplated under sect. 50; and, secondly, whether such legal right had been interfered with. It was not to be assumed against the defts. as clear, that the mere introduction by them of buying and selling in the new market buildings would necessarily interfere with the holders of stalls upon the ancient site. If, indeed, they had proceeded to clear away those stalls, then the case would hardly have required the intervention of a jury. But the notice of the defts. was carefully framed, and, at all events, there was nothing amounting to an admission that the stalls were to be removed. He felt, therefore, very great difficulty in framing any admission between the parties which would fairly raise the question for decision at law. The question was one which must be tried at law. He should therefore direct that the motion should stand over; the plts. to bring such action to try the legal right as they should be advised.

### COURT OF EXCHEQUER.

Reported by F. BAILLY and S. McCULLOCH, Esqrs., Barristers-at-Law.

Nov. 17 and Feb. 25.

COWLEY AND WIFE v. THE MAYOR AND CORPORATION OF SUNDERLAND.

*Negligence—Corporation—Public baths and wash-houses—9 & 10 Vict. c. 74.*

*In an action for injuries caused by the negligent construction of a machine set up by a corporation, and used in a public wash-house erected by them under 9 & 10 Vict. c. 74, to which the wife of the plt. resorted, and paid a certain sum for the use of the machines and other conveniences for washing there:*

*Held, that the corporation was liable for negligence in the construction and management of the establishment, and that, in discharge of the statutory duty undertaken by them, they were bound to exercise ordinary care and diligence, and to provide machines reasonably safe for use.*

In this case the plt. complained of the injury caused by the negligent construction of a machine set up by the defts., and used in some public wash-houses erected by them under the provisions of the 9 & 10 Vict. c. 74.

It appeared that the wife of the plt. resorted to the wash-houses in question, and paid 4d. for the use of the machines and other conveniences for washing there. The machine in question, by which the injury was done, was a drying machine. It consisted of a cylinder into which the wet clothes were put, and made to revolve with great rapidity, and the water driven out by the operation of centrifugal force. The machine was originally constructed to be worked by an ordinary winch-handle connected with the top of it, such handle being turned by the hand of the person using it, and there were a considerable number of these machines in the wash-house. A proposition was made among the members of the corporation to introduce steam. There was evidence to show that this was objected to by some competent persons as likely to prove dangerous. It was, however, adopted, and at the time of the accident the machine in question was turned by steam-power.

On applying the steam-power in place of the hand,

the winch-handle was taken off, but the rod on which it had been fixed was allowed to remain.

This rod was quite unnecessary, and useless to the machine as worked by steam. It projected some distance over the edge of the top of the machine, and revolved with great rapidity while the machine was in action. The plt.'s wife in using the drying machine allowed a portion of her dress to touch this rod; it was caught by it, and she was drawn against the revolving rod and considerably injured.

The action was tried before Wilde, B., at the Durham summer assizes 1860. The jury negatived any negligence on the part of the plt.'s wife, and found that the machine was dangerously and negligently constructed, and that the accident with which the female plt. met was caused by such dangerous and negligent construction of the machine. The plts. recovered a verdict for 50*l.*, with leave reserved to the defts. to move to enter the verdict for them.

*E. P. Price (Davison with him)* now showed cause. —They cited *Green v. The London General Omnibus Company*, 29 L. J. 13, C. P.; *Cornman v. Eastern Counties Railway Company*, 29 L. J. 94, Ex.; *Ruck v. Williams*, 27 L. J. 357, Ex.; *Blackmore v. The Bristol and Exeter Railway Company*, 27 L. J. 167, Q. B. *Manisty, Q.C. (T. Jones with him)* supported the rule. —They cited *Manley v. St. Helens Canal and Railway Company*, 27 L. J. 159, Ex.; *Metcalf v. Hetherington*, 11 Ex. 755. *Cur. adv. vult.*

Feb. 25.—WILDE, B. now delivered the judgment of the court.—It was argued by the defts. that the 9 & 10 Vict. c. 74, imposed no responsibility or liability whatever on the corporation, but only on the committee to which the erection and management of the wash-houses were confided. But several clauses of the Act were pointed out during the argument, which tended to negative this proposition. It is unnecessary to refer to them again in detail. It is sufficient to say that, in our opinion, the Legislature did not intend to withdraw from the corporation to whom the wash-houses belonged the responsibility which might attach to any improper construction or management of them. It was then argued that, as the plt. was a volunteer, and chose to use the machine such as it was, she could not recover; but we think this argument does not avail the defts. The statute was passed for the benefit of the poor and more ignorant classes of the population. The corporation chose to avail themselves of these powers to erect these wash-houses. In discharge of the statutory duty thus undertaken by them, we think they were bound to exercise ordinary care and diligence, and provide machines reasonably safe for use. It is clear from the evidence and the finding of the jury that the projecting rod which did the mischief was unnecessarily, carelessly and negligently allowed by the defts. to remain after all use and purposes of it had ceased. It is also clear that this danger was one which the plt. might reasonably fail to perceive or appreciate, and the jury have in substance found that neither in the fact of using the machine at all, nor in the particular mode of using it by the plt., was there any negligence. The accident was caused by the immediate negligence of the defts., and on an occasion when the plt. was in no way to blame. We think the plt.'s verdict ought to stand, and this rule be discharged. *Rule discharged.*

### MIDDLESEX SESSIONS.

Nov. 1 and 5, 1860.

(Before Mr. BODKIN, Assistant Judge.)

THE CHARTERED GAS COMPANY v. CLEKENWELL. *Poor-rate—Gas company—Principle on which assessment should be made, and mode of estimating the annual rateable value.*

MD. SES.] THE CHARTERED GAS COMPANY v. CLERKENWELL.—REG. v. JONES. [NISI PRIUS.

This was an appeal against a poor-rate made in June 1859, by which the property of the company in Clerkenwell was rated at the sum of 2598*l*.

*John Clarke and Norman* for the appellants.

*Metcalf and Poland* for the respondents.

The facts are fully stated in the following JUDGMENT.

MR. BODKIN.—The company produced their accounts for the Brick-lane district, in which the respondents' parish is situate, by which accounts it appeared that their gross receipts from all sources, if taken, as the company proposed, on an average of four years, amounted to 60,918*l*. The respondents proposed to adopt the account for the year 1859, the year in which the rate was made. The difference between the two modes is unimportant; in fact, the mode proposed by the company is taken favourably to the respondents so far as the receipts are concerned, but the extension of the area of calculation enables the company to avail themselves of a larger amount of expenditure than was incurred in 1859, and, as I think the respondents are in strictness entitled to look to the rateable value for the year in which the rate is made, and as I see no reason to think that an incoming tenant would object in this particular case to treat upon the footing of that year's transactions, I have adopted the receipts for 1859 only, amounting to 60,539*l*. It follows that the expenditure must be taken for the same year, and this, according to the company's book, was 48,050*l*. Some items were questioned by the respondents, particularly the charge for ordinary repairs, but so far as the evidence enabled me to form a judgment, that item and all the others appeared to have been in fact paid by the company, and I must assume that the expenses so paid were necessarily incurred. An objection was taken specifically to the charge made for remuneration to the directors and auditors, on the ground that an individual tenant would carry on the works without directors or auditors. But although the supposition of a tenancy is of necessity resorted to in these cases, such an occupation is extremely improbable, and if such were to arise, it is difficult to understand how works of such magnitude and complication could be satisfactorily conducted without a controlling power of some kind. Finding, therefore, that such a charge is considered essential, and is in fact incurred, I see no sufficient reason for disallowing it. The sum of 48,050*l* deducted from 60,539*l* will leave as the gross earnings 12,489*l*. The balance thus remaining may be taken as composed of two elements: 1, *Profits of trade*; 2, *Rent*; and the first being ascertained, the remainder will represent what, if a tenancy arose, an occupier might reasonably be expected to pay. Such a tenant would require to embark a considerable capital in the concern, and the appellants estimated their capital at 50,000*l*, viz., tools and tents, fixtures and implements, 22,000*l*, and floating capital 28,000*l*. Considering that this value has been proved by an unchecked estimate, and considering that the revenue is received quarterly, I think a tenant would not require a capital beyond 30,000*l*. Upon this the claim of 5 per cent as interest, and 10 per cent. as tenants' profits (bad debts being already provided for) is reasonable, making together 4500*l*. This leaves as a rent what a tenant might reasonably be expected to pay, 7989*l*. The Parochial Assessment Act, however, provides that the assessment shall be made after allowing for repairs, insurance and whatever expenditure may be necessary to maintain the property rated in a state to command the same rent, and the appellants therefore claim for insurance against fire the sum of 225*l*. They do not, in fact, insure, but this does not make the claim less reasonable, and I have therefore allowed it at 225*l*. The appellants also claim a percentage on the value of their works of 2 per cent., amounting upon an unchecked estimate to 1620*l*. But, upon the

best judgment I can form, seeing that all ordinary repairs, as well as injury by fire, have been already provided for, I consider 1 per cent. amply sufficient, and this will amount to 810*l*. These deductions will leave the rateable value of all the works in the district at 6954*l*. The respondents' parish is a terminal parish and the pipes within it do not contribute to the supply of any other place; and this, so far as Clerkenwell is concerned, somewhat simplifies the division of the total sum amongst the various parishes in the district. Several modes of doing this have been discussed, and this question is always attended with considerable difficulty. That which seems to me the most advisable to adopt in this case is to apportion the whole rateable value according to the present value of the works in each parish—a mode suggested by the appellants, and certainly the most favourable to the respondents. Adopting this rule, the respondents' parish appears entitled to one month's part of the whole sum, amounting to 772*l*. It has, however, been stated by the appellants that in the city portion of the district the company's gas is supplied at a lower rate than in the other portions, and that the outlying parishes are entitled to a larger portion of the rateable value by reason of the extra profit obtained in them. I assume that the appellants are right in this suggestion. I therefore adopt the additional sum which they assign to the respondents on this ground; I therefore find and determine the rateable value of the company's property in Clerkenwell to be 1022*l*, and I order the rate appealed against to be reduced accordingly.

*No costs.*

## NISI PRIUS.

### NORTH WALES CIRCUIT.

Reported by V. WILLIAMS, Esq., Barrister-at-Law.

#### DENBIGHSHIRE.

(Before CHANNELL, B.)

REG. v. JONES.

#### Rape.

*The rule now is that the connection must be without the consent of the person alleged to have been ravished. Where a father has established a kind of reign of terror in his family, and his daughter, under the influence of dread and terror, remains passive while he has connection with her, he may be found guilty of rape.*

The prisoner was charged with committing a rape upon the person of Jane Jones.

*Sweetenham* for the prosecution.

Jane Jones was the daughter of the prisoner and fourteen years of age. She stated that she lived with her father and mother in Love-lane, Denbigh, in a house a short distance from the road; that on the 29th Jan. last she and her father were alone in the house; that her father told her to go to the front door to see if her mother was coming home; that she went to the door and said her mother was not coming home; that her father then took hold of her and threw her on a bed in the room and had connection with her [his Lordship hereupon stated that he was of opinion that, although the counsel for the prosecution must confine himself to one act of ravishing, he might ask the witness as to the previous conduct of the prisoner towards the witness, and she then stated]; that her father had previously told her not to tell any one what he had done to her; that he had said he would throttle her, and would kill her if she told of anything he had done; that he had throttled her; that he had had connection with her many times before, and on those occasions had told her not to tell, and that that was the reason she did not tell; that after the last occurrence she told her mother; that she consented to the

prisoner's having connection with her because she was afraid of him; that she was afraid of his choking her—was afraid if she resisted him; that she begged of him not to do it, and asked him to be quiet, to leave her alone.

Enoch Williams, a policeman, stated that, before the magistrates, the prisoner said he did it with the prisoner's consent.

His LORDSHIP stated to the jury that until lately it was the rule on a charge of rape that the connection must be proved to have been against the will of the female; but since the case of *Reg. v. Fletcher*, Bell's Crown Cas. 63 (the principle of which case his Lordship expressed his approval of, notwithstanding there was a mistake in it—the court having assumed that the Statute of Westminster, 2 C. 34, was still in force, which is not the case, it having been repealed), the rule was, that it must be without her consent, so as to meet the case of idiots and infants, and persons incapable of giving consent; that where it appeared that such persons had any violent desires and passions, it might be the duty of the jury to take that into their consideration before finding a prisoner guilty; but where that did not appear, they might find that the connection was without consent; that the amount of resistance necessary to be proved may be less in some cases than in others; that that may be so where there are no persons near, and where shouting and resistance would be useless. His Lordship then continued:—If in this case it is made out to your satisfaction that a kind of reign of terror was set up in this family, and in consequence of that terror and dread the girl allowed the connection to take place without resistance, then I am of opinion you may convict. It is possible she may have been a consenting party, and not influenced by dread. That is a question for you. She says the same thing had been done upon previous occasions, and her father had told her he would throttle her if she told her mother, and that is why she did not tell. She says she begged him not to do it, and to be quiet and leave her alone. This in ordinary cases would be quite insufficient. But in this case, if you think she remained passive under the influence of that dread and reign of terror which I have mentioned, and that is clearly made out, you may find the prisoner guilty. *Verdict, guilty.*

There was another case against the prisoner for committing a similar offence upon another daughter, and one for an attempt upon a third daughter. He was sentenced to ten years' penal servitude.

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, April 27.*

(Before POLLOCK, C.B., WILLIAMS, WILLES and BLACKBURN, JJ. and WILDE, B.)

REG. v. JAMES TITE.

*Embezzlement—Clerk or servant—Commercial traveller.*

*The fact of a commercial traveller being paid by commission and being permitted to obtain orders for others than the prosecutor, does not prevent him from being a servant to the prosecutor within 7 & 8 Geo. 4, c. 29, s. 47, upon an indictment for embezzlement.*

Case reserved for the opinion of this Court by the Recorder of London.

At a session of the Central Criminal Court holden on the 28th day of Jan. 1861 James Tite was tried and convicted before me on an indictment which charged that he was servant to Richard Adams Ford, and by virtue of his employment as such servant he did receive the sum of 4l. 16s. 6d. in money, for and on account of the said Richard Adams Ford, his said master, and

fraudulently and feloniously did embezzle, secrete and steal the said money.

It was proved that he was engaged by the prosecutor (who was a shirt manufacturer) as a commercial traveller, and that the agreement between them was that he should be paid by commission, and that he was at liberty to obtain orders for others than the prosecutor.

It was also proved that he received from the prosecutor various samples with which he set out on his journey, and that while on that journey he received by virtue of his employment the sum charged in the indictment, for which he did not account, but which he fraudulently appropriated to his own use. He never returned the samples entrusted to him, and was new seen by the prosecutor from the time he set out on his journey until he was taken into custody.

The question on which I wish for the decision of the Court for Consideration of Crown Cases Reserved is:—

Whether there was any evidence of the prisoner being a servant, as alleged in the indictment.

The prisoner remains in custody awaiting judgment. RUSSELL GUARANTY.

*Sleigh* for the prisoner.—It is submitted that there was no evidence that the prisoner was a servant of the prosecutor, as alleged in the indictment. His engagement was that of a commercial traveller, and is more like that of the prisoner in *Reg. v. Walker*, 1 Dr. & Bell, 600; S. C. 8 Cox Crim. Cas. In that case the prosecutors, manure manufacturers, engaged the prisoner, who kept a refreshment-house at B., to get orders which were supplied from their stores at B., under the prisoner's control. The rent was paid by the prosecutors, and the prisoner's duty was to collect money and pay it over at once; he was also to send weekly accounts of sales and receipts. He was to be paid by commission, and was called agent for the B. district. After some time the prisoner signed a proposal to a guarantee society, which stated that his salary was 11 per year, besides commission, and it was proved that the prosecutors had agreed to give this salary of 11 per year. And it was held by the court that he was not a servant within the 7 & 8 Geo. 4, c. 29, s. 47, and that he could not be convicted of embezzlement.

POLLOCK, C.B.—Is not this question one of fact for the jury? A man may be employed as a tailor, and he may be the servant of the employer, but he may also be employed as a tradesman, and not as a servant. A commission agent is a separate and distinct occupation, but no doubt by agreement the nature of the occupation may be such that he may be the servant of his employer. There may be a servant who has the power of being employed by other people.

*Sleigh*.—There is no evidence of the existence of the relationship of master and servant here.

POLLOCK, C.B.—The evidence is ambiguous. It is quite consistent with the existence or non-existence of that relation.

BLACKBURN, J.—The question reserved, as I understand, is this, Do the two facts set out in the case, the payment by commission and the liberty to obtain orders for others than the prosecutor, conclusively show that the prisoner was not a servant?

*Sleigh*.—I shall not contend for the now exploded view that payment by commission prevents a person from being a servant. And *Reg. v. Baty*, 3 Mo. C. C. 257, contrary to the view expressed by Park, B. in *Reg. v. Goodbody*, 2 Car. & P. 667, decided that a person might be convicted of embezzlement as the servant, though at the same time he was employed by other persons. But on the facts stated in the case it is ambiguous whether the prisoner was a servant or not. He was not bound to obey the orders of Mr. Ford.

WILLES, J.—Is not an ordinary commercial

C. B.]

HUNT AND OTHERS v. ALLGOOD AND OTHERS.

[C. B.]

traveller bound to obey the orders of his employer as to the price, terms of payment and such like matters?

*Sleigh*.—A man may well be a commercial traveller without being a servant.

*WILDE, J.*—The difficulty I feel is, that the case does not state what he was employed to do, but merely states compendiously that he was a commercial traveller.

*BLACKBURN, J.*—Can it be said that if a commercial traveller goes on a journey with samples, and is also to receive moneys for his employer, that there is not some evidence that he was a servant?

*Sleigh*.—He goes about the country at his own pleasure, and is not bound to get any orders. It is like the case of *Reg. v. May*, 8 Cox Crim. Cas. 421; 8 C. 30 L. J. 81, M. C., where the prisoner was appointed by letter to get orders upon commission, and it was his duty to account for any money he might receive immediately on receipt of it, and it was held that this did not make him a servant within the statute. In that case Cockburn, C.J. said, "The position of clerk or servant implies control." Here it was not incumbent on the prisoner to obtain any orders for Mr. Ford. Here there is nothing *ejusdem generis* as a clerk or servant.

*WILLIAMS, J.*—I concurred in the judgment in that case, on the ground that it was not found to be any part of the prisoner's duty to receive money.

*M'Intyre*, for the prosecution, was not called upon to argue.

*POLLOCK, C. B.*—We are all of opinion that the conviction was right. The question arose at the trial whether there was any evidence of the prisoner's being the servant of the prosecutor as alleged in the indictment. The occupation of a commission agent is now perfectly well known; he may be employed by a number of persons for different purposes. Here the prisoner was employed as a commercial traveller by the prosecutor, to be paid by commission, but with permission to obtain orders for other persons. In our opinion that would not prevent him being servant to the prosecutor. We understand that the object of the recorder in reserving this case was that the doubt which had been expressed by Mr. Baron Parke (now Lord Wensleydale) in *Reg. v. Goodbody* might be cleared up. That has been cleared up, and the conviction must be affirmed.

*WILLIAMS, J.*—I am of the same opinion. The case of *Reg. v. Batty* not only decided that the prisoner was not the less a servant because he was employed by other persons at the same time, but that the employment for wages made him a servant. That is applicable to this case, unless the payment by commission makes a difference. That, however, is only a mode of receiving wages.

*WILLES, J.*—I am of the same opinion.

*BLACKBURN, J.*—I am of the same opinion.

*WILDE, J.*—I am of the same opinion. The case of *Reg. v. May* is an authority in favour of the conviction, for Cockburn, C. J. says a traveller is under the control of his several employers, he is bound to go here and there, and to do this and that according to orders.

*Conviction affirmed.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MATY, Esqrs., Barristers-at-Law.

Saturday, April 20.

*HUNT AND OTHERS v. ALLGOOD AND OTHERS.*  
*Lands vested in churchwardens and overseers, under 59 Geo. 3, c. 12, held by poor of the parish—Payment of rent in advance—Notice to quit.*  
*The defts., who were poor parishioners of the parish of C., claimed to hold as yearly tenants certain*

*lands in the parish which were vested, under the provisions of the 17th section of 59 Geo. 3, c. 12, in the churchwardens and overseers for the time being, at the yearly rent of 4s. per acre. Up to the year 1803 these lands had been occupied at the above rent, which was always paid in advance; in that year these lands were inclosed, and to pay the expenses the rent was raised to 12s., which was paid up to the year 1848, when all the expenses being liquidated, the defts. refused to pay more than 4s., which sum was tendered and refused and the present action brought:*

*Held, in the absence of any agreement to the contrary, that they were tenants from year to year, and entitled to notices to quit, and that the facts stated below did not amount to a disclaimer.*

This was an action of ejectment which was brought to obtain possession of some property known as the "Coton Church and Town Lands," situate in the parish of Coton, which belongs to the parish, and as such is vested in the churchwardens and overseers. It appeared that previous to the year 1803 these lands were held by the poor of the parish at the nominal rent of 4s. per acre, which was paid in advance; in that year an Act was passed for the inclosure of these lands, at which time the rents were raised to 12s. per acre, to defray the expenses of the inclosure.

From the evidence it appeared that in 1848, the expenses for which the additional 8s. had been imposed having been paid, the defts. attended a vestry meeting and asserted that the land was theirs at 4s. per acre.

This not being assented to by the trustees of the charity the defts. than in possession ceased to pay any rent for the lands which they held and have not done so up to the present time; and the trustees have tried to induce them to give up possession, or to pay the rent, which they have refused to do; and consequently this action has been brought.

The cause was tried at Cambridge, at the last summer assizes, before Pollock, C. B., when a verdict was found for the plts., subject to leave being granted to the defts. to move to enter a nonsuit on the grounds that the defts.' tenancy from year to year had not been determined by any notice to quit; and secondly, that there had not been any disclaimer by the defts., or any of them, of the plts.' title.

A rule having been obtained on a former day, *O'Malley, Q.C. (Keans and Couch with him)* now showed cause.—This was a hiring for a year at a rental which was to be paid in advance, and therefore at the end of the year they were not entitled to a notice, as it was a fresh letting from year to year. Then as to the disclaimer, the defts. say that they have a right to the land at a rental of 4s. Surely this amounts to a disclaimer. They cannot show any deed giving them a right to dictate the terms upon which the land should be let; if the landlord has a title he has a right to prescribe the rents to be paid; and if a tenant says "I can compel you to reduce your rent," surely that is setting up an adverse title. They cited *Doe dem. Calvert v. Frowd*, 4 Bing. 557; *Samuels v. Freeman*, 2 Dyer, 209; *Doe dem. Gray v. Stannion*, 1 M. & W. 695; *Doe dem. Donne and others*, 10 A. & E. 427.

*Power, Q.C., Tozer, Serjt. and Douglas Brown*, for the defts., were not called on.

*ERLE, C. J.*—I am of opinion this rule must be made absolute. The judge who tried this cause reserved the point of law, and left it to the court to say what was the law, and what were the inferences of fact to be drawn from the evidence. Two points have been made in support of the plts.' case, one is: that the defts. do not hold from year to year, but for one year certain, and therefore the interest of each one of them terminated at the end of each year. I have looked carefully at the evidence, and I take the facts



PRIV. CO.]

POOLE v. BISHOP OF LONDON.

[PRIV. CO.]

to be, that for many years the defts. had been occupiers of these premises, and paid their rent in advance. It has been an occupation for many years, and there has been nothing shown which would enable the landlord to say "Unless you pay the rent I can turn you out without notice." I am of opinion that the defts. held as tenants from year to year. The plts. have also had leave to move on another point, namely, that there had been a disclaimer; the facts are that the defts. have held for 4s. per annum, which appears to have been raised to 12s., and there seems to have been some expectation that it would have been lowered again to the former sum, as the purposes for which it had been raised were satisfied. At a parish meeting, where there was a discussion about the matter, words were used, "The land was the defts'." The Chief Baron says the words used were, "The land was theirs, and they ought to pay 4s. rent." When I look at the circumstances under which they were used, it seems to me they meant, "We have a right to continue our tenancy at 4s. an acre," which seems to me to be much more probable that they had not made an investigation into facts than that they had done so. I do not think the words fairly mean what the plts. say they do. I further think that it would not be satisfactory to turn thirty-six persons off the land on the evidence of what appears to have taken place at a parish meeting, which would be the case if we gave judgment for the plts. I cannot, therefore, hold that these premises have been forfeited by these words, which the plts. contend set up an adverse title; and, consequently, the rule must be made absolute.

WILLES, BYLES and KEATING, JJ. concurred.

*Judgment for defts.*

### Judicial Committee of the Privy Council.

Reported by JAMES PATTERSON, Esq., of the Middle Temple Barrister-at-Law.

Wednesday, March 13.

(Present—The Right Hon. the ARCHBISHOP OF YORK, Lords CRANWORTH, CHILMERSFORD and KINGSDOWN, Sir E. RYAN and Sir J. T. COLERIDGE.)

POOLE v. BISHOP OF LONDON.

*Clergy—Stipendiary curate—Revocation of licence by bishop—Appeal to Privy Council*—36 Geo. 3, c. 83; s. 6, 1 & 2 Vict. c. 106, ss. 98, 109.

*Where the bishop revokes the licence of a stipendiary curate acting within the diocese, such curate has no appeal except to the archbishop, whose decision is final.*

This was an appeal from a decision of his Grace the Archbishop of Canterbury, whereby he confirmed the revocation made by the Bishop of London of the licence of Mr. Poole, the app., who was an assistant stipendiary curate in the church of St. Barnabas, Fimlico.

Mr. Poole had been duly licensed by the late bishop, but, in consequence of certain alleged malpractices touching the practice of confession, the present Bishop of London had, under the authority of the statute 1 & 2 Vict. c. 106, s. 98, after hearing evidence, revoked such licence on May 25, 1858. Mr. Poole appealed to the Archbishop of Canterbury, who, without hearing the parties, confirmed the revocation. It having been found that the archbishop had acted illegally in deciding without hearing the parties, a *writ of mandamus* was issued from the Q. B. to his Grace to hear evidence, which was accordingly done on Feb. 18, 1859, when his Grace sat, assisted by the Right Hon. Dr. Lushington. On the 23rd May 1859 his Grace confirmed the decision of the Bishop of London. Mr. Poole then appealed to her Majesty in Council, and the competency of the appeal was objected to.

The Queen's Advocate, M. Smith, Q. C. and Dr.

Stoobey, for the resp., contended that it was not competent to appeal from the decision of the archbishop to the Privy Council: (Lyndwood, B. 5, tit. 13, edit. 1679; 2 Gibson's Codex, tit. 36, c. 5; 3 Hooker's Eocl. Pol. P. 1.; 1 Inst. 344; 4 Inst. 334; 1 Stephens' Eocl. Stat. 161, 406 nn.; 1 Burn's Eocl. L. 74, et seq.; Cascard's case, 5 Rep. 64; Edes v. Bishop of Oxford, Vaugh. 18; Russell v. Bishop of Lincoln, 3 Bing. 371; R. v. Bishop of Peterborough, 3 R. & C. 47; R. v. Recorder of Ipswich, 8 Dowl. 103; West v. Turner, 6 A. & E. 613; Hodgson v. Dillon, 2 Curt. 388. Wood v. Ledbitter, 13 M. & W. 838; Gorham v. Bishop of Exeter, 15 Q. B. 53, 66.)

Dr. Phillimore, Q. C., Coleridge and Buller, for the app., contended that the right of appeal under the former statutes was not taken away by the recent statute: (Lyndwood, B. 3, tit. 4; B. 5, tit. 11; 1 Inst. 96; Godolphin's Abridg. 22, 81; 1 Gibson's Codex, 266, 329; Ducange, "Curatus;" 3 Thomas-simis, 4; Bishop of St. David's case, 14 St. Tr. 417; Lins v. Harris, 1 Lee, 146; Duke of Portland v. Bingham, 1 Hagg. 157; Doe v. Thomas, 9 A. & E. 556; R. v. Archbishop of Canterbury, 38 L. J. 154, Q. B.)

*Cur. adm. vol.*

LORD CRANWORTH.—The only question on which we have to pronounce an opinion in this case is, as to the right of Mr. Poole to appeal to her Majesty from a sentence of the Archbishop of Canterbury, dated March 23, 1859, by which his grace confirmed the revocation by the resp. of the app.'s licence as an assistant stipendiary curate in the church of St. Barnabas, in the diocese of London. The case was argued before us with great learning and ability, and our attention was directed to numerous ancient ecclesiastical authorities supposed to bear on the question. But, after giving the most careful attention to all which was addressed to us, we have come to the conclusion that the question turns, not on ancient ecclesiastical law, but on the true construction of, at most, two modern Acts of Parliament. It is not necessary to decide whether there were or were not in our church before the Reformation functionaries corresponding precisely to the stipendiary curate of the present day. It is sufficient for the purpose of enabling us to come to a satisfactory conclusion that we should see how far they have existed, and to what extent their rights have been recognised, in more modern times. That such a class of persons existed at the beginning of the 17th century is plain from the canons of 1603. The 47th canon provides that every beneficed clergyman, licensed not to reside on his benefice, shall cause the cure to be supplied by a curate, that is, a sufficient and licensed preacher; and the next canon, the 48th, goes on to say that no curate shall be permitted to serve in any place without examination and admission by the bishop in writing under his hand and seal. Though, doubtless, there was by no means the same number of curates then as in modern times, yet it seems certain from these canons that such an order of ecclesiastics then existed; that is made more plain by subsequent Acts of the Legislature. I am not aware of any statute bearing directly on the point prior to the 12th of Anne, s. 2, c. 12. By that statute it was enacted, "that if any rector or vicar should present any curate to the bishop to be licensed, or admitted to serve the cure in his absence, the bishop should fix his stipend at an annual sum not exceeding 50*l.* And in the case of any dispute as to payment, the bishop should summarily hear and determine the same; and in case of nonpayment he might sequester the profits of the living." This statute shows clearly that in the reign of Queen Anne, curates, according to the modern acceptation of the word, were a class of ecclesiastical functionaries commonly known and recognised in the Church. The next statute to which it is necessary to

refer is the 36 Geo. 3, c. 83. The first section of that statute, after reciting the statute of Queen Anne, and that in many places the stipend thereby authorised was inadequate, authorised the bishop, in cases where the incumbent is nonresident, to fix the stipend at any sum not exceeding 75*l.* per annum, and to allow the curate to occupy the rectory-house. There are then some clauses, putting, for certain purposes, perpetual curacies, and churches augmented under Queen Anne's Bounty, under the same footing as ordinary benefices. And then the 6th section proceeds thus:—"And whereas it is expedient that the authority of ordinaries to license curates, and to remove licensed curates, should be further explained, enlarged and confirmed, be it enacted and declared, that it shall be lawful for the ordinary to license any curate who is or shall be actually employed by the rector, vicar, or other incumbent of any parish church or chapel, although no express nomination of such curate shall have been made, either in words or in writing, to the ordinary by the said rector, vicar, or other incumbent; and that the ordinary shall have power to revoke, summarily and without process, any licence granted to any curate employed within his jurisdiction, and to remove such curate for such good and reasonable cause as he shall approve, subject, nevertheless, to an appeal, as well in the case of a grant of a licence to a curate who has not been nominated, as in revocation of a licence granted to a curate; such appeal to be made in either case to the archbishop of the province, and to be determined in a summary manner." By the 57 Geo. 3, c. 99, so much of the Act of Queen Anne and of the 36 Geo. 3, c. 83, as relates to the maintenance of curates and to the fixing of their stipend is repealed, together with the whole of an intermediate Act, namely, the 53 Geo. 3, c. 149, which had contained provisions further extending the amount of stipend which might be assigned to them. This repeal does not touch the 6th section of the 36 Geo. 3, inasmuch as that does not relate to the maintenance of curates or the fixing of their stipends. This last statute, the 57 Geo. 3, c. 99, is wholly repealed by the 1 & 2 Vict. c. 106, except so far as it had repealed former enactments; so that the enactments now in force appear to be the 6th section of the 36 Geo. 3, c. 83, and the whole of the 1 & 2 Vict. c. 106. It is under this last statute that the present appeal was presented, and it is necessary, therefore, to look closely to its provisions. The first seventy-four sections relate to matters foreign to our present inquiry; the 75th and 76th sections give power to the bishop, when an incumbent is nonresident, to appoint a curate, and fix within certain limits the amount of his stipend. Sects. 77 and 78 enable the bishop, in certain cases, to appoint a curate even when the incumbent is resident, and does not consent to the appointment. Sects. 81 and 82 point out the steps to be taken by any curate in order to obtain the bishop's licence, whether the incumbent be resident or not. Sect. 83 provides that, whether the incumbent is or is not resident, the licence shall state the amount of the stipend; and if any dispute arises concerning the stipend or its payments, the bishop shall summarily hear and determine it without appeal, and may, if necessary, sequester the profits of the living. Sects. 84 to 94, both inclusive, point out the amount of the stipend to be allowed in different cases. Sects. 95 and 96 regulate the mode in which a curate is to give up his cure and the rectory-house when a new incumbent is appointed, and in certain other cases. Sect. 97 forbids a curate to give up his curacy without a certain notice. And then comes sect. 98, on which the present question arises: "And be it enacted that it shall be lawful for the bishop to license any curate, who is or shall be actually employed by any nonresident incumbent of any benefice

within his diocese, although no express nomination of such curate shall have been made to such bishop by the incumbent, and that the bishop shall have power, after having given to the curate sufficient opportunity of showing reason to the contrary, to revoke, summarily and without further process, any licence granted to any curate, and to remove such curate, for any cause which shall appear to such bishop to be good and reasonable, provided always that any such curate may, within one month after service upon him of such revocation, appeal to the archbishop of the province, who shall confirm or annul such revocation as to him shall appear just and proper." Acting on the authority conferred, or supposed to be conferred, by this section, the bishop revoked the licence which had been granted by his predecessor to Mr. Poole. Mr. Poole duly appealed to the archbishop, who confirmed the revocation. Does any appeal lie from the decision of the archbishop? We think not. The argument on behalf of Mr. Poole was, that by the ancient law of the Church, as finally altered and settled by the statute 24 Hen. 8, c. 12, and 25 Hen. 8, c. 19, there lay, of common right, an appeal from every decision of an archbishop to the King in his Court of Ch.; and that, by the recent statutes of 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, a 3, that appeal has been now transferred to the Judicial Committee of the Privy Council. By the 2nd section of 24 Hen. 8, c. 12, it is enacted that all causes testamentary, causes matrimonial, and causes relating to tithes, should from thenceforth be finally determined within this realm. And then, by sects. 5 and 6, it is enacted that in all such causes, i. e. causes relating to testaments, marriages, or tithes, any of the parties grieved may appeal from the archdeacon (if the matter or cause be there begun) to the bishop; and if commenced before the bishop, then from him to the archbishop, there to be definitively determined. In the next year was passed the celebrated Act commonly called the Act of the Submission of the Clergy, 25 Hen. 8, c. 25; and by the 3rd section of that Act it is enacted that no appeals whatever should be had to any authority out of the realm in any causes or matters whatever, but that all appeals, what cases or matter soever they might concern, should be had and prosecuted by the parties aggrieved after such manner as had been limited by the preceding statute in regard to causes of matrimony and tithes; and then by the 4th section it is provided that parties grieved by any act of justice in any of the courts of the archbishop might appeal to the King in Chancery, who should thereupon direct his commission to the delegates to hear and determine the same in the same way as in appeals from the Court of Admiralty. The power thus conferred on the Crown was, by the Acts of the last reign, transferred to the King in council, and is now exercised upon the advice of the Judicial Committee of the Privy Council. The argument of the app. was, that his case comes within the purview of these statutes. The stat. 1 & 2 Vict. c. 106 gives him, he contends, a right of appeal to the archbishop, and from him the statutes of Hen. 8 and Will. 4 give him a right of appeal to her Majesty in council, and to the Judicial Committee. But we are of opinion that the provisions of the statutes of Hen. 8 cannot be thus engrafted on those of the modern statute. The appeals given by the statutes of Hen. 8 were appeals in matters and causes in contest in which complaint was made of some violated right where there was in the ordinary acceptation of the word litigation. But the case is very different in the appeals given by the statute under which the present question arises. The object of that statute evidently is to authorise and compel the bishop, for the benefit of the community, to exercise his discretion in a summary way on various matters in which it is necessary or expedient that a discretionary power should be lodged somewhere. Thus

it may be reasonable, under special circumstances, to permit an incumbent to be nonresident. Circumstances may arise which may make it expedient to put an end to such a permission. It may be necessary to fix the stipend of a curate; additional curates may be required for the sake of the parish. In these, and very many similar cases to which the Act extends, it is absolutely necessary that a discretion should be lodged somewhere, and the Legislature has confided that discretion to the bishop. He is to determine whether there are circumstances which will justify the non-residence of an incumbent, or which make it expedient that a licence given to him for that purpose shall be revoked, or what amount of salary a curate ought to receive, or whether in certain cases additional curates ought to be appointed. He is to exercise in these and the numerous other cases which the Act embraces his discretion as to what ought, in the interests of the Church and of the public, to be done. But then the Legislature, seeing that, in the exercise of that discretion, the bishop may err, has given to the party affected by what has been done or refused to be done, a right to appeal to the archbishop, whose duty it still is to exercise his discretion as it had been the duty of the bishop. In a solitary instance—namely, the refusal by the archbishop to grant a dispensation to hold two livings—a right of appeal is given to the Queen in council by sect. 6. But in that case the original discretion is exercised by the archbishop and not by the bishop, so that, unless there had been such an appeal given, there would have been no control over the discretion first exercised. The circumstances that in this case an appeal is expressly given to the Queen in council is strong to show that where no such appeal is expressly given it cannot be implied. The appeal given by the statute from the bishop to the archbishop, and in the case mentioned from the archbishop to the Queen in council, is not an appeal as between litigant parties. It is a reasonable safeguard provided by the Legislature to prevent hardship from a hasty or erroneous exercise of discretion; and even if there were nothing in the Act excluding further appeal, we might reasonably have inferred that no such further appeal was contemplated; but all question on this subject seems to us to be excluded by the positive provisions of the Legislature. The 109th section is as follows:—"And be it enacted that in every case in which jurisdiction is given to the bishop of the diocese, or to any archbishop under the provisions of this Act and for the purposes thereof, and the enforcing of the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall, except as herein otherwise provided, wholly cease, and no other jurisdiction in relation to the provisions of this Act shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this Act; anything in any Act or Acts of Parliament or law or laws, or usage or custom to the contrary, notwithstanding." This section appears to us decisive on the subject; it excludes all proceedings not expressly authorised by the Act, and thus relieves us from all obligation of considering the numerous ancient authorities and principles to which we were referred. We only add, with reference to the doubt suggested whether the 98th section of the Act extends to the case of the app., he having been the curate of a resident, not of a nonresident incumbent, that it is a point not material to be considered; for, if the appellant does not come within that clause, he certainly comes within the 6th section of 36 Geo. 3, c. 83, to which the same principles apply. Their Lordships will therefore humbly report to her Majesty that the appeal must be dismissed, no such appeal lying from the decision of the archbishop, and we see no reason for departing from the ordinary rule that it must be dismissed with costs.

*Dismissed with costs.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HENKELLEY, Esqrs., Barristers-at-Law.

Wednesday, April 24.

### REG. v. THE GUARDIANS OF THE CAMBRIDGE UNION.

*Appeal—Part heard—Adjournment to a subsequent session.*

*It is competent to the court of quarter sessions to adjourn the further hearing of a part heard appeal to a subsequent session.*

This was a case stated from sessions under the following circumstances:—An appeal against a lunatic order, dated the 14th May 1860, came on for trial at the Warwickshire sessions on the 4th July 1860. At the hearing the resps. relied upon a settlement by apprenticeship, and the case stated "that in order to enable them to give secondary evidence of the indenture of apprenticeship of the said pauper, the resps. called evidence to prove a proper search for the said indenture, and the loss of the same. The sessions, on hearing this evidence and on the objection of the app., held that a sufficient search for the missing indenture had not been made by the resps., and refused to admit secondary evidence of the same. The resps. then applied to the sessions to adjourn the further hearing of the said appeal to the then next quarter sessions of the peace, in order to enable them to make further search for the said missing indenture. On the part of the app. it was objected that the statute 16 & 17 Vict. c. 97, limited the jurisdiction of the sessions over the said appeal to the particular sessions at which the same was then being tried, and that the sessions had no power to further adjourn the hearing of the said appeal, as contended for by the resps., and that no subsequent sessions had power over the said appeal, and that the said order of the 14th May 1860 ought to be quashed, there being no evidence before the sessions to support the same. The sessions held that they had jurisdiction to adjourn the further hearing of the appeal to the then next quarter sessions of the peace, and they made an order adjourning the same accordingly, on payment of the costs of the day by the resps. to the app., subject to the opinion of the Court of Q.B. on this point. And at the then next quarter sessions of the peace held at Warwick, on the 16th Oct. 1860, the court, on application of the resps., and for the purposes of, and without prejudice to this case, further adjourned the hearing of the said appeal to the then next quarter sessions of the peace for the said county. If this court should be of opinion that the decision of the court of quarter sessions was incorrect on this point, and that they had no jurisdiction to adjourn the further hearing of the said appeal, then the said order of sessions adjourning the further hearing of the said appeal and the said order of the 14th May 1860 to be quashed."

*Macaulay, Q.C. and E. C. Leigh* appeared in support of the order of sessions, and contended that the sessions had a power to adjourn a case though part heard: (*R. v. Kendal*, 2 Ell. & Ell. 249; *R. v. Wals*, 13 East, 353; *R. v. Baker*, 11 Q.B. 397; *Bowman v. Blyth*, 7 Ell. & Bl. 26; *R. v. Kimbolton*, 6 A. & E. 603; *Kees v. The Queen*, 10 Q.B. 928.)

*Huddleston, Q.C. and Spooner*, contra, argued that, notwithstanding the sessions might adjourn a case to give judgment or consult the judges of assize, they have no jurisdiction to adjourn a part heard appeal: (16 & 17 Vict. c. 97, s. 108, s. 128; *Bac. Ab.* vol. 2, 160; *Rex v. Reading*, Cas. tem. Hardwick, 2nd vol. 79; *Rex v. Kendal*, 1 Ell. & Ell. 492, judgment of Crompton, J.; 17 & 18 Vict. c. 125, s. 19.)

*CROMPTON, J.*—I am of opinion, upon the whole, that the sessions had jurisdiction to adjourn the appeal as they did, but that it should be exercised with very great caution. There are many cases in which

Q. B.] TOWN COUNCIL OF BIRMINGHAM v. BIRMINGHAM WATERWORKS COMPANY.

[Q. B.]

it could not be said that such an adjournment would be improper. The only *dictum* against the power is in *Rez v. Kendal*. I certainly thought there that it could not be done when the appeal had been part heard. But I was rather hasty in that opinion; I should have said, "it ought not to be done," and not "it could not be done." As regards the particular Act of Parliament upon which this appeal took place, I see no distinction in this case in that respect and others. That there is a jurisdiction in the sessions, either to respite or adjourn by continuances, is clear; but it is said that where a case is part heard, the case itself cannot be adjourned, but the sessions themselves must be adjourned. It was asked by Mr. Spooner what is to be adjourned? I think that the whole appeal should be adjourned, and the whole heard again. It is admitted that it can be adjourned for certain causes, such as to consult with the judges of assize, or to give judgment; and if so it is very difficult to say that it cannot be adjourned when part heard. Now I think that the later authorities show us this may be done. It is said there are no such instances, but I find it laid down in Burrow's Settlement Cases (*Rez v. Sible Hedingham*, p. 114), an appeal is spoken of as being taken up at a subsequent sessions, which looks as though it had been part heard. That view is very much confirmed by the case in Hardwick, *E. v. Reading*. After considerable doubt, I come to the conclusion that there is nothing to show that the sessions have not this jurisdiction. There will, therefore, be judgment for the respa. I may say that my brother Hill, before he left the court, came to the same conclusion.

BLACKBURN, J.—The general rule as laid down in *Rez v. Wills* is, that the court who are to try the appeal have an incidental authority to adjourn it when once properly lodged, if it be necessary for the advancement or convenience of justice, and that the sessions are to judge of the proper occasion for doing so. The question now raised is, whether it is impossible that the sessions can determine that it is for the advancement of justice that they can adjourn it. No doubt, after an appeal is once commenced, it would be very inconvenient to adjourn it, and therefore those who have the power to adjourn should pause before adjourning. But I cannot see any decision which prohibits this. Whether or not in the present case there was sufficient ground for adjourning I will not say; but I may say that in general it ought to be exercised with very great caution. There may be cases, such as a witness being taken ill, or its being discovered that the other side have been guilty of malpractices, in which it would be very proper to adjourn. In the case of *Rez v. Reading*, it would appear that the justices had part heard the case, and then had adjourned it to ask the opinion of the judges of assize. The case was then taken up by a subsequent court of quarter sessions. I hope it will be understood that the power of adjournment should be very sparingly exercised. (a)

*Judgment for the respa.*

REG. v. THE GOVERNORS, &C., OF THE LICENSED VICTUALLERS' SOCIETY.

Poor-rate—School of the Licensed Victuallers' Society—Rateability of.

*The school of the Licensed Victuallers' Society is established under Royal charter, and is of a purely charitable character, no profits being derived from it. There is, however, a large hall in the building in which the quarterly and other meetings of the society are held:*

*Held, that there is a beneficial occupation, and that the building is liable to be assessed to the poor-rate.*

(a) Cockburn, J. was absent through indisposition, and Hill, J. had gone to chambers pending the arguments.

This was a case which reserved the question of whether or not the school of the Licensed Victuallers' Society, in Kennington-lane, is exempt from being assessed to the rate for the relief of the poor. The school was established by Royal charter, and is of a purely charitable character, no profits whatever being derived from it. It appeared, however, that there is a large hall in which the quarterly and other meetings of the society are held. The rate was appealed against upon the ground that there was no beneficial occupation.

Huddleston, Q.C. appeared for the appa., and argued that there was no beneficial occupation, and so the premises were not liable to be rated: (*R. v. Waldo*, Cald. 358; *R. v. Agar*, 14 East, 256; *R. v. Wilson*, 12 A. & E. 94; *R. v. Temple*, 2 Ell. & B.; *R. v. Baptist Infirmary Society*, 10 Q. B. 889; *R. v. Sterry*, 12 A. & E. 84.)

Lush, Q.C. (Knapp with him) in support of the rate, were not called upon.

CROMPTON J.—It is impossible to contend in this case that where a society whose main object is private benefit to their own members, keep the building for that purpose, and hold their meetings there, that it is not liable to be assessed to the poor rate.

HILL and BLACKBURN, JJ. concurred.

*Judgment for the respa.*

Saturday, April 27.

REG. on the prosecution of the TOWN COUNCIL OF BIRMINGHAM (respa.) v. THE BIRMINGHAM WATERWORKS COMPANY (appa.).

Rate—Land covered with water—Reservoirs—Water-pipes.

*By the Birmingham Improvement Act 1851 the town council are empowered, by clause 128, to make and levy a rate to be called "the Borough Improvement Rate," upon any person who occupies any house, shop, &c., except as thereafter excepted, according to the full net annual value thereof respectively; and by clause 129 it is provided that "the occupiers of any land covered with water," &c., shall be rated in respect of the same at one-fourth part only of the net annual value:*

*Held, that a reservoir of a water company came within the proviso, but that water-pipes did not.*

This was a case stated by the Recorder of Birmingham, upon an appeal tried before him, against an assessment of the appa. to the borough improvement rate.

It appeared that the company were incorporated by the 7 Geo. 4, c. 109 (local), for the purpose of constructing waterworks, and to supply, by means of aqueducts, pipes, mains and reservoirs, the town of Birmingham, &c., with water. The company, in pursuance of their Act, made a large reservoir covering about eighteen acres of land. They also constructed a smaller reservoir, and from this reservoir, which is supplied from the larger one by means of underground pipes they supplied the town. The company subsequently obtained another Act, the 18 Vict. c. 34 (local), by which the former one was repealed, and in which was embodied the Waterworks Clauses Act 1847 (10 Vict. c. 17). In pursuance of this Act the company proceeded to construct new reservoirs and lay down new mains and pipes. By the Birmingham Improvement Act 1851, in which the 10 & 11 Vict. c. 34 (the Towns Improvement Clauses Act 1847), so far as relates to sects. 167 to 184, both inclusive, is incorporated, the town council is empowered by clause 128 to make and levy a rate to be called "the Borough Improvement Rate" upon every person who occupies any house, shop, warehouse, counting-house, coach-house, stable, cellar, vault, building, workshop, manufactory, garden, land, or tenement whatsoever, except as thereafter excepted within the limits of the Act, according to the full and

Q. B.]

STEPHENSON v. TAYLOR.

[Q. B.]

annual value thereof respectively; and by clause 129 it is provided that the occupiers of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the rates authorised to be levied by this Act, at one-fourth part only of the net annual value; and by clause 131 the following additional clauses of the Towns Improvement Act, namely, the 156th, and 163rd to 166th, both inclusive, are incorporated. The borough improvement rate, which was the subject of the appeal, was made in pursuance of and subject to the provisions of the said Act, at the rate of 2s. in the pound. It was admitted that the company were rated to the full extent as houses, &c., and not at one-fourth part of the net annual value of the reservoir, pipes, mains and other works within the said borough. It was contended (and the case was stated for the opinion of the court thereupon) that the reservoir and pipes and mains ought to have been rated at one-fourth as land covered with water.

*Lush, Q.C. (Field with him)* appeared for the resps., and contended that, first, as regards the reservoir, they ought not to be considered as "land covered with water," such words evidently applying to land naturally covered with water, and not to land artificially covered for commercial purposes, and that the mention of "canals" shows that the Legislature meant this, for if they had intended otherwise they would have mentioned "reservoirs." Secondly, as regards the pipes, in no sense could they be considered as "land covered with water."

*Huddleston, Q.C. (Adams with him)* for the appas., argued, first, that the reservoirs were clearly within the words "land covered with water." [*CROMPTON, J.*—What do you say to the pipes?] Secondly, the pipes which contain water come under the same description, and that it matters not that the water itself may be covered with land. [*CROMPTON, J.*—Then a gaspipe would be "land covered with gas!"

*COCKBURN, C.J.*—This case is very clear. There is no doubt that the reservoir is "land covered with water." The argument addressed to us by the resps. upon the point would have been a very good one for the committee upon the Bill, but it is clear that the words used bring the reservoirs within the meaning of the Act. As regards the pipes, they are only the medium of conveying the water from the reservoir, and are not privileged.

*CROMPTON and HILL, JJ.* concurred.

*Case sent back, with the opinion of the court that the rate should be amended as regards the reservoirs, and to stand as regards the pipes.*

*STEPHENSON (app.) v. TAYLOR (resp.)*  
*Volunteer infantry — Turnpike toll — Exemption—3 Geo. 4, c. 126, s. 32.*

*A member of a corps of volunteer infantry, if dressed in the uniform of his corps, and having his arms, furniture and accoutrements, according to the regulations of his corps, is exempt from toll when passing through any turnpike-gate in a carriage, either to or from any place appointed for and on the days of exercise, inspection, or review, and this notwithstanding the carriage is one hired for the occasion.*

This was a case stated under the 20 & 21 Vict. c. 43, by one of the metropolitan police magistrates as follows:—

"The app. in this case is a captain in the 1st Surrey Rifle Volunteers, and the resp. is collector of tolls at Kennington turnpike-gate, Surrey, and on the 19th June 1860 the resp. appeared before me to answer the complaint of the app., "for that he, the said resp., on the 2nd day of June 1860, at the parish

of Lambeth, &c., being then and there the collector of tolls at a certain turnpike-gate there situate, did unlawfully demand and take of and from one George Hodgkins, the sum of three pence as and for toll for a carriage drawn by one horse then passing through the said gate, the said George Hodgkins being then and there exempt from the payment of such toll by reason that the said carriage was then and there conveying volunteer infantry, and the said George Hodgkins then and there claiming such exemption," contrary to the provisions of the statutes 3 Geo. 4, c. 126, s. 32, and 4 Geo. 4, c. 95, s. 30 (the General Turnpike Acts). It was proved before me that Hodgkins was a volunteer belonging to the before-mentioned corps, and that on the 2nd of June he and others the members of the corps were assembled at Kennington, by regimental order, for "marching and drill," and did march out and were afterwards dismissed at the head-quarters of the regiment, at Hanover-park, Peckham; that Hodgkins and two other members of the corps there hired a hackney carriage and proceeded towards home, and that it was necessary to pass through Kennington turnpike-gate to do so. There was no one else in the cab, and the volunteers were dressed in their uniform and had their arms and accoutrements according to the regulations of the corps. The resp. demanded threepence for toll, and Hodgkins claimed exemption, which the resp. refused to allow, and Hodgkins paid the amount demanded. Upon the part of the resp. it was contended that the carriage was not then and there employed in conveying volunteer infantry within the meaning of the statute, and that Hodgkins was not entitled to exemption from payment of toll. I was of opinion that the exemption did not extend to carriages used by members of a volunteer corps for their own private ease and convenience, which appeared to be the case on the occasion in question, but was limited to carriages used in performing some public duty requiring the use of a carriage. It was agreed that the nature of the duty to be performed to give the exemption was shown by subsequent words in sect. 3, Geo. 4, c. 126, s. 32, and that if the volunteer was going to or returning from any place appointed for and on the days of exercise, and was dressed in the uniform of his corps, and had his arms, furniture and accoutrements according to the regulations of such corps, he was exempt from the payment of toll; but looking carefully at these words, I could not come to this conclusion. It appeared to me that those words related only to the exemption of horses furnished by or for a person belonging to a corps of yeomanry or volunteer cavalry or infantry, and rode by him on the occasion referred to, and not at all to carriages. That is the consideration of the matter I was confined to the words "carriage conveying volunteer infantry," that I was bound to put a reasonable construction upon these words, in accordance with other provisions in the section relating to the exemption of carriages when used by the regular forces of the kingdom; and that if, under the circumstances of the case before me, the parties were exempt, any carriage with any number of horses, and under any circumstances whatever, so long as the person in whose employment it was belonged to a volunteer corps would be alike exempt, which I thought could not be intended, wherefore I dismissed the information."

By the 32nd section of 3 Geo. 4, c. 126, certain exemptions from toll are enacted (*inter alia*):—"Or for any carriage conveying volunteer infantry, or for any horse furnished by or for any person belonging to any corps of yeomanry or volunteer cavalry or infantry, and rode by him in going to or returning from any place appointed for and on the days of exercise, inspection, or review, or on other public duty, provided that such person shall be dressed in the uniform of his corps, and shall have his arms, furniture and accoutrements, ac-

V.C. S.]

BROCK v. KELLOCK.

[V.C. S.]

ording to the regulations of such corps, at the time of claiming the exemption."

Garth appeared for the app., and contended that the magistrate was wrong, for that the exaction of the toll was illegal, the carriage being exempt as conveying members of volunteer corps.

Lush, Q.C. (with him Levy) was called upon, and he argued that there was no exemption in such a case, for that the words "any carriage conveying voluntary infantry" must be taken to mean a carriage employed in the public service; that the exemption from toll of the regular army by the Mutiny Act does not extend to any hired or private vehicle.

ROCKBURN, C.J.—I am of opinion that the decision of the magistrate was erroneous, and that he ought to have decided in favour of the complainant; the case, therefore, will be remitted to him, with our opinion upon it. Upon looking carefully at the Turnpike Act, I am of opinion that a carriage *bona fide* employed in conveying volunteer infantry to a place of exercise, and bringing them back, is entitled to exemption. The carriage must be employed substantially in the conveyance of the fare. The act of a volunteer riding upon a public conveyance would not cause it to be exempt, and I think that if *bona fide* occupied by volunteers, the mere accidental circumstance of a person not a volunteer riding in it would not deprive it of its exemption, nor would a public carriage be exempt merely because volunteers were riding in it. Much doubt has arisen in consequence of the faulty punctuation in the published copy of the statute. Attention has been called to the case of the regular army; but there is an obvious distinction between the volunteers who give up a portion of their valuable time, and the regular army, whose whole time is at the disposal of the public. The Legislature, for the purpose of encouraging these useful bodies, have given them an exemption which it did not think it necessary to confer on the regular army. I think, therefore, the exemption applies to such a case where the volunteers were actually returning from exercise.

CROMPTON and BLACKBURN, JJ. concurred.

To be remitted back to the magistrate with the opinion of the court.

## V. C. STUART'S COURT.

Reported by JAMES B. DAVISON, Esq., of Lincoln's Inn, Barrister-at-Law.

Monday, April 29.

BROCK v. KELLOCK.

Medical law—Proof of live birth—Respiration and pulsation.

Upon a question of whether a child was still-born, or whether it was born alive and died shortly after its birth, the accoucheur who delivered the mother gave evidence that he felt the child move, and, after it was born, he felt a slight pulsation of the funis; also that the chest of the child was arched. He did not, however, notice any movement of the chest subsequent to the child's birth.

In order to establish legal proof that a child was born alive, it is not invariably necessary to show that respiration has taken place.

A single vital act, such as the beating of the heart of the infant after separation from the mother, is a better, because a more easily defined, proof of live birth than any amount of undefined respiratory action.

The sole question in this suit was, whether a child was or was not born alive.

Thomas Corral, of Sheerness, by his will, dated the 1st Oct. 1825, gave all his estate and effects on trust for his widow for life, and after his death for his son Thomas Corral and his daughter Elizabeth Sarah Cor-

ral, in equal shares, as and when they should attain the age of twenty-one.

Testator died in 1827. Both the children attained twenty-one. On the 16th March 1841 Thomas Corral the son married the plt. Harriet Elizabeth Beresford Brock, then H. E. B. Patey, spinster. Thomas Corral the son died on the 25th July 1842, intestate, leaving, as the plts. alleged, one child only surviving. This child was a female, and was an infant *en ventre sa mere* at the time of the death of Thomas Corral the son. It was born on the 22nd March 1843, and died, as the plts. alleged, a few hours after its birth.

The female plt., who had since, viz. on the 9th July 1859, married the other plt. Samuel Brock, claimed—or her husband in her right claimed—to be entitled to one moiety of the trust-estate, i. e. to the whole of her late husband's share in the trust-estate, as the legal personal representative of her late husband, and of her deceased daughter.

The deft. John Kellock had married Elizabeth Sarah Corral, the testator's daughter. She died in 1851. Elizabeth Corral, the testator's widow, died on the 5th April 1860. Letters of administration to the estate of the testator's widow were granted to the deft., and through her he was also the legal personal representative of the testator.

The deft. Kellock had also administered to the estate of his wife. He said he believed that the child of Mrs. Corral, which died on the 22nd March 1843, was still-born. If that were so, the female plt. would be entitled to only one moiety of her husband's share as his widow; and the other moiety of the share of Thomas Corral, the son, would belong to the deft. as representative of his widow, the sister and sole next of kin of Thomas Corral the son.

The suit was for administration; a decree had been made, and inquiries directed, and the contest turned mainly upon the medical evidence.

Dr. Freeman, surgeon, who delivered the child's mother, said: "I verily believe the child was born alive. When it was born it was very weak, and I had great doubts whether I could save its life. When I believe that a child was born alive, I always place it in warm water, which I never do when it is still-born. Believing the child to be born alive, I placed it in warm water according to my usual practice, and used other means to sustain its vitality, but without success. I should not have adopted these measures had the child been born dead."

Mrs. Fowell, widow, who was present, said that about half an hour after the birth, she went into the room to which the child had been taken. She found it was in a warm bath; its eyes were wide open, and she was particularly struck with their brightness and beauty. She remembered calling the nurse's attention to them. They had all the appearance of life in them. She then believed, and still believed, that at that period the child was alive. She afterwards saw the child in its coffin, when the eyes were closed.

Mrs. Brock, the mother, said that the child was born alive, and up to the period of its birth she had a distinct recollection of having felt the child to be alive. She believed the child survived its birth only two hours.

Dr. Freeman was examined. He said: "It was Mrs. Corral's first confinement and she was very ill. I was satisfied that the child was alive. I am quite sure the child was alive immediately before the last expulsive effort. I felt it move, and after it was born I felt a slight pulsation at the funis. It is not unusual for a child not to cry when the labour has been very protracted. The child's existence became separate from the mother at the moment that I divided the funis, and I felt a very weak pulsation of the funis attached to the child, and I therefore believed it to be alive, and applied methods for its restoration. I gave up all hopes of saving the child within a few minutes,

V.C. S.]

BROCK v. KELLOCK.

[V.C. S.]

as the funis had gradually ceased to pulsate. This was soon after it was put into the bath. When I am not satisfied that a child is dead, I usually order it to be put into a warm bath, and sometimes even if it is still-born. I did not notice whether the eyes were closed or open, and I did not notice that the eyes were very bright or very beautiful when in the bath. . . . I did not observe that the child breathed or moved after it was born; my attention was directed to restoring its vitality, as there was still a feeble action going on at its funis. This feeble pulsation of the funis clearly showed circulation was going on in the child independent of the mother. Although I did not notice that the child breathed, I believe it was quite capable of breathing, from the pulsation which I felt at the funis. I believe the child was alive several minutes after it was separated from its mother, and that it died from the severity of the labour."

Dr. Freeman was again examined. He said there were a variety of reasons besides that of the funis having pulsated at the time he divided the child from the mother, which induced him to believe that the child was living. One reason was, the certainty that the child moved one minute before it was born; the great flexibility of every joint and part of the child; there not being the slightest rigidity, and the chest being fully developed and arched, which was a strong evidence of its having breathed. The arching of the chest was always considered evidence of the child having breathed; when the chest was flat, it was evidence that the child had not breathed. The child's chest was arched at its birth; he noticed no movement of the chest afterwards. There was a marked distinction in the child's countenance and appearance different to what it was when it was placed in the bath. He should not expect to see any change in a child that was dead-born, but he should in a child that was born alive. The countenance and pulsation in the funis was an indication that infant circulation was going on in the heart of the child. He considered pulsation one of the principal evidences of life. You could not have breath without circulation, neither could you have continued circulation without breath and without life. He never particularly noticed its breathing, but he had no doubt of its breathing—he meant after its birth. It was usual in practice to wait until the child had breathed, before the cord was divided. He had no doubt of the child's breathing, by his having followed his usual practice.

Dr. Robert Lee, of No. 4, Savile-row, physician, deposed, that having read Dr. Freeman's evidence, he had no hesitation in declaring it to be his opinion that in this case the child was not born alive. He founded his opinion on the following circumstances, viz.:—"According to both Scotch and English law, a child cannot be said to be born alive unless it breathes. If the funis of the child is felt pulsating while the fœtus is within the uterus, that is held by all medical men to be a proof that the child is alive before its birth; whereas, if the funis has ceased pulsating, the conclusion is that the child is dead. The pulsation of the funis continuing after birth, proves that the child is alive in the same sense as it was before birth. I mean by that, that the child has a sign of uterine life still extant; but the pulsation does not prove that the child is alive, because another function of life is required to constitute life, viz. that of respiration. The pulsation of the cord is a symptom that there is that continuing circulation of the heart which has sustained the life of the child while in the mother's womb; but before a child can be said to possess independent life it must respire. The circulation of the heart would induce respiration, and without it respiration cannot take place. The circulation of the heart forms only one symptom of life, and that a minor symptom; and respiration must ensue before a child can be said to live. The gradual

cessation of pulsation in the funis is what I should expect to find in a child that had been so weakened during the labour as in this instance, and shows that the circulation of the heart was so weak, and the remains of uterine life so feeble, as to be unable to induce respiration. The heart may act, and in some creatures does act, many hours after it has been cut out of the body, and although the body is actually dead. For these reasons I say that circulation of the heart is not alone a sufficient symptom of life, but there must also be the essential symptom of respiration which Dr. Freeman swears was absent in this case." As to the remaining symptoms, Dr. Lee said: "First, as to the certainty that the child moved one minute after its birth, it has always been held that the fact of uterine life would not establish extra-uterine life, especially as in the cases of primiparous females the labour is frequently so severe that a child who is fully alive, so far as uterine life is concerned, is perfectly dead before its final expulsion from the mother. Secondly, as to there being no rigidity of the body, I should not expect to find rigidity of the body until after a considerable period had elapsed after death. Thirdly, as to the chest being arched, if this is meant to convey any symptom of respiration after birth, the description of the child cannot be correct, as, if the child respired after birth, Dr. Freeman must have observed some movement of its chest, which he swears he did not. If the chest was arched at birth, and no movement of the chest was observed, it must have been a case when the child endeavoured to respire before final expulsion from the womb."

Dr. Ramsbotham, of No. 8, Portman-square, physician, deposed that, having read Dr. Freeman's evidence, he had no hesitation in swearing positively that, if no other symptoms of life could be proved than those which had been mentioned by Dr. Freeman, the child must be pronounced to have been still-born. "I have always, and still do, draw a great distinction between intra-uterine and extra-uterine life, and I do so for the following reasons. When a child is born, if living, it enters on a new phase of existence, &c. The commencement of the function of respiration is universally considered as heralding the entrance into life, and a child that has never breathed is said to be still-born. To constitute a live birth, then, the child must have respired; that is to say, it must have taken upon itself the performance of those functions which will allow it to exist independently of its mother. I cannot admit that a few feeble pulsations in the funis, or a twitch of the lips, or even the movement of a limb, would be sufficient to entitle it to be regarded as born alive."

Mr. Godson, of Barnet, surgeon, said he should have certified the child in the present case as a still-born child; for it was the practice amongst medical men to certify a child still-born unless it had been observed to breathe after death.

Dr. Tyler Smith, of No. 7, Upper Grosvenor-street, physician, deposed as follows:—"In my opinion the fact that pulsation was observed in the funis or umbilical cord after delivery is a physiological proof that the child in question was not born dead. The pulsation of the cord proves that the heart of the child was still beating, and the circulation, at least to some extent, going on. This is wholly incompatible with death. The child may at this time have been dying, but most certainly it was not dead. The action of the heart is at the foundation of all other acts of vitality. It has hence been called by physiologists, "*Primum vivas, ultimum moriens*." The remarks of Dr. Robert Lee on the contraction of the heart in the lower animals, as fishes and reptiles, after the removal of the organs from the body, do not fairly apply to the heart of the human infant. The human heart has never been seen so to pulsate under like circumstances. Even in the cases referred

V.C. S.]

BROCK v. KELLOCK.

[V.C. S.]

to, the contraction of the heart is a proof that vitality is not extinct. I do not consider it likely that Mr. Freeman was deceived as to the pulsation of the funis: the frequency of the beat of the foetal heart is very different from the pulse of the accoucheur. Mr. Freeman speaks of it as a positive fact, and it is very common for the heart of a new-born infant to beat a short time after birth and then to cease. . . . In giving a certificate of still-birth or otherwise, medical men or accoucheurs do not consider the question of whether the child is legally alive or dead at or after birth. If a child's heart should beat forcibly for many minutes, if it gasped and performed the movements of respiration again and again, yet if it died within a few minutes after birth, medical men would consider it as still-born and certify accordingly. I believe there could be no question but that such a child would be considered as born alive; a distinction therefore must be made between the medical and legal ideas of still birth and live birth. . . . It is clear from the cases cited in Beck's Medical Jurisprudence, to which I have referred, that perfect respiration is not essential to legal life; and Mr. Chitty appears to depend more upon the circulation of which the heart is the centre, than upon respiration, for its establishment. It is for legal authorities to define the meaning of legal life; but physiologically there can be no question that this child was not dead, or beyond the chance of recovery, as long as the heart continued beating. It was therefore alive at the moment of birth, and subsequently, according to the testimony of Mr. Freeman. I submit that it would be much better to take as proof of live birth a single vital act, such as the beating of the heart after separation from the mother, which can hardly be mistaken, than an indefinite amount of respiratory action, which must always be doubtful and difficult of proof in cases where the child dies shortly after delivery."

In an affidavit in reply, Mr. Freeman said it was a mistake on Dr. Lee's part to have stated that he (Mr. Freeman) had sworn respiration to have been absent in this case; on the contrary, he had said he had no doubt that the child breathed after he had separated it from its mother.

Dr. Taylor (author of the work on Medical Jurisprudence), in a letter addressed to Dr. Lee with reference to this case, dated the 27th Feb. last, referring to an old case of *Fish v. Palmer*, cited in 1 Paris & Fonblanque, 225; John Gordon Smith's Forensic Medicine, 515; and 1 Beck Med. Jur. 355, 10th edit., wrote as follows:—"Most of the writers differ from me, and think that the child should have been (in *Fish v. Palmer*) pronounced dead. But this depends upon what is considered to be real and absolute death. One fixes on the cessation of the action of the lungs, another of the heart, another of the muscular contractibility. I am of opinion that in a case of this kind we should not affirm that a child is dead in law until it is completely dead in a physiological sense, and all vital actions have ceased."

Bacon, Q.C. and Karlake appeared for the plts.

Mains, Q.C. and Hardy were for the defts.

The following authorities were referred to:—*Underwood v. Wing*, 4 De G. M. & G. 633; Beck's Med. Jur. 269; Co. Litt. 29 b (n.).

THE VICE-CHANCELLOR.—The single question in this case is, whether this child was born alive. The person competent to speak upon the subject is Dr. Freeman, who attended as accoucheur at the birth, and who has given his evidence upon oath three times over so cautiously, yet so clearly, that I am of opinion he has established that this child was born alive, and was not dead at the time when it was separated from its mother. The affidavits on the other side are mere criticisms upon the sworn statement of Dr. Freeman, and whatever may be the ingenuity of these criticisms, they

certainly show differences of opinion between medical men. Dr. Lee and Dr. Ramsbotham are of opinion that unless respiration, which is one of the vital functions, be proved to have taken place, there is no sufficient evidence that the child has been born alive. But Dr. Freeman, Dr. Taylor, and Dr. Tyler Smith are of another opinion, and I think upon very sound grounds. A proof of pulsation and of action of the heart is much more easily to be had, and is a thing much more clearly a subject of evidence, than a proof of respiration. The connection between circulation, of which pulsation is evidence, and respiration is so extraordinary, that Dr. Freeman has stated that even Dr. Lee and Dr. Ramsbotham do not affect to controvert that the functions of respiration and circulation must necessarily co-exist. But respiration is a thing that may exist, and yet be extremely difficult to prove. It has been clearly proved in this case that this child respired—that is, that there must have been respiration during parturition. The chest was arched. None of the medical gentlemen whose testimony is adverse to that of Dr. Freeman affects to say that an arched chest is not a clear proof that respiration has taken place. They only say that this child had performed the function of respiration during the period of parturition. Where is the evidence that there was no respiration of any the faintest or most imperceptible kind, after the separation of the funis? None of them venture to swear that there was no respiration. Dr. Freeman, who speaks with extraordinary caution, says that he observed no movement of the chest after the separation of the funis; but that he believed at the time of the birth, and still believes, that the child was alive, from the pulsation of the cord. Now, in order to prove the existence of animal life, I think that proof of the performance of one clear vital function is enough. I think it is enough to prove pulsation in order to prove the existence of life; and speaking of what is legal evidence, I cannot adopt the view of Dr. Lee and Dr. Ramsbotham, whose theory is that unless you have proof of the performance of three functions essential to vitality, you have no proof that vitality existed. They say that respiration, which is most difficult to prove, is a clear evidence of animal life. So it is. But they swear, what surprises me, that, in the absence of clear evidence of respiration, clear evidence of pulsation and of animal motion is not to be taken as proof of the existence of animal life. I think, speaking as a lawyer, that the truth lies in the statement with which Dr. Tyler Smith concludes his affidavit, concurring in the statement of Dr. Taylor's opinion, which Dr. Lee has had the candour to bring forward. The truth lies, I think, in this statement of Dr. Smith: "It would be much better to take as proof of live birth a single vital act, such as the beating of the heart after separation from the mother, which can hardly be mistaken, than an undefinable amount of respiratory action, which must always be doubtful and difficult of proof in cases where the child dies shortly after delivery." Therefore, upon the whole, I am of opinion that it has been proved satisfactorily that this child was born alive, and was not born dead.

Upon the question of costs, his Honour said he had already stated his disapprobation of the course taken by the plts. They omitted to give the defts. the name of the accoucheur, or to supply other information whereby the truth might be ascertained, until after the bill was filed. His Honour disapproved also the amount of costs which had been incurred; therefore, upon the best consideration, he meant to dispose of the costs in the following way: he did not mean to give the plts. costs out of the fund until after that stage in the suit when Dr. Freeman's affidavit was filed. The plts.' costs after the date of that affidavit would be taxed and paid out of the entire fund. Up to that point the defts. would



have his costs out of the entire fund, and no costs after that date.

*Declaration accordingly.*

Solicitors for the plts., *Thomas Baker*, agent for *H. T. and A. Smith*, Devonport.

For the defts., *Parker, Rooks and Parkers.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HENTLEY, Esqrs., Barristers-at-Law.

*Wednesday, May 1.*

REG. v. THE OVERSEERS OF TOXTETH-PARK.

*The Local Government Act 1858—General district rate—Rateability of a workhouse.*

*Under the provisions of sect. 55 of the 21 & 22*

*Vict. c. 98 (the Local Government Act 1858), which enacts that "general district rates shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor," a parish workhouse is assessable.*

This was a case stated for the opinion of this court under 12 & 13 Vict. c. 45, s. 11. The following were the principal facts:—

Toxteth-park is an extra-parochial place separately maintaining its own poor; part of it lies within the boundary of the borough of Liverpool, and the other part beyond such boundary, and such last-mentioned part is called the rural district of Toxteth-park. Toxteth-park and certain contiguous parishes were for some time united for the administration of the poor-laws, called the Union of West Derby; but in consequence of the increase of the population Toxteth-park was in the year 1857 separated from such union, and since then the poor-laws have been administered and the apps. as a separate board of guardians elected under the provisions of the 7 & 8 Vict. c. 101, s. 66, and poor-rates made in respect of Toxteth-park are entire rates, extending over the whole of Toxteth-park. In consequence of such separation, the board of guardians of Toxteth-park purchased a large piece of land situate in the district of Smithdown-lane hereinafter mentioned, in the said rural district of Toxteth-park, and erected thereon a very extensive workhouse and workhouse hospital for the poor of the whole of the said extra-parochial places. Toxteth-park and such land was before and until the time of such purchase not assessable to any rate for the relief of the poor. Prior to the erection of such workhouse and workhouse hospital, there was no sewer in the said district of Smithdown-lane, but in consequence of the erection of such workhouse and hospital the resps., after the passing of the Local Government Act 1858, commenced and made a sewer, being a work of a permanent nature, under the powers given to them by the Public Health Act 1848, and the Local Government Act 1858, for the purpose of draining the said workhouse and workhouse hospital, and the dwelling-houses within the said district of Smithdown-lane, and for the benefit thereof and at the request of the apps. the resps. have given permission to the apps. to enter such sewer for the use and benefit of such workhouse and workhouse hospital, and the apps. have accordingly entered such sewer, and made drains communicating between the said sewer and the workhouse and hospital. Prior to the passing of the Local Government Act 1858 the resps. had, under the 88th section of the Public Health Act 1848, made and levied special district rates. The said workhouse and workhouse hospital, at the time when the said sewer rates were made, were in fact assessed to rates for the relief of the poor of the said extra-parochial place of Toxteth-park, but whether they were according to law assessable to such rates is a part of the question submitted to the court.

By the 8th section of the 9 & 10 Vict. c. 127,

entitled "An Act for the improvement of the sewerage and drainage, and for the sanitary regulation of the borough of Liverpool," after reciting that the powers and provisions of the Act of the 5 & 6 Vict. c. 105, entitled "An Act for the better paving and improving the streets and highways within the extra-parochial place of Toxteth-park, in the county palatine of Lancaster, and for the sewerage of certain parts of the said place, so far as the same related to the construction and repair of sewers, drains and watercourses, and other sewerage purposes, and to the raising of money and the imposition of rates for the last-mentioned purposes," were confined to such parts of the said extra-parochial place as lie within the boundary of the said borough, &c. By the provisional order of the General Board of Health, dated July 30, 1855, the Public Health Act was applied to the parts included within the boundaries of Toxteth-park, as defined in the 5 & 6 Vict., and the commissioners for the time being acting in the execution of the said local Act were appointed the local board of health. After the erection of the workhouse and hospital, and such communication had been made by the apps. into the said sewer, that is, on March 6, 1860, a general district rate was made and published by the resps. for the district of Smithdown-lane aforesaid, for the purpose of paying the first instalment of principal borrowed from the Royal Insurance Company, at the rate of ninepence in the pound, and in that rate the apps. were assessed for the said workhouse to the amount of 37l. 10s. upon the net annual value of 10000l. On June 5, 1860, a general district rate was made by the local board of health, for defraying such expenses as are by the Public Health Act 1848, and the Local Government Act 1858, charged upon that rate, at the rate of 1s. 10d. in the pound, in which rate the apps. were assessed for their workhouse to the amount of 91l. 13s. 4d. upon the net annual value of 1000l. and for their workhouse hospital to the amount of 18l. 6s. 8d. upon the net annual value of 200l.

The apps. contended that they were not liable to be rated to the said several rates, on the ground that the resps. are only authorised to levy such rates upon such kinds of property as are assessable to poor-rates, and that such workhouse and hospital being situate within Toxteth-park, and not being united with other parishes for the relief of the poor, is not a kind of property assessable to the poor-rate, and the resps. were precluded from levying the several rates in question upon the said workhouse and hospital. The resps. contended that the said workhouse and hospital were and are a workhouse and hospital for the whole district of Toxteth-park, both within and beyond the boundaries of the said borough of Liverpool, and were and are by the laws in force for the time being assessable to rates for the relief of the poor; and the resps. further contended, that even if the court should be of opinion that the said workhouse and hospital are not assessable to rates for the relief of the poor, the workhouse and hospital are assessable to the said rates, or one of them, as the rural district of Toxteth-park joins only a portion of Toxteth-park aforesaid, for the benefit of the whole of which the said workhouse and hospital were and are erected. The question for the opinion of the court was, whether such workhouse is properly assessable to the said several rates or either of them.

By sect. 55 of the 21 & 22 Vict. c. 93 (Local Government Act), after repealing the 88th section of the Public Health Act 1848 (11 & 12 Vict. c. 63), it is enacted, "that the general district rates shall be made and levied upon the occupiers of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor," &c.

*Welsby* (Baylis with him) now appeared for the resps., and contended that the workhouse was assess-

[Q. B.]

GEORGE CURETON v. THE QUEEN.

[Q. B.]

able, for that it came within the description of property rateable under the statute of 43 Eliz., and that a workhouse has been held to be exempt from being rated only when built in the parish to which it belongs, upon the ground that it would be useless to rate it, when the sum assessed must afterwards be paid out of the rate; an exemption which does not exist when it is built in another parish, or built in one parish for a union of parishes: (*Reg. v. The Wallingford Union*, 10 Ad. & Ell. 259; *Reg. v. Justices of Hull*, 4 Ell. & Bl. 29; *Governors of the Bristol Poor v. Wait*, 5 Ad. & Ell. 1.)

*Overend, Q.C.* (*Aspinall* with him) for the appra., argued that the workhouse was exempt from being rated, the 55th section of the 21 & 22 Vict. c. 98, making it rateable to this rate only where it would be rateable to the poor-rate, and that the workhouse would not be liable to be assessed to the poor-rate; he argued also that the workhouse would not be assessable on account of being devoted to public purposes.

*Cockburn, C. J.*—Two different views may be taken of the 55th section—the one, that it refers to the kind of property, the other that it refers to the occupation. It is clear, however, that whatever was rateable under the poor-rate is rateable under this Act. The authorities have an immediate bearing upon the case, and show that, as regards the poor-rate, when the workhouse for two parishes is locally situated in one of them, it is liable to be rated in the one where it is situated. I think the case is not only within the words of the 55th section, but is rateable upon the soundest principles. I think the workhouse was therefore rateable.

*Crompton, J.*—I am of the same opinion. I think that the words "all such kinds of property," point out what is the description of property that may be assessed. Now I think this is the kind of property that may be assessed to the poor-rate, and is therefore liable to be rated to the rate in question.

*Hill, J.*—I think that the words "all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor," apply to the kind of property, and not to the nature of the occupation.

*Blackburn, J.* concurred.

*Judgment for the repps.; rate affirmed.*

*Monday, May 6.*

GEORGE CURETON v. THE QUEEN.

*Indictment—Game-laws—Sufficiency of allegation of previous convictions*—9 Geo. 4, c. 69, s. 1. (a)

(a) The stat. 9 Geo. 4, c. 69, s. 1, enacts that "if any person shall, after the passing of this Act, by night unlawfully take or destroy any game or rabbits in any land, whether open or inclosed, or shall by night unlawfully enter or be in any land, whether open or inclosed, with any gun, net, cage, or other instrument, for the purpose of taking or destroying game, such offender shall upon conviction thereof before two justices of the peace be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, himself in 10*l*. and two sureties in 5*l*. each, or one surety in 10*l*. for his not so offending again for the space of one year next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, himself in 20*l*. and two sureties in 10*l*. each, or one surety in 20*l*. for his not so offending again for the space of two years next following, and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years."

An indictment alleged that A., on, &c., at, &c., was duly convicted before two justices, for that he within six months, on, &c., by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise—that is to say, about the hour of five o'clock of the night, &c., did by night then and there unlawfully enter a certain close of land, situate, &c., with a gun, for the purpose of then and there taking and destroying game, contrary, &c., and that he was thereupon then and there adjudged, the same being a first offence, to be imprisoned, &c., for three calendar months, &c. That the said A. afterwards, on, &c., at, &c., was convicted before two justices, for that he within, &c., on, &c., in the night of the same day, &c., by night, unlawfully did enter on certain inclosed land, &c., with certain instruments for the purpose of killing, taking and destroying game thereon; this being his second offence, said A. was then and there adjudged to be imprisoned, &c. for six calendar months, &c. That the said A. afterwards, and after he had been twice convicted as aforesaid, within, &c., on, &c., by night, to wit, about the hour of two o'clock in the night, did unlawfully enter certain inclosed land, &c., for the purpose by night of therein taking and destroying game, &c.:

*Held*, that the first and second convictions were sufficiently shown to justify a conviction and prolonged sentence of imprisonment as for a third offence, under 9 Geo. 4, c. 69, s. 1, and that the other averments in the indictment were sufficient to sustain the conviction.

George Cureton was indicted at the Stafford January quarter sessions 1861, under 9 Geo. 4, c. 69, s. 1, for a misdemeanor in going armed by night for the purpose of taking game, after two previous convictions for the same offence, when he was convicted and sentenced to nine calendar months' hard labour.

The indictment stated that George Cureton, on the 26th Dec. 1854, at Wolverhampton, in the county of Stafford, was duly convicted before three of her Majesty's justices of the peace for the said county of Stafford, for that he the said George Cureton, within the space of six calendar months then last past, to wit, in the night of the 18th Dec., in the year aforesaid, by night, after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, that is to say, about the hour of five o'clock of the night of the day and year last aforesaid, did by night then and there unlawfully enter a certain close of land situate in the parish of Tettenhall, in the said county of Stafford, in the occupation of Lord Wrottesley, with a gun, for the purpose of then and there taking and destroying game, contrary to an Act passed in the ninth year of the reign of his Majesty King George the Fourth, entitled "An Act for the more effectual prevention of persons going armed by night, for the destruction of game." And the said George Cureton was thereupon then and there adjudged for his said offence—the same being his first offence—to be imprisoned in the House of Correction at Stafford, in and for the said county of Stafford, and there kept to hard labour for the period of three calendar months, and at the expiration of such period to find sureties by recognisance, himself in the sum of 10*l*., and two sureties in the sum of 5*l*. each, or one surety in the sum of 10*l*., conditioned that he the said George Cureton should not so offend again for the space of one year then next following, and in case he should not find such surety or sureties as aforesaid, that he should be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties should be sooner found.

That the said George Cureton afterwards, on the 27th Nov. 1858, at the parish of Shiffnal, in the county of Salop, was duly convicted before two of, her

Q. B.]

DAWES v. HAWKINS.

[C. B.]

Majesty's justices of the peace in and for the said county of Salop, for that he the said George Cureton, within six calendar months next before the making of the information on which the said conviction on the 27th Nov. 1858 was founded, to wit, on the 24th Nov. in the year aforesaid, in the night of the same day, at the parish of Shiffnal, in the said county of Salop, by night unlawfully did enter and be in and upon certain inclosed land in the said parish of Shiffnal, in the occupation of William Henry Slaney, Esq., with certain instruments for the purpose of killing, taking and destroying game thereon, this being his second offence contrary to the form of the statute in such case made and provided, and the said George Cureton was thereupon then and there adjudged for his said offence to be imprisoned in the house of correction at Shrewsbury, in the said county of Salop, and there kept to hard labour for the period of six calendar months; and at the expiration of such period to find sureties by recognisance, himself in the sum of 20l. and two sureties in the sum of 10l. each, or one surety in the sum of 20l., conditioned that he the said George Cureton should not so offend again for the space of two years then next following; and it was further adjudged that the said George Cureton, in case he should not find such sureties as aforesaid, should be further imprisoned and kept to hard labour for the space of one year, unless such sureties should be sooner found.

That the said George Cureton afterwards, and after he had been so twice convicted as aforesaid, and within twelve calendar months now last past, to wit, on the 25th Nov. 1860, by night, to wit, about the hour of two o'clock in the night of the same day, did unlawfully enter and be in and upon certain inclosed land in the parish of Codsall, in the county of Stafford, in the occupation of William Fleming Fryer, for the purpose, by night as aforesaid, of therein taking and destroying game, and was then and there, by night, unlawfully in the said land with a certain gun and other instruments for the purpose, by night as aforesaid, of therein taking and destroying game, against the form of the statute, &c.

To this indictment the said George Cureton assigned errors. First, that the second conviction in the said indictment mentioned is bad and insufficient in law, and shows no jurisdiction in the justices to convict and adjudicate upon the said George Cureton, as therein mentioned; secondly, that the first conviction in the said indictment mentioned is bad and insufficient in law, for that it does not show with sufficient legal certainty that any offence had been committed, and that it does not appear by the said record and indictment that the said George Cureton had been twice duly convicted before two justices of the peace of so offending; thirdly, that the matters in the said indictment are not sufficient in law to warrant the judgment against the said George Cureton, now given, or to convict him of the misdemeanour aforesaid, &c.

*Henry Matthews* for the prisoner.—The second count in the indictment is bad. There must be shown two good and valid convictions for a first and second offence, and this record does not show any valid conviction for a second offence. On the second conviction no jurisdiction is shown to impose an imprisonment of six months, inasmuch as no valid first conviction is shown. [CROMPTON, J.—To have found him guilty a second time, they must have had evidence of a first conviction.] If the conviction were before the court on *certiorari* the court would quash it as bad in form; it would have satisfied the terms of that conviction that the former offence was an assault. [HILL, J.—The conviction is set out according to its legal effect. Why should we assume it to be bad?] Because the court will not assume anything against the prisoner. [COCKBURN, C.J.—If the second conviction were bad, but there was a good offence shown and jurisdiction,

and it has not been brought up to be quashed, would not that make it good? CROMPTON, J.—And might it not be amended under the 12 & 13 Vict. c. 45, s. 7?] The indictment must show a second valid conviction. [COCKBURN, C.J.—There are two convictions, neither appealed against. Are we to say that they have been unduly made? The prisoner not having chosen to appeal, is it incumbent upon us to say that either is invalid?] In trespass against magistrates the court used to hold that a conviction, if bad, though unreversed would not protect the magistrate. The second conviction is bad for other reasons. It does not appear that it was for an offence under the Act; it says merely that he was on land with certain instruments. [BLACKBURN, J.—Surely, if the instrument had been named it would have been good. Any possible instrument for destroying game would do. CROMPTON, J.—And if you lay one instrument you might prove another.] It is matter of law what instrument is within the statute. [BLACKBURN, J.—I should say it was matter of fact. COCKBURN, C.J.—Are we to scan with the greatest technical nicety each word of this conviction?] Yes, in criminal cases the rule is as strict as it used to be in special demurrer. The first conviction is bad on the authority of *Dawes v. The King*, 10 B. & C. 89. "Then and there" is not an averment of being then by night, or in the close, and "night" is not described in the words of the statute: (Paley on Convictions, 216; *Reg. v. Reynolds*, 13 L. J. 65, M. C.; *Reg. v. Allen*, 5 Rom. & Ry. 513; *Fletcher v. Colthorpe*, 6 Q.B. 880, were referred to.)

*Alexander Staveley Hill*, contra, was not called on. COCKBURN, C.J.—I think our judgment should be for the defendant in error. The principal objection made is to the second conviction, and it is said that it does not appear on the face of the indictment that on the first occasion the prisoner was convicted, the answer to which seems to me to be, that although the conviction is not set out in *hoc verba*, all is shown that is necessary. The indictment sufficiently states a jurisdiction in the magistrates to punish for a second offence, and the requirements of the Act of Parliament sufficiently appear to have been satisfied. The other points have been disposed of in the course of the arguments. The statement that the prisoner did by night then and there enter is, I think, amply sufficient. There will, therefore, be judgment for the defendant in error. CROMPTON, HILL and BLACKBURN, JJ. concurred.

*Judgment for the defendant in error.*

#### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs.  
Barristers-at-Law.

June 1 and 2, and July 6.

DAWES v. HAWKINS.

*Trespass—Highway—Deviation from line of way—User—Evidence of dedication—Substituted way.*  
On an issue raised in an action of trespass, *quare clausum fregit*, whether there was a highway over the plaintiff's land, there was evidence that there had been a highway over adjoining land, which was then together with the locus in quo, an open common. Furthermore, there was evidence that for many years the highway was obstructed by an inclosure illegally made on such common, and that during twenty years of that period the public had deviated necessarily from the old line of way, by going outside the said inclosure, and over the locus in quo. The track thus made was afterwards stopped up by the occupier of the land building a wall across it; and subsequently the old road was reopened, which during twenty-five years had never been used:  
*Held*, per Erle, C.J. and Eyler, J. (dissentient, Williams, J.), that there was no evidence of a dedication

C. B.]

DAWES v. HAWKINS.

[C. B.]

*of the road over the locus in quo to the public, it having been proved that the deviating track was never used by the public, except when they were shut out from the true ancient highway.*

This was an action of trespass for breaking and entering certain land of the plt. situate in the parish of Whitewell, in the Isle of Wight, and near to a certain house, land and premises of the deft. called "The Hermitage," and for pulling down and destroying a wall of the plt.; and also for cutting down, damaging and destroying the trees of the plt. then growing and being in and upon the said land.

For a third plea the deft. pleaded that before and at the time when, &c. there was and of right ought to have been a certain common and public highway into, over and along the said land of the plt., in which, &c. for all the liege subjects of our lady the Queen, to go, return, pass and repass on foot and with horses and other cattle at all times of the day at their free will and pleasure, wherefore the deft., being a liege subject of our lady the Queen, and having occasion to use the said way, did at the said time when, &c. enter into and upon the said land of the plt. and along the said highway, then using the same as he lawfully might for the cause aforesaid, and because the said wall in the declaration mentioned had been wrongfully erected, and was then standing in and across the said highway, and obstructing the same, and because the said trees were planted in and upon, and were then and there preventing the convenient use of the said highway, the deft., in order to remove the said obstructions, and to be enabled to pass and repass along the said highways, did necessarily pull down the said wall and also remove the said trees from the said highway, doing no unnecessary damage, &c. Issue thereon.

At the trial before Martin, B., at Winchester, at the last spring assizes, it appeared that there had always been from the time of legal memory a highway running from the village of Whitewell to the village of Chale, in the Isle of Wight, and that the highway passed over what was formerly a common or down land belonging to a Sir Richard Worsley, and afterwards to the Baroness de Villars. About 1809 or 1813 a Mr. Michael Hoy, who was the owner of adjoining property called the Hermitage, inclosed a part of the common, including a portion of such highway; and afterwards down to the year 1832 the public passing along the highway deviated in consequence of such inclosure to the south side of it, and went over that part of the common which subsequently became the plt.'s garden, and for the alleged trespass on which the present action was brought. No objection appears to have been ever made to this encroachment by Mr. Michael Hoy. In 1832 the Hermitage became the property of Mr. Barlow Hoy, who made some plantations to the east of Michael Hoy's inclosure, which still further stopped the highway; and he formed a new road going towards the south-west and away from any part of the land which was the subject of this action. This new road was adopted as a substitution for the old road, and from that time, viz. 1832 to 1857, the old road was altogether abandoned. The plt. purchased in 1844 from the Baroness de Villars the land on which he erected the garden wall mentioned in the declaration, and which land had been the downland on the south side of and adjoining to Michael Hoy's inclosure. At the same time the trustees of Mr. Barlow Hoy purchased from the Baroness de Villars the land which had been so previously inclosed by Mr. Michael Hoy. In 1857 the deft. bought the Hermitage from the representative of the late Mr. Barlow Hoy, and at the same time the old road through this property, including the inclosure made by Mr. Michael Hoy, was opened by the public, and the defendant received an allowance out of the purchase-money for the Hermitage, as a compensation in respect of such

right of way. It was disputed, however, by the deft. at the trial that the right of way for which the compensation was paid him, was the one which went through such inclosure, and it was also contended on his behalf that whether the old road ever existed or not was immaterial, as the public had used the way over the plt.'s land and across that part where the garden wall in question had been built for twenty years, so that even if the old road had existed, the public had gained a new road across this place of the plt.

The learned judge expressed as his opinion that if for convenience a public road was diverted and taken a little to the side of the old road, the public would have a right to use the new substituted road so long as the old one remained closed up, but that if the public insisted on the old road being opened, it would then become the true road, and the obligation of the parish to repair would attach to the old road, and not to the new one; and his Lordship left it to the jury to say whether they believed from the evidence before them the old road ran through the inclosure and plantation made by the Hoys, telling the jury that if such was the case the consequence would be that there was no road where the plt.'s garden wall had been built, and the deft. would be guilty of a trespass in pulling it down.

The jury found a verdict for the plt.

A rule nisi having been obtained calling on the plt. to show cause why the verdict found for him on the trial of the cause at the last assizes holden in and for the county of Hants should not be set aside and a new trial be had between the said parties on the ground that the judge presiding at the trial misdirected the jury in telling them that as a matter of law two parallel public roads running to the same point could not exist together, as a parish could not be compelled or called upon to repair both such roads; and that the judge did not leave the facts proved and necessary to enable the jury as a matter of fact to find whether the locus in quo was a highway or not.

*M. Smith and Karslake* showed cause.

*F. Edwards, Carter and Kingdon* supported the rule.

*Curr. adv. vult.*

*July 6.*—*ERLE, C. J.* (read by Byles, J.).—On this rule the question was whether there had been a misdirection at the trial. The issue was, whether a highway over the plt.'s land had existed. Some highway was admitted, but the dispute was whether the line of that way was on the plt.'s or the deft.'s side of the roadway separating the lands of these parties. At the close of the evidence the deft.'s counsel contended that, even if the line of highway was found to be on the plt.'s land, still there was evidence from which the jury might find that there was also an additional parallel pathway running on the deft.'s land. The learned judge in substance directed the jury that there was no such evidence, and this was the misdirection complained of. The question is, whether there was any such evidence. It was shown that a highway for horses passed over land which was the property of Lady Villars and those under whom she claimed, and the land was divided into two parcels, and at the southern part of the property, where the common was open, the line of way was very near the boundary between the two parcels; and it was found by the jury to have been on the deft.'s side of that boundary down to 1809, and all the common was open, and the line of roadway must be taken to have been as found by the jury. There was no obstacle to prevent persons passing in any way they pleased over the waste. Between 1809 and 1813, Mr. Hoy, without excuse as against the public, and without lawful right as against the owner of the soil, and without notice, as appears by the evidence in the case, inclosed a part of the common with a ditch, and included in this inclosure the line of way for more than 100 yards; and after this inclosure, down to 1832, persons using the way, on

C. B.]

DAWES v. HAWKINS.

[C. B.]

arriving at the inclosure, deviated and were directed by a line of way a few yards to the south, and so passed along the southern side of the inclosure, and returned by a line of way running a few yards towards the north, at the other end, so that the deviation began at the obstruction, and therefore travellers who were thus directed passed over what was the line of inclosure, which became afterwards the line of deviation between the plt.'s and deft.'s land, and these travellers passed on the plt.'s land. There was evidence that the line of deviation continued only till 1832, when the open common was planted, and a way laid out further to the south, and altogether away from the place in question. In 1857 the obstruction was removed, and the original line of way over the deft.'s land was reopened; and it remains to be seen whether, under these circumstances, there is any evidence that the line over the plt.'s land had also become a highway, and was dedicated by the owner of the soil and used by the public for a highway. Express evidence of the dedication by the owner of the soil there was none; and there seems to be no analogy to the case where the owner of the soil of a highway shuts it up and puts down a substituted highway in lieu thereof, which may be express evidence of intention to give the public some right, absolute or otherwise, over the substituted way. Then, was there any evidence of user from which the jury might reasonably infer dedication? The parties who passed that way intended to use the original highway, and probably deviated without knowing it; if they so deviated by reason of the obstruction, and the user of the line of deviation was a user of the highway, is that sufficient to make the user of the highway, as of right, a user of the deviation on the adjoining land by reason of the highway being so diverted? I know of no decision and no principle making a distinction between land impassable by non-feasance or the neglect to repair, and land impassable by misfeasance by putting an obstruction upon it. But even if the deviation be a trespass, and would not be justifiable, still, in either case, would the user of right of the line of deviation be evidence of the exercise of a user of the line of highway? If the user of the line of deviation is not a user of the highway, then the user of the line of deviation for twenty years would not alter the nature of the act. If the first traveller passing did not use the highway, neither did the second. According to this view, the judge was right in directing the jury that there was no reasonable evidence in support of the deft.'s contention, and I have taken this to be the effect of the summing-up. In the argument, much stress was laid on the observations made by the learned judge relating to the right of the public where a highway had been stopped up by the owner of the soil, and a new way in substitution set out by him, and afterwards the original highway reopened. I do not discuss these observations nor the arguments relating to them, for I consider the case to have been rightly disposed of by telling the jury that there was no reasonable evidence before them on these facts of the way in question.

WILLIAMS, J.—I regret that I cannot quite concur with my Lord in the judgment which he has given in this case. I think there was some evidence of the dedication of a way over the plt.'s land used by the public during the time the old highway was obstructed. That user lasted for nearly twenty years, at least; and some of the witnesses described the deviation as having been for that line of road. It is incontrovertible that, if this uninterrupted enjoyment by the public had stood alone, it would have afforded some evidence from which the jury might have inferred an intention, on the part of the owner of the soil—whoever he might be—to dedicate the way to the public. But in the present case, it is said that no such intention can be inferred, because the user may be accounted for by the circumstance that the adjoining way, by which the public had

a right to travel, had been wrongfully inclosed and obstructed, that the deviation was not a trespass, but had been done in the exercise of a public right of going on the adjacent ground when the common highway has become impassable. It is remarkable that, in the text-books, that right is confined to cases where a highway is foundrous and out of repair (2 Saund. 160 B, note, 12, and *Ree v. Stoughton*, 1 Russell on Crimes, 34; 2 Smith's L. Cas. 119, 4th edit., note to *Dovaston v. Payne*); and on principle it may be doubtful whether the burden to which the adjacent soil is subjected when the parish has been guilty of a nonfeasance in respect of the nonrepair of a highway ought to be likewise inflicted, because some wrong-doer has put an obstruction on the highway, which may be abated as a nuisance by any one who has occasion to use the road, unless the obstruction be of such a nature that it practically cannot be abated, and so the road is in effect impassable. However, in the case of *Aboor v. French*, 2 Show. 28; it seems to have been held a good plea in an action of trespass where the plt. himself stopped a highway, so as that the deft. could not pass, that therefore he went over the plt.'s close, doing as little damage as he could. But even supposing the right exists of only going on the adjacent soil along the highway obstructed, still, if the owner of the soil for a great many years submitted to such a burden, instead of causing the obstruction to be removed, this would afford some evidence of intention to dedicate the substituted road to the public. It does not appear to have been distinctly shown who was the owner of the soil during the public use of it, whether it was the same person who obstructed the old highway or somebody adjacent. The law is clear, if there had been of right such a public, uninterrupted user of the road for such a length of time so as to satisfy the jury that the owner of the soil, whoever he might be, intended to dedicate it to the public, this is sufficient to show the existence of the highway, though it cannot be ascertained why, during the same period, it has been so used by the public. If the soil over which the road passed in the present case had been made a road open, and the same person who made the inclosure had obstructed thereby the old highway, I think it plain that he intended dedication, because I apprehend he must surely be deemed to have been aware that the inclosure should always be over it, that the public should be deprived of the old road, and in lieu thereof have the substituted one. If the soil belonged to the owner of the land, Lady Villars, her acquiescence in the existence of the inclosure which necessarily stopped the old highway, coupled with the uninterrupted continuance of the public user of the substituted road, afforded evidence which ought to have been laid before the jury of an intention on her part to dedicate. The effect of this evidence was certainly much weakened by the circumstance that, after the substituted road had been used by the public for nearly twenty years up to 1832, the use of it was destroyed by reason of the new way having been laid out in a different direction. But if, having regard to all the circumstances of the case, the jury had thought fit to negative any intention to dedicate, I should have approved of their verdict; and though I do not at all regret that my learned brethren should have come to the conclusion that there ought to be no new trial in this case, at the same time I think it is of such importance to adhere to what I conceive to be the law as to the evidence of dedication of a highway, that I think it my duty to express my opinion for the reasons above stated, that there was some evidence of it in the present case. As it appears to the majority of the court, however, that the effect of the summing up was to direct the jury that there was no reasonable evidence of that given at the trial, and as it likewise appears to them that this direction was right, the rule must be discharged. I abstain, as my Lord has done, from ex-

C. B.]

WALLINGTON v. WHITE.

[C. B.]

pressing any opinion on the other points raised on the rule.

BYLES, J.—I think the direction of the learned judge was substantially correct. It amounts to this: that at the time in question, that is to say, after the old road had been reopened, the alleged new road did not exist; indeed, I conceive there is no evidence to be submitted to the jury that the alleged new road ever had existed. It is clear that there can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity—and it is also an established maxim, once a highway, always a highway for the public. Therefore, unless that limits it, there is no distinct presumption of prescription. The only methods of legally stopping a highway are by *mandamus* or *ad quod damnum*, and proceeding before the magistrates under the statute. The true question therefore seems to be this, Was there any evidence of the alleged dedication of the way to the public by the owner of the soil? I collect from the evidence that the material facts were these:—The road was an ancient and undoubted highway, and was illegally stopped about the year 1813. The old road being stopped, the public in consequence deviated on the adjoining land, which was open down, traversing over various parts of the down, but the principal tracks were nearly parallel with the old road; the ownership of the soil of the old and the new road was in the same person. About 1832 the principal track, called at the trial the "new road," was stopped up by the occupier of the land building a wall across the track; but in the year 1857 the old road was reopened, which for those twenty-five years had never been used. The contention of the deft. at the trial and since was, that the principal track of deviation was no deviation at all, but was the true ancient road. Upon that contention the jury decided against him; but the learned counsel for the deft., in his summing-up to the jury, for the first time raised the point that the deviated road, even if not the ancient road, had been dedicated to the public, and had been a public highway, even as the old one. The facts, as above stated, do not appear to me to amount to any reasonable evidence of a dedication to the public. It was proved that the public had never used the deviating track except when they were shut out from the true ancient highway; the public user was therefore lawful, and of right, when the public so deviated on the adjoining land: (see *Aboor v. French*, 2 Shower.) And it further appears that the deviation was not confined to a single defined track, but the right was occasionally exercised all over the down. It is difficult to suppose that the owner of the soil could have assented to such a dedication. Lastly, the deviating track has been shut up and disused for twenty years. These facts seem to me very consistent with the public right of user of the deviation during the temporary obstruction of the old road, and inconsistent with a dedication to the public of the new way. The new road and the old road were parallel, the old road still continuing to exist in point of law. But assuming the facts to be as consistent with the deft.'s hypothesis as with the plt.'s hypothesis, there is still no balance of probability in favour of the deft.'s hypothesis; and if that be so, the burden of proof lying on the deft., there is no evidence to be left to the jury. Lastly, assuming some evidence of the new road to exist, it is at most such a scintilla of evidence that if the jury had found a verdict for the deft. upon it, that verdict would have been set aside: (see the observations of the Ex. Ch. in *Avery v. Bowden*, 6 Ell. & B. 972.) For these reasons I am of opinion that the rule for a new trial should be discharged. The rule in this case will be discharged.

*Rule discharged.*

Attorneys for plt., *Harrison and Lewis*.  
Attorney for deft., *Burn*.

[MAG. CAS.]

Monday, April 22.

WALLINGTON (app.) v. WHITE (resp.)

*Highway—Liability to repair—Dedication to public—Public Health Act 1848.*

*In the year 1830 a street in a town (connecting two streets which were common and public highways) was made by the owner of the land, and opened throughout to the public, and the same has ever since remained open. At the time when he opened it, he intended the said street or road to be used as and to be a common and public highway, and the same has been ever since adopted and used uninterruptedly as such. In the year 1825 a local Act was passed, for paving, lighting and cleansing the said town; and by it commissioners were appointed for carrying its purpose into execution. By sect. 7, when any new streets, &c., are made in the town, and well and effectually flagged and paved to their satisfaction, the commissioners, on application of the owner or owners of the soil, are required by writing under their hands to declare the same to be public highways; and from and after such declaration the same shall be deemed and taken to be highways, and be repaired by the said commissioners.*

*In the year 1852 the provisions of the Public Health Act 1848, with the exception of sect. 50, was applied to and put in force in the said town. By sect. 69 of the said Act, the local board of health, in case any street, &c. be not paved and sewered to their satisfaction, may by notice in writing call upon the owners or occupiers of premises fronting them, to pave, &c. the same, and if such notice be not complied with, the said local board of health may execute the work of paving, &c., and recover the expenses thereof from the last-mentioned owner in a summary manner.*

*The local board gave notice to the resps., who were owners of the premises in the above-mentioned street, requiring them within a month to pave, flag, channel and make good so much of the said street as their premises respectively abutted upon. Such notice was not complied with, and the local board thereupon executed the work, and demanded from the resps. payment of the expenses so incurred, which being refused, they took proceedings in a summary manner for the recovery thereof.*

*Upon the facts proved at the hearing of the information, it appeared that if the said street was not on the 1st Sept. 1858 a highway within the meaning of the 69th section of the Public Health Act, the resps. were liable to the payment of the sum demanded of them; but if it was a highway within the meaning of that section, they were not liable to such payment. The commissioners under the local Act never exercised their option of declaring the said street a highway, so as to render it repairable by them, and neither they nor the local board of health, nor the resps., had ever repaired the said street:*

*Held, that the order made by the local board of health requiring the owner to repair was a lawful order, the said street not being a highway repairable by the inhabitants at large.*

This is a case stated by us the undersigned justices of the peace under the stat. 20 & 21 Vict. c. 43, for obtaining the opinion of the court on a question of law which arose in the exercise of our summary jurisdiction under the Public Health Act 1848. The following are the circumstances of the case:—

In the year 1852 the parish of Leamington was, by a provisional order of the General Board of Health, confirmed and made absolute by the Public Health Supplemental Act 1852 (No. 2), created a district for the Public Health Act 1848, and the said Public Health Act, with the exception of sect. 50, was applied to and put in force within the said district.

By sect. 69 of the Public Health Act 1848, it is

enacted, "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, joining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing, shall be paid by the owners, in default according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or in case of dispute as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses and be recoverable as such in the manner hereinafter provided."

The Local Government Act 1858 took effect in the said district of Leamington from the 1st Sept. 1858. By sect. 38 of this Act it is enacted that, "the powers given to local boards of health by the 69th and 70th sections of the Public Health Act 1848, to compel the sewerage, levelling, paving, flagging and channelling of streets that are not highways repairable at the public expense, shall extend to providing the means of lighting, metalling, or making good such streets, and may be exercised in respect of the carriage-way, footway, or any part of such streets, and the said powers shall also be deemed to have extended, and shall extend and be exercised in respect of any street or road of which a part was at the time of the application of the Public Health Act 1848, or is or may be a public footpath, or repairable at the public expense, as fully as if the whole of such street or road had been or was a highway not repairable at the public expense."

After the 1st Sept. 1858 a certain street or road within the district of Leamington, called Springfield-street, was not sewered, levelled, paved, flagged, channelled, metalled and made good to the satisfaction of the local board of health for the said district; thereupon the local board, by notice in writing to all the owners within the meaning of the said Act of the premises fronting, adjoining, or abutting upon the whole of the said street or road, required them respectively, within one calendar month from the service thereof, to sewer, level, pave, flag, channel, metal and make good so much of the said street or road as their said premises respectively parted or adjoined to, or abutted upon. Such notice was not complied with by any of the said owners, and the local board thereupon executed the works mentioned or referred to in the said notice, and incurred certain expenses in so doing. The resps. were and are owners of certain premises abutting upon the said street or road, and the proportion of the expenses, calculated according to the frontage of their said premises, and settled by the surveyor under the said Public Health Act, as due from them, was and is 49l. 10s. 1d. Payment of this amount was demanded from the resps. and refused by them, and thereupon the local board (the said expenses not having been declared to be private improvement expenses) took proceedings under the said Public Health Act for the recovery in a summary manner of the said amount, with interest at the rate of 5 per cent. per annum, amounting in all to the sum of 49l. 14s. 4d.

Accordingly, upon the 4th July 1860, an information was laid before John Johnson Bradshaw, one of her Majesty's justices of the peace in and for the county of Warwick, by the app. Richard Archer Wallington, who

was and is clerk to the said local board, and who hid such information as such clerk, and on the behalf of the said local board, and a copy of such information, marked A accompanies and forms part of this case.

The said information afterwards came on to be heard upon the 18th July 1860, and by adjournment on several other days, and finally upon the 22nd Nov. 1860, before us the undersigned justices of the peace in and for the said county assembled and acting together. The resps. having been duly summoned, attended by their attorney on each of the said occasions.

Upon the facts and circumstances proved, it appeared that if the said street or road called Springfield-street was not on the 1st Sept. 1858 a highway within the meaning of the 69th section of the Public Health Act, the resps. were liable to the payment of the said sum of 49l. 14s. 4d., and the app. as such clerk was instructed to recover the same; but if the said street or road was a highway within the meaning of the said section, the resps. were not liable to the payment of the said sum, or any sum whatever in respect of the expenses incurred by the local board as aforesaid. The facts and circumstances as to whether the said street or road was or was not a highway at the time aforesaid were and are as follow:—

In and long before the year 1820 there were two streets or roads within what is now the district of Leamington, called respectively Tachbrook-road and Brunswick-street, which run nearly parallel to each other, and both of which were common and public highways. The houses belonging to the resps. in Springfield-street were erected in the year 1820. In or soon after the year 1830 a person of the name of John Smith laid out upon his own land a new street or road running across from Tachbrook-street to Brunswick-street, and connecting those two streets or roads, and about the same time he and others built several houses along the line of the street or road so laid out by him. In the same year the said John Smith opened through-out to the public the new said street or road so laid out by him, which is that now known as Springfield-street, and referred to above, made a sewer thereunder, and the same has ever since remained open. At the time when he opened it, the said John Smith intended the said new street or road to be used as and to be a common and public highway; and the same has, in fact, ever since been adopted and used by the public as a common and public highway, and been used uninterruptedly by any persons who have desired to make use of the same. In the year 1825 an Act of Parliament (6 Geo. 4, c. 133, local and personal) was passed the title of which is, "An Act for paving or flagging, lighting, cleansing, watching, regulating, and improving the town of Leamington Priors, in the county of Warwick, a copy of which Act, marked B, accompanies and forms part of this case. By sect. 1 of this Act certain persons were appointed to be commissioners for paving, lighting, watching, regulating and improving the town of Leamington, and for putting that Act into execution.

By sect. 26, it was enacted that "it should be lawful for the said commissioners, and they were thereby authorised and required, from time to time and at all times thereafter, as often as they should think fit, to cause, order and direct all or any of the present and future streets, lanes, highways, passages and other public places, as well carriage-ways as footways, in the said town, to be repaired, made, formed, amended and sustained in such manner and with such materials as the said commissioners should think proper."

By sect. 47 it was enacted that "when any new streets, squares, crescents, ways, lanes, or passages shall be laid out and made in the said town of Leamington Priors, and the footways and carriage-roads thereof shall be well and effectually flagged, paved, stoned, gravelled and put in good order and repair, to



C. B.]

WALLINGTON v. WHITE.

[C. B.]

the satisfaction of the said commissioners, then, on application of the owner or owners of the soil, or a majority of them, it shall be lawful for the said commissioners, and they are hereby empowered and required, from time to time, by writing under their hands, to declare the same to be public highways and passages; and from and after such declaration made, such new streets, squares, crescents, lanes, ways and passages as aforesaid, and every of them, shall be deemed and taken to be public highways and passages, to all intents and purposes, and be repaired by the said commissioners, as the other parts of the streets, squares, crescents, lanes, ways and public passages within the said town, are by this Act directed to be managed and governed."

The said Act continued in force (except so far as it was repealed or altered in certain particulars immaterial to the present purpose by a subsequent local and personal Act of the year 1843) until the year 1852, when by the said provisional order of the General Board of Health, as confirmed by the said first-mentioned Act, the following sections of the said local and personal Act of the year 1825 were repealed (except in so far as the same related to any rate, assessment, composition, mortgage, assignment, annuity, or contract, made, executed, or granted by any act, matter, or thing done, or any offence committed, or penalty incurred, before the passing of the said Act confirming the said order): that is to say, sects. 1 to 27, 29 to 47, 68 to 81, all inclusive; 94, 99, 104, both inclusive; 108, 112, 121, 127, 137, 139, 155, 158, 164, all inclusive.

The said street or road, called Springfield-street, was within the town of Leamington Priors, but the commissioners under the said local Act did not at any time declare the same to be a public highway or passage, nor was any application ever made to them so to do, pursuant to the provisions of the said 47th section of the said local Act, nor was there any evidence of the commissioners having at any time adopted the said street or road as a public highway.

The houses in Springfield-street were from time to time rated or assessed by the commissioners under sect. 128 of the said local Act prior to 1835, and in the rate-book of that year they are described as being in Springfield-street, and such rate or assessment was always at the rate of 1s. in the pound of the yearly rent or value thereof, and not upon either of the higher proportions mentioned in that section.

The local board caused the street to be lighted with gas in the year 1854.

No notice was given at any time after the passing of the stat. 5 & 6 Will. 4, c. 50, of any intention to dedicate the said street or road to the public, nor was any certificate granted by two justices or enrolled at the quarter sessions as directed by that Act, and the said local board of health did not at any time before the execution of the said works as before mentioned declare the said street or road to be a highway under sect. 70 of the Public Health Act 1848.

Up to the time of the execution of the said works by the local board as before mentioned, neither the commissioners, nor the local board of health, nor the resps. had repaired the said street or road or any part thereof, executed any works of sewerage, levelling, paving, flagging, channelling, metalling, or making good to or upon the same, or any part thereof, nor had the uses of any such repairs or works, or any part thereof, been borne or paid out of any parochial district or any rates or assessments, or by the inhabitants of said parish or district at large: any repairs that were executed were done at the expense of the said John Smith. Upon these facts and circumstances it is contended by the present app. that the said street had never become a public highway under the provisions either of the said local Act, or of the Act 5 & 6 Will. 4, c. 50, or of the Public Health Act 1848, and that the same was not on the 1st Sept.

1858 a highway within the meaning of the said Public Health Act 1848. On the part of the resps. it was contended that the said street or road became a highway at some time between the year 1830 and the coming into operation of the stat. 5 & 6 Will. 4, c. 50, by dedication to and adoption and user by the public, and is a highway within the meaning of the 69th section of the Public Health Act.

In order that the question might be conveniently raised by a case to be stated under the statute 20 & 21 Vict. c. 43, we the said justices dismissed the said information, upon the ground that the said street or road was a highway on the 1st Sept. 1858, as contended by the resps.

The question for the opinion of the court is, whether our decision in dismissing the said information, on the ground aforesaid, was or was not right in point of law. If our decision was right, our order dismissing the said summons is to stand good; if not, the court are to remit the said matter to us in order that we may proceed further therein.

*Horace Lloyd*, for the app., cited *Illingworth v. Montgomery*, 2 L. T. Rep. N. S. 726; 6 Geo. 4, c. 733, ss. 26, 47 (local Act); 5 & 6 Will. 4, c. 50, ss. 68, 69, 70 and 128; 15 & 16 Vict. c. 42, s. 30.

*Quain*, for the resps., cited *Rez v. Inhabitants of St. George, Hanover-square*, 3 Camp. 222; 3 Burn's Justice, 515, tit. "Highway;" *Busey v. Storey*, 4 B. & Ad. 98; *Roberts v. Hunt*, 15 Q.B. [ERLE, C. J. referred to *Reg. v. Inhabitants of Leake*, 5 B. & Ad. 469.]

ERLE, C.J.—I am of opinion that the judgment of the justices in this instance was wrong, and that the order of the board of health in this instance was a lawful order, and that order was made under sect. 69 of the Public Health Act, and dealt with Springfield-street as a street in Leamington not being a highway repairable by the inhabitants at large. The justices held it to be a highway repairable by the inhabitants at large. I am of opinion that in that the justices were wrong, and that it was not a highway repairable by the inhabitants at large. The facts appear to be these: that Springfield-street was dedicated by the owners of the soil to the public in 1830. It is within the town of Leamington, and within the town of Leamington the commissioners have considerable powers for raising money for repairing roads within the town, and, if it stood merely at common law, the dedication to the public in 1830 made it a highway. Although the commissioners would have had certain powers to repair it as a highway, and might have repaired it as they pleased, yet there would have been auxiliary powers in the parish to repair it; being dedicated to the public, it would have been a highway which the inhabitants at large would have been bound to repair under the operation of the 6 Geo. 4. The Act for the paving and lighting of Leamington has reference to a highway repairable by the inhabitants at large. The Act was passed in 1825, and the dedication was in 1830, and therefore, this being within the town of Leamington, it could not become a highway after 1825, unless the commissioners chose to adopt it: it would be without the jurisdiction of the board of health. Now the commissioners, by sect. 26, are authorised and required to repair "all present and future highways" within the parish. Sect. 49 appears to me to give to the commissioners a power of dedicating; when any new street is dedicated to the public, the commissioners have the power of deciding, under sect. 49, whether it shall become one of the public highways, repairable by them within the operation of this statute. And it is perfectly clear that the commissioners never did exercise their option of dedicating it to a public highway within this statute, and therefore they have never become liable to repair it under sect. 26, which authorises and requires them to repair all



C. B.]

Re FERNANDEZ.

[Ex.

future and present highways. It was not a highway then, and if dedicated afterwards to the public by the owner, that dedication could not make it a highway unless, by sect. 49, the commissioners choose to adopt it as a highway. They never did choose to adopt it, and it is therefore not repairable by them. But it is said the parish might continue liable, notwithstanding this auxiliary liability on the part of the commissioners, unless there were words in the private Act exempting the parish from the order and liability, if it chose to repair the highway dedicated to the public within these bounds. And I think there are words which do go to exempt the parish from that order and liability, and it is the exemption arising from the power to impose rates, and by sect. 28 the commissioners are authorised to rate all the rateable inhabitants within the ambit of the town liable to be rated. But sect. 27 is the clause upon which my judgment turns, because sect. 27 enacts, "that every person who shall be discharged from all highway-rates within the town of Leamington," and it seems to me that this is an exemption within the town of the parishioners from the order and liabilities. The commissioners have made rates, and it is to be presumed they have made the rates properly, and if they have made them properly, they have rated the occupiers for every rateable subject within the parish, and then every rateable subject within the parish that has been rated for that rate under the local Act by sect. 27 is exempted from all liability whatever to the ordinary public parochial highway-rates that is imposed on all the other parishes. This statute, then, does contain an exempting clause from ordinary parochial liability, and differs from the cases which Mr. Quain has adverted to, where the commissioners have power to repair, and there it was held the power or duty to repair did not exempt the parish, if there were not express words creating the exemption. I have alluded to the argument about the dangers and difficulties which the public would be under if the highway were a highway for all purposes of passage, and yet that no one was bound to repair it. I am sensible there might be danger in going over a foundrous highway, or a street that was left in an imperfect and unsound state, but I think that the Legislature have considered that by no means an insurmountable obstacle there. Under the General Highway Act of the 5 & 6 Will. 4, there is an exemption applicable to all parishes throughout the island, that unless they adopt a highway dedicated by the public, they are not bound to repair it. The general enactment to all the community was by the local Act rendered applicable to streets that were dedicated to the public, and not adopted by the commissioners in Leamington; and it appears to me that there is very good reason for it. The commissioners may adopt and make highways and streets dedicated to the public, provided they have been paved, flagged, channelled and sewered. It is a private Act relating to an increasing town, because it contemplates the constructing and making of new streets, and the result of the enactment is, that the proprietors of such new streets should be bound to go to the expense, at the inception of their streets, of making it what we should consider a good, sound, and perfect street for passage; that they should go to the expense of the paving, the flagging, the channelling and the sewerage that I have adverted to, and not leave it a mere piece of ground, and then call on the rest of the town to go through the expensive operation I have alluded to. It is contemplated that if a person completes houses on each side of his street, he should complete the road in a proper way; the commissioners therefore have power to say, and they may say, they will not adopt the street until the new street has been completed for passage. When this has been done they may adopt it, and then it would for the

future be repairable out of the funds of the town. It seems to me that there was very good reason for the enactment at the time it was passed—that the statute was enacted for that purpose, and I think our construction gives force to it. I am of opinion the adjudication of the justices should be reversed.

WILLES, J.—I am of the same opinion.

BYLES, J.—I am also of the same opinion. At first, I confess, I had some difficulty, but I think that with respect to sect. 29 it is quite clear that when the Act of Parliament took away from the inhabitants of the parish their means of perfecting the new operations, the effect is the same as if they had said in express terms they should be no longer liable. Sect. 26 makes the new body assigned of the parish who are liable to future and present highways. As to the present highways, their liability seems to be absolute; but with respect to future highways, to all purposes there is a discretion. Sect. 49 seems to be the one applicable to the case of future streets. On due deliberation, I really think that will be found to be the true construction of the statute.

*Judgment for the app.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs, Barristers-at-Law.

April 19 and 23.

Re FERNANDEZ.

*Contempt of court—Refusal of witness to answer question—Commitment for, under general warrant—Habeas corpus—Authority of assize court—Old Bailey sessions court.*

*The courts of assize are Superior Courts, and have power to commit for contempt by general warrants. Where, therefore, a witness on the trial, at the assizes, of an information for bribery, refused to answer a question put to him, on the alleged ground that the answer would tend to criminate him, and the judge committed him to prison for six months, and adjudged him to pay a fine of 500*l.* for contempt, by a warrant which did not state what the question was, or set forth the particulars of the offence; and a writ of habeas corpus was moved for to bring up the prisoner, in order to his being discharged on the ground that the warrant was bad for generality:*

*Held, that the warrant was good, and that the writ should not be issued.*

*The court of sessions at the Old Bailey is a Superior Court.*

The circumstances under which the application hereinafter made to the court in this case arose are as follow:—In Nov. 1859 Mr. Jose Luis Fernandez was examined as a witness before the commissioners appointed (under the 15 & 16 Vict. c. 57) to inquire into alleged corrupt practices at an election for the borough of Wakefield, and had subsequently, in Jan. 1860, received from the said commissioners "a certificate in writing under their hand" (sect. 10 of the above Act) stating that he had made a true disclosure touching all things to which he had been examined.

On the trial before Hill, J., at the York assizes, in March last, of an information filed by the Attorney-General against Mr. J. B. Charlesworth, for bribery at the last election for Wakefield, J. L. Fernandez was produced, sworn and examined as a witness on the part of the Crown. In the course of his examination he was asked the following question by the Solicitor-General:—"Did you, in the month of April 1859, receive any money from Mr. Charlesworth?" He refused to answer this question, on the ground that his answer might tend to criminate himself.

It was proved that he had been examined before the commissioners as above stated, and that he had received the above-mentioned certificate, protecting him (under

[Ex.]

Re FERNANDEZ.

[Ex.]

sect. 9 of the above Act) "from all penal actions, forfeitures, punishments, disabilities and incapacities, and all criminal prosecutions to which he may have been or may become liable at the suit of her Majesty, her heirs or successors, or any other person, for anything done in respect of such corrupt practice."

The witness, however, alleged that he was acting under the advice of counsel, who were of opinion that the certificate, though protecting him in all other respects, did not extend to freeing him from impeachment by the House of Commons. The question was put to him by the learned judge, with the like result. Hill, J. thereupon consulted his brother judge, Keating, J., and then informed the witness that they were both of opinion that he was completely protected by the certificate, and was bound to answer the question. Upon his still refusing to answer, the learned judge told him he had been guilty of a contempt of a most serious character, and thereupon sentenced him to be imprisoned for six months, and to pay a fine of 500*l.* for contempt of court, under the following warrant:—

"Yorkshire to wit.—At the assizes held at the Castle of York, in and for the said county, on Thursday, the 7th day of March, in the 24th year of the reign of our Sovereign Lady, Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and in the year of our Lord 1861, before the Hon. Sir Hugh Hill, Knight, and the Hon. Sir Henry Singer Keating, Knight, two of her Majesty's justices assigned to take the said assizes, according to the statute, &c.

"*Reg. v. John Barff Charlesworth*.—On the trial of the information against the deft. for bribery alleged to have been committed by him on the election of a Burgess to serve in Parliament for the borough of Wakefield, Jose Luis Fernandez, a witness produced, sworn and examined on behalf of the Crown, having refused to answer a certain question, touching the matter in issue in the said information, put to him by her Majesty's Solicitor-General of counsel for the Crown in that behalf; and this court having adjudged that the said Jose Luis Fernandez was bound by law to answer the said question, and having required him so to do, he wilfully and in contempt of the court refused to answer the said question, and he having wilfully persisted, and still so persisting in such his refusal, the said court doth therefore adjudge that the said Jose Luis Fernandez has been and is guilty of a contempt of court, and the said court doth order and adjudge that the said Jose Luis Fernandez be for such his contempt committed, and he is hereby committed, to the custody of the sheriff of the said county of York, and to his keeper of her Majesty's gaol of the Castle of York, in and for the said county, to be there detained and kept in safe custody for the term of six calendar months from the date and year first above mentioned; and the said court doth further order and adjudge that the said Jose Luis Fernandez also for such his contempt shall and do pay to our said Lady the Queen the sum of 500*l.*, and that he be further detained in custody aforesaid until the said sum of 500*l.* shall have been paid.

"By the Court.

BELL, Associate."

*Bovill*, Q.C. (with whom were *Price*, Q.C. and *T. Jones*) now moved on affidavits for a writ of *habeas corpus ad subjiciendum*, directed to the governor of York Castle, to bring up the body of the said J. L. Fernandez, in order that he might be discharged from custody on the ground that the commitment was illegal. The warrant under which the committal took place is in general terms. Now although the two Houses of Parliament and the Superior Courts at Westminster have power to issue general warrants (for which *Lord Shaftesbury's case*, 1 Mod. 144, *R. v. Flower*, 8 T. R. 314; *Burdett v. Abbott*, 14 East, 1; and *Howard v. Gossett*, 10 Q. B. 359, are respectively authorities),

it is submitted that what is said in those cases, and what it is admitted is true of Superior Courts, has no application to a warrant issued under the circumstances in this case. The warrant here professes to be signed by the associate, and to be made "at the assizes held at York." Now a court of assize is not a Superior Court, and has not the power of one. The judges of assize determine some matters by virtue of their commissions, others by virtue of the statute of Westminster 2nd; and by the common law (4 Inst. 159, 160), these commissions are various: there is, first, the commission of oyer and terminer and gaol delivery; another is the commission of assize, by virtue of which and the statute of Westminster 2nd issues are tried; and thirdly, a general commission of the peace. In each of these commissions there are associated with the judges other persons of less dignity; as, for instance, in the commission of oyer and terminer, Queen's counsel, sergeants, and even justices; and now by recent Act of Parliament Queen's counsel are also included in commissions of assize. Such being their constitution, these courts are not like the Superior Courts at Westminster, nor do they emanate therefrom, but are held under a royal commission; and it would be strange to say, nor can it have been intended, that any one sitting under such a commission, as Queen's counsel, sergeants, or magistrates, should have an unlimited power to fine and imprison (it may be for life) by virtue of a general warrant. [*POLLOCK*, C. B.—There is no difference whatever between the Lord Chief Justice of England sitting at assizes and the youngest Queen's counsel sitting under these commissions.] However that may be, it is contended that there is a vast difference between persons acting under these commissions and the Superior Courts at Westminster; and the question as to the power of such commissioners to issue general warrant is a serious and important one. The power of a court of record to fine and imprison is admitted, but that power does not affect this question. In *Bacon's Abridgment*, tit. "Court," D. 1, our courts are divided into three classes—supreme, superior, and inferior; and the superior are subdivided into more or less principal—the "less principal ones," he says, "are such as are held by commissions of oyer and terminer, assize, Nisi Prius, &c. by custom or charter, or by virtue of Acts of Parliament and the King's commission, as the court of sewers, justices of the peace, &c., thus placing courts of oyer and terminer, of assize, and Nisi Prius, in the same category as courts of sewers, &c. *Bushell's case*, Vaughan's Rep. 135, is a distinct authority to show that the court of sessions at the Old Bailey, which is a court of oyer and terminer, is an inferior tribunal, and has not the power to commit by a general warrant. The court of sessions at the Old Bailey is similar in its constitution to a court of assize, and is composed in the same manner of judges and others of subordinate authority; and if, therefore, the one court has not the power, neither has the other. That such courts have the power of punishing contempt by fine and imprisonment is not disputed; but such authority is subject to revision by a superior tribunal, and the warrant must therefore set forth the grounds and circumstances under which the committal took place, in order to enable the court above to see whether a correct conclusion has been arrived at. (*Bullock v. Parsons*, 1 Salk. 454, was also referred to.) The authority of *Bushell's case* is recognised by Lord Ellenborough in *Burdett v. Abbott*, 14 East, 69, 70; and more recently by Lord Denman, C.J., who plainly shows the reason for accuracy and particularity in the warrant, when he says, "What injustice might not have been committed by the ordinary courts in past times, if such a course had been recognised, as, for instance, if the recorder of London in *Bushell's case* had suppressed the fact that the jury men were imprisoned for returning

[Ex.]

Re FERNANDEZ.

[Ex.]

a verdict of acquittal." (*Sheriff of Middlesex case*, 11 A. & E. 292.) In *Lord Shaftesbury's case*, this distinction between the powers of a superior and inferior court is referred to; that was a committal by the House of Lords for contempt, and the return to a writ of *habeas* was to the effect that the committal was under a general warrant, and in giving judgment, remanding the prisoner, it is expressly said: "Such a return, if made by an ordinary court of justice, would have been ill and uncertain:" (1 Mod. 157.) And in *Reg. v. Patey*, 2 Ld. Raym. Rep. 1106, Gould, J., in giving judgment, says: "If this had been a return of a commitment by an inferior court it had been naught, because it did not set out a sufficient cause of commitment." As to what ought to appear on the face of general warrants, he referred to judgments of Coleridge, J., in *Howard v. Gossett*, 10 Q. B. pp. 380-1, and Lord Denman, C.J. Ib. p. 407. Again, the court of assize exercises its power by virtue of a statute, and where special jurisdiction, independent of the ordinary power of the court, is exercised, it is necessary to show plainly the facts giving the jurisdiction: (*Christie v. Unwin*, A. & E. 373, per Coleridge, J., p. 379; *Harrison v. Wright*, per Parke, B., 13 M. & W. 818; *Ex parte Leake*, per Parke, B. 9 B. & C. 240; *Re v. Brown*, 8 T. R. 26; *Thomlinson's case*, 12 Rep. 104.) Another objection is, that the warrant does not show whether the offence was committed during a civil or criminal trial, or whether or not before a jury. It says, "At the assizes held," &c., and "this court having adjudged," &c. It is impossible to say whether this took place under the commission of oyer and terminer, or of assize, or whether it was an information laid by the Attorney-General before the justices, as commissioners of the peace. It is bad too for not showing special authority and jurisdiction. Wilde, B. refers to the judgment of Ashurst, J. in *R. v. Joliffe*, that although judges of assize derive authority under a particular statute, yet all that is done by them is virtually done under the authority of the court above. Again, it ought to appear on the warrant whether it emanated from a Superior Court, which the court of oyer and terminer is not. [BRAMWELL, B.—There were two judges assigned to take the assizes: records are drawn up under different captions, according to the business done—the criminal business under the commission of oyer and terminer; the civil, under the commission of assize.] Then if it is to be assumed, from the caption, that it was under the commission of assize, it is bad for not showing that the proceedings were under an information sent down by the Court of Q. B. Further, the warrant does not state what the question was, nor that it was material. In such a case nothing must be presumed. But, apart from all question as to jurisdiction and the validity of the warrant, the witness was not bound to answer the question; the 9th and 10th sections of the 15 & 16 Vict. c. 57, do not extend to impeachment by the House of Commons. The certificate, however powerful to shelter the witness from any other proceedings, cannot stop the House of Commons—it is a *casus omissus*. Nor could the judge protect him by his opinion. The witness alone can determine whether an answer has a tendency to criminate him, and it is his privilege so to do; and even if he were mistaken in supposing himself liable to impeachment, he is still entitled to the privilege, and it is not to be assumed that the tendency to criminate must have reference solely to bribery. Suppose he had embezzled the money; the certificate would have been no protection there, whilst the answer might be a link in the chain to convict him hereafter. In *Fisher v. Ronalds*, 12 G. B. 765, Maule, J. clearly states the nature of the privilege, and his view has been adopted by Pollock, C. B. in *Adams v. Lloyd*, 3 H. & N. 361, and was referred to in *Garbett's case*, 2 Carr. & Kir.

[WILDE, B.—The result would be that you would never be able to obtain an answer to the simplest question: a man might refuse to tell his name.] Lastly, the witness should have been asked if he had any cause to show why he should not be adjudged guilty of contempt, and then the matter and the *bona fides* of the refusal could have been inquired into. But this was not done, and no proper opportunity was given to the witness to explain his conduct. In his affidavit the witness swears to his *bona fide* belief that the answer would have a tendency to criminate him; that he was not acting in collusion with J. B. Charlesworth, and that he had no intention to commit a contempt of court.

POLLOCK, C.B.—We think we ought to take time to consider the argument which has been prepared with so much pains, and presented to us with such ingenuity, and here we do no wrong to the applicant, because, if we gave judgment now, it would probably be adverse to his application. *Cur. adv. vult.*

April 23.—POLLOCK, C.B. now delivered the judgment of the court.—I have the written judgment of the court in the matter of Fernandez, and I now proceed to deliver it. This was a case moved by Mr. Bovill, on Friday last, and the motion was for a writ of *habeas corpus* to bring up the body of the deft. in order to his being discharged on the ground of the commitment being illegal. The argument occupied a considerable time, and was founded on cases not very often cited in court, and some of them of an ancient date. We had little doubt at the close that the writ ought not to be issued, but we thought it desirable to take a short time to look into the state of the law upon the subject, and we are now clearly of opinion that no writ ought to be granted. The only question in reality before us is, whether the court of assize at York which ordered this commitment is a superior or an inferior court. If superior, it is not required to set out the cause of commitment with the particular circumstances—it is sufficient to state the cause generally; and the case would be otherwise if it be an inferior court. To support the view of Mr. Bovill, that a court of assize is an inferior court, two authorities, and two authorities only, were cited. The first was in Bacon's Abr. tit. "Courts," D; upon referring to which it appears to be an authority directly the other way. The courts of record are there divided into supreme, superior, and inferior. Superior Courts of record are more principal or less principal; the more principal are—Parliament, Chancery, Queen's Bench, Common Pleas, and Exchequer, the justices itinerant, &c.; the less principal courts are such as are held by commission of gaol delivery, oyer and terminer, assize, Nisi Prius, &c. All these seem to stand on the same footing. A court of assize, or of Nisi Prius, is therefore a Superior Court, although a less principal one, and as such, as far as this authority goes, has authority to commit for contempt without setting forth the particulars of the contempt in respect of which the commitment is awarded. The other authority was *Bushell's case*, the comments on which by Lord Ellenborough, in *Burdett v. Abbott*, 14 East, pp. 69 and 70, show that for this purpose *Bushell's case* is no authority. It was cited to show that an order of the court of commissioners at the Old Bailey ought to set out the cause of commitment, and therefore that that court is to be considered as an inferior court. In p. 70 Lord Ellenborough called Mr. Holroyd's attention to the fact that in *Bushell's case* it was laid down generally that the cause of commitment ought to appear, and that the necessity of setting out the cause with particularity is not confined to the case of an inferior court, but ought to be observed whether the court be inferior or superior. Mr. Holroyd admitted, as he could not avoid doing, that it was laid down generally. Now, so far *Bushell's case* was wrong, although the

[Ex.]

REG. on the prosecution of MAPPIN AND OTHERS v. YOULE.

[Ex.]

decision was undoubtedly quite right in law to the extent of holding that the cause of commitment must appear in the commitment of the inferior court. The argument therefore fails to show that the court of commissioners at the Old Bailey was an inferior court. But there is an authority, not cited by Mr. Bovill, which goes directly to show that that court is a Superior Court, in the opinion at least of Abbot, C. J., and also was expressly so held by Wood, B., in the case of *Rez v. Clement*, 4 B. & Ald. 218, and 11 Pri. 70. In that case the court at the Old Bailey had made an order forbidding any publications of a portion of certain trials until the whole were concluded. This order had been disobeyed by the deft, and the court fined him 500*l.* for his contempt in disobeying the order, not stating what was the order he had disobeyed. The presiding judge at that session was Abbot, C. J., and we have no doubt that the order, imposing the fine for the contempt of the deft. in disobeying the order, was very carefully considered and prepared. It is set out at full in the report in 11 Price, and it is an authority to show that the court, at that time, Abbot, C. J. being the commissioner, claimed to act and did act as a Superior Court, not setting out the particulars of the contempt it proposed to punish, and Wood, B. in his judgment (11 Price, 87), expressly speaks of the court as a Superior Court of Record. Assuming, therefore, that a court of assize is a Superior Court (and it certainly may be taken without any doubt that a court of assize is as much a Superior Court of Record as a court of commissioners at the Old Bailey was before it was superseded by the present court established by Act of Parliament), assuming a court of assize to be a Superior Court, the law applicable to this commitment is really not open to any doubt. It was solemnly decided in the *H. of L.*, in *Burdett v. Abbott* (in error, 5 Dow. Rep. 200), as it had been in the court below, 14 East, and in *The Sheriff of Middlesex case*, 11 Ad. & Ell. 292, that in a warrant of commitment by a Superior Court, the adjudication of the contempt may be general, and the particular circumstances need not be set forth. This is all that is necessary for the purpose of the decision of this case now before us; but we do not regret that Mr. Bovill brought under our notice all the circumstances that took place at the trial, as it affords us an opportunity of saying that we entirely concur in the view taken by the learned judge who presided (Hill, J.), as to the whole course of proceeding on that occasion. There will be no writ of *habeas corpus* issued.

Writ refused.

Attorneys for the applicant, Singleton and Pitman.

Monday, April 29.

REG. on the prosecution of MAPPIN AND OTHERS (resps.) v. YOULE (app.)

*Master and workman—Absenting from service—Conviction for by justices under 6 Geo. 3, c. 25—Second leaving service under bonâ fide claim of right—Statutes 6 Geo. 3, c. 25, and 4 Geo. 4, c. 34—Repeal of former by latter Act.*

Where at the time of the original departure from the master's service the workman means it to be a permanent departure, and has no intention to return to such service:

Held (per Pollock, C. B. and Martin, B.; dissentiente, Bramwell, B.), that the master puts an end to the contract of service by proceeding against the workman summarily under the Act; and that the justices have no power to convict the workman a second time for not returning to the service after the expiration of the first imprisonment.

Where a workman declines to return to the service after his first imprisonment, under a bonâ fide claim of right founded on his belief in the advice given

him by his attorney that he is not bound to return in consequence of the previous conviction having put an end to the contract, but the justices nevertheless convict him for not returning:

Held (per totam curiam), that the workman in acting upon such bonâ fide claim of right is not liable to be proceeded against before the justices a second time, and that the second conviction is bad on that ground.

Held also, that a conviction under 6 Geo. 3, c. 25, s. 4, is bad on the ground that that statute is repealed or practically superseded (quoad these particular proceedings) by the 4 Geo. 4, c. 34, s. 3.

Special case under 20 & 21 Vict. c. 43, stated by two justices of the borough of Sheffield for the opinion of the court, as to the validity of a conviction by said justices under 6 Geo. 3, c. 25, s. 4, of a workman for absenting himself from his master's service before his contract had expired. The facts found by the case are as follow:—

The app., a journeyman cutler, was in the service of Messrs. Mappin, of Sheffield, under a written agreement, signed by both parties, in the following form:—

"An agreement made this 19th Dec. 1859, between Robert Youle of the first part, and Edward Mappin and Joseph Charles Mappin of the second part. The said R. Youle doth hereby hire himself and agree to work for the said parties of the second part as a journeyman springknife cutler, for the term of three years from the date hereof, during all which time the said Robert Youle shall and will diligently and wholly employ and apply himself in the service of the said parties of the second part, and shall not work for, serve, or assist any other person or persons whatsoever," and in consideration thereof the said E. and J. C. Mappin did thereby "hire and agree fully to employ the said R. Youle in the capacity and for the term aforesaid," and to pay him as in the said agreement mentioned for the work which he should do, with a proviso enabling either party to determine the hiring at the end of two years, on giving to the other of them one month's notice in writing; "and if the said R. Youle be the person giving such notice, on his paying to the said parties of the second part at the time of giving such notice the whole of any debt which he may then owe to them."

The app. was to be paid by piecework—that is to say, not by wages by the week or month, but in proportion to the value of the work done according to a certain scale of prices. Under this contract he entered and remained in Messrs. Mappin's service until the 7th July last, when he absented himself without their consent, and continuing so absent, a complaint was laid against him on the 3rd Aug. After hearing evidence upon oath on both sides, the justices convicted the said R. Youle of a misdemeanor in respect of his contract, "for that he did on the 7th July, and still did, unlawfully absent himself from his said master's service, without leave or lawful excuse, and without his said master's consent, and neglected to fulfil the conditions of the said contract, contrary to the statute in that case made and provided;" and the said justices did thereupon adjudge that the said R. Youle should be "imprisoned in the house of correction at Wakefield, and kept to hard labour for the space of twenty-one days, and that during the said term the wages of the said Robert Youle should abate."

In pursuance of the above conviction, which was made under the 4 Geo. 4, c. 34, s. 3, the app. was committed to prison for twenty-one days. He did not return to Messrs. Mappin's service at the expiration of his imprisonment, whereupon on the 12th Sept. they preferred a second complaint against him, "for that he did, on the 29th Aug. last, before the term of his contract was completed, unlawfully absent himself without leave or lawful excuse." This complaint was

[Ex.]

REG. on the prosecution of MAPPIN AND OTHERS v. YOULE.

[Ex.]

heard on the 13th Sept., before the two justices who state this case.

It was proved before them that the app. entered Messrs. Mappin's service under the aforesaid agreement and was absent therefrom on the day named in the information (29th Aug.), and had not returned since that day; that he was found on the 11th Sept. working at another manufactory, when, on being asked why he had not come to his work now he was out of prison, he said he "had offered to pay Mr. Mappin the money he owed him, and he thought Mr. Mappin ought to accept it, and release him from the agreement, for he was earning more money there and did not want to return." His previous committal on the 3rd Aug., and that he had not returned to his service since his discharge from prison, were also proved. In answer to a question by the justices, he said he declined now to return to Messrs. Mappin's service in consequence of his solicitor having advised him not to do so. It was urged on his behalf before the justices that, having been once convicted for leaving the service, he could not again be convicted for not returning; that the justices had no jurisdiction, inasmuch as it was one offence which had been satisfied. The justices, however, convicted him "of having on 29th Aug. last past, at the borough aforesaid, without notice, and before the term of his contract was completed, unlawfully, without the consent of his said masters, or either of them, and without just or lawful excuse, absented himself from his said service; and of not having fulfilled his said contract, contrary to the form of the statute made and passed, &c. (6 Geo. 3, c. 25), and did adjudge the said R. Youle to be imprisoned in the house of correction at Wakefield, in the West Riding of Yorkshire, for the space of one month."

Being dissatisfied with the above decision, as erroneous in point of law, the app. applied to the justices for a case, under 20 & 21 Vict. c. 43, and was admitted to bail in the meantime.

The justices say: "We were of opinion that the deft. was proved to be guilty of the offence charged in the information and complaint, and against the provisions in that behalf contained in the statute of 6 Geo. 3; and we were also of opinion that deft. was liable under the above statute to be again convicted and imprisoned for not returning after his said imprisonment, under the same agreement, but on the contrary, advisedly, absented himself from the service of his masters, and working for others, after his former imprisonment and before the time of his agreement with Messrs. Mappin had expired; and we accordingly adjudge him to be imprisoned in the house of correction at Wakefield for one month. If the court shall be of opinion that the said determination is not erroneous in point of law, then the said determination shall be confirmed; but if the court shall be of a contrary opinion, then the said determination shall be reversed."

The case came on for argument in Hilary Term, when the court directed the case to be sent back for amendment and more specific statement by the justices on the two following points:—

1. If any evidence was given before them to show whether the absence of the app. in respect of which the first conviction was made was a temporary absence, or an absence with intention not to return at all, and not to fulfil the contract? and if there was, to state it, and the conclusion they draw from such evidence.

2. Whether on the last occasion on which he refused to return to the service, he *bonâ fide* believed that he was not bound to return to the service, in consequence of the previous conviction?

The amended case states in substance, first, that there was no evidence to show whether the first absence was temporary only, or an absence with intention not to return at all, and not to fulfil the contract except that, on the 11th Sept., eighteen days after his im-

prisonment had expired, the app. had stated, in answer to the question why he had not returned to his work at Messrs. Mappin's, that he was willing to pay them the money he owed them for advances, which they ought to accept, and release him from his contract, as he was earning higher wages elsewhere, and more than Messrs. Mappin would allow him to earn; and secondly, that he absented himself from his work owing to a dispute with his master about the prices allowed for work, and also about the kind of work on which he had been employed; and that he was advised by his attorney that the contract was at an end, and that he was not compellable to return, and the justice thought it very probable that he *bonâ fide* believed the opinion of his attorney.

The following are the sections of the two statutes bearing on the question:—

The 6 Geo. 3, c. 25, "An Act for better regulating apprentices and persons working under contract."

SECT. 1. Recites, that persons employed in several manufactories of this kingdom frequently take apprentices, and such apprentices frequently absent themselves from their service, for remedy whereof it is enacted, that "if any apprentice shall absent himself from his master's service before the term of his apprenticeship shall have expired, every such apprentice shall, at any time or times thereafter, whenever he shall be found, be compelled to serve his said master for so long a time as he shall have absented himself from such service, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence from his service; and so, from time to time as often as such apprentice shall, without leave of his master, absent himself from his service before the term of his contract shall be fulfilled; and in case any such apprentice shall refuse to serve as hereby required, or to make such satisfaction to his master, such master may complain, upon oath, to any justice of the peace for the county or place where he shall reside, which oath such justice is hereby empowered to administer, and to issue a warrant under his hand and seal for apprehending any such apprentice; and such justice, upon hearing the complaint, may determine what satisfaction shall be made to such master by such apprentice; and in case such apprentice shall not give security to make such satisfaction according to such determination, it shall and may be lawful for such justice to commit every such apprentice to the house of correction for any time not exceeding three months."

SECT. 4. "And whereas it frequently happens that artificers, calico printers, handicraftsmen, &c. and others, who contract with persons for certain terms, do leave their respective services before the terms of their contracts are fulfilled, to the great disappointment and loss of the persons with whom they so contract, for remedy whereof be it further enacted, that if any calico printer, handicraftsman, &c., or other person shall contract with any person whomsoever, for any time or times whatsoever, and shall absent himself from his service before the term of his contract shall be completed, or be guilty of any other misdemeanor, that then and in every such case it shall and may be lawful for any justice of the peace of the county or place where any such artificer, &c. shall be found, and such justice is hereby authorised and empowered, upon complaint thereof made upon oath to him by the person with whom such artificer, &c. shall have so contracted, or by his or her steward or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such artificer, &c. and to examine into the nature of the complaint; and if it shall appear to such justice that any such artificer, &c. shall not have fulfilled such contract, or hath been guilty of any misdemeanor, it shall and may be lawful for such justice to commit every such person to the

[Ex.] REG. on the prosecution of MAPPIN AND OTHERS v. YOULE. [Ex.]

house of correction for the county or place where such justice shall reside, for any time not exceeding three months nor less than one month."

The 4 Geo. 4, c. 34, "An Act to enlarge the powers of justices in determining complaints between masters and servants, and between masters, apprentices, artificers and others."

Sect. 1 recites the 6 Geo. 3, c. 25, and other Acts, and that "it is expedient to extend the powers of the said Acts," &c.

Sect. 4. "And be it further enacted, that if any servant in husbandry, or any artificer, &c., shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract to be in writing, and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanour in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any justice of the peace of the county or place where such servant in husbandry, artificer, &c., shall have so contracted, or be employed or be found, and such justice is hereby authorised and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them, with whom such servant in husbandry, artificer, &c., shall have so contracted, or by his, her, or their steward, manager, or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, artificer, &c., and to examine into the nature of the complaint; and if it shall appear to such justice that any such servant in husbandry, artificer, &c., shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanour as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part of his or her wages for and during such period as he or she shall be so confined in the house of correction; or in lieu thereof, to punish the offender by abating the whole or any part of his or her wages; or to discharge such servant in husbandry, artificer, &c., from his or her contract, service, or employment, which discharge shall be given under the hand and seal of such justice gratis."

April 29.—*Mellish, Q.C.* for the deft.—The question is, whether a workman who has been convicted for absenting himself from his employment, and sentenced to imprisonment, and who declines to return to his service after his discharge, is liable to be summoned and punished again. Assuming that he was bound to return, he could not be convicted criminally for not returning, if he *bona fide* believed he was not bound.

The case of *Ryder v. Wood*, 29 L. J. 1, M.C., is an express authority to that effect. No doubt in that case the man thought he had complied with the contract. Here the deft. acted on a supposed right, and under the advice of his attorney, and adopting the view expressed by Pollock, C.B., in *Ex parte Baker*, 2 H. & N. 219, Ex., he declined to return to the service. But, secondly, the prior conviction put an end to the contract. The leaving the service permanently was one offence, and having been once punished, he cannot be punished a second time: the justices have no further jurisdiction in the matter. An ordinary case of contract of service is put an end to by the party going away and abandoning it, and the remedy a master has is by an action for damages. So if a servant be wrongfully dismissed an action lies, and

damages may be recovered, but in both these cases the service is at an end, and the remedy adopted for compensation is taken once and for all. So here the leaving the service is an offence against the Act, for which a workman is to be punished once for all. His liability to serve is gone after he has once wilfully absented himself and been punished; the service is at an end, and he cannot be again punished under the Act, any more than a second action could be brought in either of the last-mentioned cases.

[*MARTIN, B.*—Suppose a contract of service for five years, and at the end of three months the man chooses to leave and refuses to return; can the master by the assistance of the justices keep him in prison for four years and three-quarters?] Again, the former conviction was under 4 Geo. 4, c. 34, s. 3; the present one is under the 4th section of 6 Geo. 3, c. 25; there is nothing about "and so from time to time" in this section; those words occur in the 1st section of this very Act, with respect to "apprentices," which makes the remarks of the Lord Chief Baron, in *Ex parte Baker*, on the omission of those words altogether from the 4 Geo. 4, c. 34 (which was the Act under consideration in that case) stronger in favour of the deft. Thirdly, the 6 Geo. 3, c. 25, is impliedly repealed by the 4 Geo. 4, c. 34; the latter Act extends the powers of the justices in favour both of master and servant; the previous statute gave a minimum punishment of a month; by the latter Act the justices may either imprison for a reasonable time not exceeding three months, with abatement of wages; or abate the whole or any part of the wages, or discharge the servant from the employment. The two statutes are inconsistent with each other. Cases must often occur between master and workman in which the minimum punishment of one month would be very unjust; the Legislature intended to remedy that evil, but if it be held that the statute of Geo. 3 remains in force and unmodified by the subsequent statute, then, if the master chooses to proceed under the former statute, he may still imprison a servant for a month, in a case where under the subsequent statute a small abatement of wages, or may be, in a case where both were in fault, a discharging of the contract, would be the fitting and adequate adjudication. [*WILDE, B.*—How is it brought before the magistrate? Has the magistrate no power to decide under 4 Geo. 4, even though the information is laid under 6 Geo. 3?] The argument on the other side is that it is cumulative. The case states that the deft. having been charged with an offence "contrary to the statute 6 Geo. 3," the justices sentenced him in terms under that Act; and the reason, it is apprehended, why they rely on that statute is, that as the justices must, under 4 Geo. 4, adjudicate on wages, they could not do so where a man is paid by piecework, as there the wages would deduct themselves, since he could not do any work whilst in prison. No doubt the last-named Act says the justices are so to adjudicate, but it does not follow because the nature of the contract is to do without their adjudication what the Legislature intended should be done, that therefore the conviction must be under the 6 Geo. 3. The justices have fairly stated the case, but they were wrong.

*Quain*, contra, in support of the conviction.—There are so many Acts *in pari materia* regulating the dealings between masters and workmen, that it would be difficult to exaggerate the importance of this question, especially if the court should accede to the view of this case propounded on the other side. He contended that the first conviction did not put an end to the contract for the purpose of a second conviction. In *Ex parte Baker*, 7 El. & Bl. 697, there is the unanimous judgment of Lord Campbell, C.J. and Erle and Coleridge, J.J. to that effect. That case first came before the Q.B. It was under the 4 Geo. 4, but for the purpose of this argument it is no matter on which

[Ex.]

REG. on the prosecution of *MAPPIN AND OTHERS v. YOULE*.

[Ex.]

statute the question arose. [POLLOCK, C.B.—Was the attention of the Q.B. drawn to the difference between the two statutes?] No. Your Lordship first stated that distinction when *Ex parte Baker* came before this court. The main point there was, could there be a second conviction upon an absenting himself after the first imprisonment had expired? And the Q.B. held that there could, and of that opinion also were Bramwell and Watson, BB. when the case afterwards came before this court; Pollock, C.B. being of a contrary opinion, and Martin, B. doubting: (S.C. 2 H. & N. 219.) As to the policy of these statutes, it was of immense importance to hold artificers to their contracts. To bring an action against men in their position would be nugatory; without this statutory remedy the contracts of hiring would be unilateral; the masters would be bound, whilst practically the men would be free. The Legislature intended these Acts as a mode of compelling performance of the contract—a kind of bill in equity to enforce performance, as distinguished from an action to recover damages for the breach of a contract; and if this conviction is reversed the court will impliedly repeal these useful and salutary statutes. The effect will be very disastrous to the masters who are in the habit of advancing money and buying tools for their workmen, on the faith of their contracts, the work being piecework, and taken by the men to their own homes. No master will prosecute for misconduct on the part of his workmen if twenty-one days' imprisonment is to annul the contract, and thus the men will have the upper hand of their masters. The 20 Geo. 2, c. 19 is the earliest of this class of statutes, and throws light on the construction of the statutes in question. By the 2nd section of that Act, three modes of punishment were given alternatively. The 4 Geo. 4 is founded on that, and it cannot be said that the latter statute, any more than the former one, meant to put an end to the contract of service certainly. Where the Legislature so intends it says so expressly, as in the 3rd section of 39 & 40 Geo. 3, c. 43, s. 3, relating to colliers, where it says: "And upon such conviction every such contract shall become void." [POLLOCK, C.B.—In *Ex parte Baker* I did not mean to say that the contract was at an end, but that there was no power to convict a second time; and looking at the way that case is reported in the Q.B., it is not an authority against that view. It is a matter of very large substance, and which I consider to be of immense importance. MARTIN, B.—The 1st section of 6 Geo. 3, c. 25, in which alone the words "from time to time" occur, obviously points to the apprentice's refusal to serve or to make satisfaction; and in case of such refusal he may be imprisoned. BRAMWELL, B.—The words "from time to time" refer not to the justices punishing, but to the apprentice's refusal to make satisfaction.] The analogy of an action for breach of contract fails; there, in bringing an action, a person elects to rescind, and recovers damages once for all. Here the master goes before the justices, not to rescind, but to compel performance of the contract; and the conclusion seems inevitable that, after punishment for one offence, he may, if he offend again, be punished again. *Rez v. Inhabitants of Barton-upon-Irwell*, 2 M. & S. 339; and *Rez v. Inhabitants of Hallow*, show that imprisonment under the 20 Geo. 2, c. 19, was held no dissolution of the contract of service. [POLLOCK, C.B.—Those are settlement cases; and Lord Eldon once complained of such cases being cited as authorities upon other branches of the law.] With regard to the guilty intention, he absented himself wilfully, and to get higher wages. It was only at the last moment that the dissolution of the contract was rested upon. Then he says, "My attorney tells me there is the opinion of one judge in my favour, so I'll break my contract, and take the chance of a point of law being in my favour." Such a course would dis-

pense with the criminal law altogether. No *bona fide* was shown here. [MARTIN, B.—Suppose a man imagines his masters are not working out his contract fairly by him, and so leaves, is not that *bona fide*?] In *Ryder v. Wood*, the *mens rea* was absent. Not so in this case. He refers also to *Willett v. Boote*, and judgment of Bramwell, B., 30 L. J. 6, M. C. The advice given by his attorney is no excuse; if he stands on it he must take his chance; and both in fact and in law it fails. As to repeal, a later statute which is general and affirmative cannot repeal a prior affirmative statute unless in express terms, or unless there is some gross inconsistency between them. There are provisions in the prior Act which are not in the subsequent Act, and there is an appeal given in the former Act, but not in the latter; and the effect of holding the prior Act repealed will be to throw a large number of operatives throughout the kingdom out of the operation of the statute altogether. [POLLOCK, C.B. referred to the judgment of Bramwell, B. in *Ex parte Baker*, 2 H. & N. 242, on this point.]

*Mellish*, Q.C. in reply.—It is not necessary to say whether the Act is entirely repealed or not. The question is, is it superseded *quoad* this particular case? (Here he was stopped by the court.)

POLLOCK, C.B.—I am of opinion that this conviction is bad. It appears to me that the deft. acted perfectly *bona fide* in refusing to return; and having proceeded against him once, the justices could not compel him to return. I also think his original departure was intended to be permanent; and, without discussing the question whether the justices can interfere more than once where the absence is temporary (on which I retain my former opinion), I think, where the man clearly shows an intention to leave altogether, the magistrate should deal with the case once and for all: and whatever may be the power of the justices to punish a short absence, such as an unpermitted holiday more than once, yet where the workman means to quit the service altogether, the punishment should include the whole question of compensation, and be final. On that ground I think the present conviction not sustainable. The conviction is under the 6 Geo. 3, expressly, with imprisonment for *one month*, being the *maximum* allowed by that statute. Possibly the justices committed him for that period, thinking they could not commit for less; but the 6 Geo. 3, being repealed by the 4 Geo. 4, they were wrong, and the conviction is bad on that ground also.

MARTIN, B.—I also think the conviction, being expressly under 6 Geo. 3, is not supportable. I agree with what my brother Bramwell said in *Ex parte Baker* on the question of the repeal of that statute by the 4 Geo. 4, and I think the Legislature must be taken to have intended that the one Act shall be substituted for the other. It is a plain superseding of the one Act by the other. We cannot apply the strict rules laid down for construction to such a case; we must take a common-sense view of the matter. The justices are confined to the 4 Geo. 4, and had no right to fall back on 6 Geo. 3. True there is an appeal under the 6 Geo. 3, and none under the 4 Geo. 4, and so it may be said there is a hardship done in holding the former Act repealed; but that objection is removed by the very statute under which this case comes before us. I may say that my brother Wilde intimated to me, before he left the court, that on this point he concurred in opinion with me. As to the other point, I adhere to the opinion I expressed in *Ex parte Baker*, that it is one offence, and can only be dealt with once for all if the man absents himself meaning to leave altogether. In contemplation of law all men are equal, and we must not look at the ability of people to pay damages. The master has a right to act upon the statute, but if he do so act he must do so once for all; neither the master nor the justices may split the

Ex.]

WOODARD v. THE EASTERN COUNTIES RAILWAY COMPANY.

[BAIL.

matter up into many bits. As to *bona fides*, it is a difficult question to deal with, but I think it was sufficiently established in this case. My judgment will, therefore, be for the app.

BRAMWELL, B.—There seems to be some peculiarity in these cases which prevents the courts from agreeing in their reasons for coming to the same conclusions. As to the repeal of the 6 Geo. 3, I agree with the app.; I cannot see why "piecework" is not within the 4 Geo. 4. I own I think there can, as a general proposition, be a second conviction, and but for the opinions of my Lord and my brother Martin, I should think so strongly. Ordinarily in breaches of contract the remedy is by action, but there are necessary exceptions in certain cases—e. g. a breach by a fraudulent bailee. I cannot see why a man, who otherwise would be able to break a contract with impunity, may not be punished for doing it wilfully and with dishonest intentions. Why is it not a crime? I know it is not so called. The law generally redresses broken contracts by civil remedy, but in the case of a workman it is nugatory and idle to say that the master has a remedy by action—it is like the advice said to have been once given by a learned judge to a labourer prosecuted before him for bigamy. The workman is benefited by having a cheap remedy for recovery of his wages, and I see nothing unreasonable in the Legislature having given that mode of punishment for breaches of the contract of service. Now, is the contract put an end to? The 4 Geo. 4 contemplates an abatement of wages and no discharge of the service, and why should not the master have the same power of punishing a misdemeanor by breach of contract again as he had in the first instance? I see no inconvenience, no injustice, in his having such a power. I confess (with the greatest respect for my Lord and my brother Martin, so far as they differ from me) I entertain the opinion that there is a power of punishing again under this statute, in cases where the contract of service is not put an end to. But entertaining this opinion, and the opinion of the policy of the law in this respect, which I do, I should be sorry if the law were not as it is laid down in *Ryder v. Wood*, an authority with which I express my humble agreement—it would be harsh indeed if it were not so, but as it is I think it is not harsh. In the case of a man acting under a *bona fide* belief of right, it would be monstrous that he should be punished under this Act instead of the master being left to his civil remedy. There are many instances of jurisdiction being taken away by a claim of right, and a recent case in the Q. B. settles that where summary jurisdiction is given, it must be with the qualification that the man knows that he is doing wrong. Surely there is no difficulty in ascertaining whether a man have a *bona fide* excuse. I see nothing contrary to any rule or principle of law in this. It is a reasonable thing, without which the Act would be tyrannical. Did the justices find here that the man had a lawful excuse? They find that he was strongly advised not to return, and that they think it very probable he really believed the opinion of his legal adviser. I cannot think he was wrong in believing that opinion, founded as it was on the opinion of the Lord Chief Baron. I think, therefore, the justices ought not to have convicted him on the ground of *bona fides*; and I decidedly think that the conviction is bad, on the ground that the original Act (6 Geo. 3, c. 25) is no longer in force in the matter.

WILDS, B. left the court before the conclusion of the argument.

*Judgment for the app.; conviction reversed, without costs.*

A. Duncan, Lincoln's-inn-fields, attorney for the app.

Singleton and Pisman, Great James-street, for Chambers and Waterhouse, Sheffield, attorneys for the resp.

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Monday, May 6.

(Before WIGHTMAN, J.)

WOODARD v. THE EASTERN COUNTIES RAILWAY COMPANY.

*Railway traveller—Bye-laws—Production of ticket on request—Annual ticket—Conviction.*

*The bye-laws of the Eastern Counties Railway Company provides that "each passenger booking his place will be furnished with a ticket which he is to show and deliver up when required to the guard in charge of the train, or to any officer or servant of the said company authorised to inspect or collect tickets. Each passenger not producing or delivering up his ticket when required is hereby subjected to a penalty not exceeding 40s." The said company granted annual tickets for passengers up and down their line, which ticket expressed that it was to be exhibited when required, and the holder was required to sign a memorandum in which it was provided that he would "abide by and conform to the company's present and future bye-laws," and also that he would produce his ticket on entering the company's carriages, or whenever required by the company's servants, "or in default thereof pay the ordinary fare."*

*Held, that a passenger who had an annual ticket was subject to the above bye-law, and that he incurred the penalty of 40s. for refusing to produce his ticket when required by the company's officer.*

This was a case stated by justices under the 20 & 21 Vict. c. 43, for the opinion of this court, as follows:—

At a petty sessions held for the divisions of the Half-hundred of Beacontree, in the county of Essex, at Little Ilford, before us, the undersigned and others, her Majesty's justices of the peace, acting in and for the said county, on the 16th Feb. 1861, Edward Woodard, of Billericay, in the said county of Essex, and of 106, Fenchurch-street, in the city of London, solicitor, appeared to answer an information laid against him at the instance of the Eastern Counties Railway Company, for having on the 4th Feb. 1861, at Stratford, in the parish of Westham, in the said county, refused to show his ticket when required so to do by one of the servants of the said company duly authorised to inspect and collect tickets, he, the said Edward Woodard, being then and there a passenger on the said Eastern Counties Railway, contrary to the bye-laws of the said company in that behalf duly made and published by the said company pursuant to the several Acts of Parliament relating to their railways.

On the hearing of the information it was proved by Charles Pratt, a ticket collector of the company, that the deft. was a passenger from Brentwood by a train to London, due at Stratford at 8.46 a.m. on the day in question, and that on the arrival of the train at Stratford station, where the passengers' tickets are collected, he requested the deft. to show his ticket, which the deft. declined to do, at the same time stating that he did not intend to produce his ticket on that or any future journey; whereupon Pratt demanded the deft.'s fare, which the deft. refused to pay. The witness Pratt, on cross-examination, stated that he was aware the deft. was the holder of an annual ticket, entitling him to travel upon the line of railway between London and Brentwood, and it was admitted by the company's attorney that such ticket had been taken out and paid for by the deft., and would not expire until the 9th May 1861.

The bye-laws of the company under their corporate seal, and the seal of the Commissioners of Railways, were put in evidence, and their publications at the



[BAIL.]

WOODARD v THE EASTERN COUNTIES RAILWAY COMPANY.

[BAIL.]

stations of the company at Stratford, Bishopsgate, and Brentwood duly proved.

The following is a copy of the bye-laws under which the information was laid against the deft. :

"The bye-laws of the Eastern Counties Railway Company.—Notice is hereby given, that the Eastern Counties Railway Company, acting under the powers and provisions contained in the several Acts of Parliament relating to their railways, have made the following bye-laws for regulating the travelling upon and the use of their railways by travellers and passengers; which bye-laws have been duly allowed and confirmed as by law is required.

"1. No passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railways, without first having booked his place and paid his fare.

"Each passenger booking his place will be furnished with a ticket, which he is to show and deliver up when required to the guard in charge of the train, or to any officer or servant of the said company authorised to inspect or collect tickets. Each passenger not producing or delivering up his ticket when required, is hereby subjected to a penalty not exceeding 40s.

"2. Every person attempting to defraud the company by riding in or upon a carriage of higher class than that for which he has booked his place and paid his fare, is hereby subjected to a penalty not exceeding 40s.

"3. Passengers at the road or intermediate stations will only be booked conditionally; that is to say, in case there shall be room in the train for which they are booked, and without any warranty as to the time of arrival and departure of trains; and in case there shall not be room in the train for all passengers booked, those booked for the longest distance shall have priority according to the order in which they are booked. The passengers cannot rebook at any intermediate station for proceeding by the same train, further than they were originally booked to proceed.

"No passenger shall be permitted to ride upon the roof, steps, or sideboard of any carriage, and any passenger persisting in doing so, after being warned to desist by the guard in charge of the train, or any officer of the company, is hereby subjected to a penalty not exceeding 40s.

"5. Smoking is strictly prohibited both in and upon the carriages, and in the company's stations. Every person smoking in a carriage or elsewhere upon the company's premises, is hereby subjected to a penalty not exceeding 40s., and every person persisting in smoking in a carriage or station, after being warned to desist by any officer of the company, shall, in addition to a penalty not exceeding 40s., be immediately, or if travelling at the first opportunity, removed by the company's servants from the company's carriages and premises, and shall, if a passenger, forfeit any fare he may have paid.

"6. Any person found in the company's carriages, stations, or premises in a state of intoxication, or committing any nuisance, or otherwise wilfully interfering with the comfort of other passengers, is hereby subjected to a penalty not exceeding 40s., and shall immediately, or if travelling at the first opportunity, be removed by the company's servants from the company's carriages and premises, and if a passenger forfeit any fare he may have paid.

"7. Any person cutting, tearing, or soiling the linings, removing or defacing the number plates, breaking, scratching, or cracking the windows, or otherwise wilfully damaging or injuring any of the company's carriages, shall forfeit and pay a sum not exceeding 5*l.* in addition to the amount of damage done.

"8. No person will be allowed to get into or upon any carriage after, or to quit any carriage when, the train of which it forms part has been put on or is in

motion, and every person doing so or attempting to do so is hereby subjected and made liable to a penalty not exceeding 40s.

"Given under the common seal of the Eastern Counties Railway Company, the 5th day of April 1850.  
(Signed) "J. B. OWEN, Secretary.

[The seal of the company.]

"Allowed by the Commissioners of Railways this 15th day of April, 1850.

(Signed) "GRANVILLE.  
"EDWARD RYAN.

[The seal of the Commissioners of Railways.]

"This is to certify that the foregoing is a correct copy of the bye-laws of the Eastern Counties Railway Company.

"J. B. OWEN, Secretary.

"10th Nov. 1859.

"Printed at the Company's Works, Stratford."

In answer to the information the deft. produced the annual ticket granted to him by the company in the following words:—

"(No. 2170.) Eastern Counties Railway, first-class season ticket, between London and Brentwood, not transferable. Granted to Edward Woodward, Esq.

"Expires 9th May 1861."

"This ticket is to be exhibited when required, and the holder of it is subjected in all respects to the regulations as regards passengers."

And it was proved that when the ticket was granted the company required the deft. to sign, and he did sign a memorandum in the following words:—

"London, 9th May 1860.

"To the Eastern Counties Railway Company, I hereby acknowledge the receipt of ticket, entitling me to travel by all Eastern Counties trains, in a first-class carriage, between London and Brentwood, for the term of twelve months from this date, in consideration of my having paid 23*l.* (deposit 10*s.*), and I agree that I have received such ticket upon condition, that in the event of the loss of this ticket, that I abide by and conform to the company's present and future bye-laws, as approved, or hereafter to be approved, by the Commissioners of Railways, and also all rules and regulations as regards alterations of trains without notice or liability to me, security against improper use of such tickets, and all other matters, not holding the company answerable for any stoppage, hindrance, change or delay, in the proper starting or running of any train, arising from negligence, accident, or any other cause, and that I produce the said ticket on entering the company's carriages, or whenever required by the company's servants, or in default thereof pay the ordinary fare, and that I return the said ticket whenever called upon to do so by you, for the purpose of exchange or removal, and I agree that I will not transfer or part with such ticket, and in the event of its being transferred or parted with, or used by any other person, or in the event of my not abiding by or conforming to such bye-laws, rules and regulations as aforesaid, such ticket to be null and void, and all my rights thereunder to cease and determine, and I agree to pay the usual fares for travelling over the line for the remainder of the said term, as if such ticket had never been granted me, and I agree to deliver up such ticket or other changed or renewed ticket to the secretary of the company, on the 9th day of May 1861, or on demand of the same shall have become forfeited as before-mentioned.

"(Name) EDWARD WOODARD,  
" (Address) Billericay, Essex."

It was contended on behalf of the deft. that the justices had no jurisdiction to convict him in a penalty under the company's bye-law, inasmuch as the annual ticket and memorandum formed a special contract between him and the company, and that he was not for this reason liable to be dealt with in a summary

[BAIL.]

ONLEY v. GEE.

[BAIL.]

manner before justices as a passenger booking his place and taking a ticket for a specific journey, to which cases alone the bye-laws applied; and further, that if any breach of the contract had been committed, the remedy of the company was by action at law against the deft., and not by information before justices for recovery of a penalty, or forfeiture under the provisions of the Railway Acts. The justices were of opinion that the company's bye-laws extended to the holders of annual tickets as well as to passengers booking their places for return or single journeys only, and they convicted the deft. in the mitigated penalty of 10s. and costs for refusing to produce his ticket to the servant of the company when required so to do.

*Kearns* now appeared in support of the conviction, and argued that the app. came within the operation of the first bye-law, for that whether he had a ticket for the single journey or an annual ticket, he was equally a passenger, and it was equally necessary that he should be placed under the obligation of producing his ticket when required, an obligation which, by his express contract, he has admitted.

*T. Chitty*, for the app., contended that the bye-law was framed obviously to meet the case of ordinary daily passengers who had a ticket given them for each journey and who had to give it up; and not to affect annual ticket-holders, who, by their contract, stipulated that in default of producing their tickets they would pay the ordinary fare.

*WIGHTMAN, J.*—I am of opinion that the decision of the justices was right, and that the app. was liable to the penalty imposed upon him. Here he has an annual ticket, and whilst on his journey to London, the railway official at Stratford, where the train stops and the tickets are shown and collected, requires him to produce his ticket. He declined, however, to do so, and said he did not intend to produce it then or at any other time. It may, therefore, be taken that, in fact, he had it and refused to produce it; so that none of the questions of hardship which have been urged arise. Now it is just as important to enforce the production of annual as of ordinary tickets; for, unless the railway officer knows the person, he may be told that he has an annual ticket when in fact he has not. But it is said, however that may be, he is not within the terms of the bye-law. Now the bye-law is this: "Each passenger booking his place will be furnished with a ticket which he is to show and deliver up when required to the guard in charge of the train, or to any officer or servant of the said company authorised to inspect or collect tickets. Each passenger not producing or delivering up his ticket when required, is hereby subjected to a penalty not exceeding 40s." Now, it is said, he has already paid his fare, and he has not to deliver his ticket up. But he is furnished with an annual ticket instead of daily ones, and he may be required to show it without giving it up. There is, therefore, a distinction between producing and delivering up. Here he does not produce it when called upon to do so. It appears to me, therefore, that he does come within the meaning of the bye-law. But, it is said, there is a distinction arising upon the contract. The ticket itself says little except that "this ticket is to be exhibited when required, and the holder of it is subjected in all respects to the regulations as regards passengers." It is said there is a distinction between bye-laws and regulations, and that there are regulations distinct from the bye-laws. But I think from their very terms that the bye-laws do form regulations. Now the ticket is granted upon the ground that it is to be produced when required. It is said, however, that the contract he entered into excludes this bye-law, for it says that in default of producing the ticket he will pay the ordinary fare. If he had paid the fare when demanded he would so far have complied with this provision, but he did not do so. It seems to me there is

no comparison between the inconvenience of requiring the holders of annual tickets to produce them, and their being at liberty not to produce them. I don't suggest that the app. intended any fraud—he has merely raised a question of right. Still it seems to me that, under the bye-law and the contract, he was bound to produce his ticket, and that by not producing it he incurred the penalty, and that the justices were justified in convicting. *Conviction affirmed.*

Tuesday, May 7.

(Before WIGHTMAN, J.)

ONLEY (app.) v. GEE (resp.)

*Conviction — Keeping a betting-house — Continuous offence—Information—16 & 17 Vict. c. 43, ss. 1, 9 and 10.*

*The app. was convicted summarily by justices upon an information preferred against him under sect. 3 of the 16 & 17 Vict. c. 119 (An Act for the suppression of betting-houses), which charged him "with having on the 5th day of Oct. in the year aforesaid, and on divers other days and times between the said 5th of Oct. and the laying of the said information" (16th Nov. following), "being then and there the occupier of a certain house in the said city" (Manchester), "knowingly and wilfully opened, kept and used the same for the purpose of the said Bartholomew Onley betting with persons resorting thereto." The justices convicted him of the offence committed on the 8th Nov., and in a case stated for the opinion of this court, they stated that it was established to their satisfaction that he did so keep and use the house on the 8th Nov., but not on the 5th Oct. or on any other day:*

*Held, that the information was good, and did not allege more than one offence, and that upon such information the justices were warranted in convicting of the offence as committed on the 8th Nov.*

Case stated under the 20 & 21 Vict. c. 43, by the magistrates of Manchester, upon a conviction under sect. 3 of the 16 & 17 Vict. c. 119 ("An Act for the suppression of betting-houses"), in the following form:—

"City of Manchester to wit.—At the police court in the said city, before the undersigned, two of her Majesty's justices of the peace for the said city, on the 26th day of November 1860, Bartholomew Onley was charged, on an information laid on the 16th day of November, in the year aforesaid, under the 3rd section of the 16 & 17 Vict. c. 119, with having on the 5th day of October, in the year aforesaid, and on divers other days and times between the said 5th October and the laying of the said information, being then and there the occupier of a certain house in the said city, knowingly and wilfully opened, kept and used the same for the purpose of the said Bartholomew Onley betting with persons resorting thereto, contrary to the form of the said statute." Besides this there were eight other informations varying the charge against the deft., and amongst them was one stating the above offence to have been committed on the 8th of Nov., in the year aforesaid, but omitting the words "and on divers other days," &c. On the information being read by the counsel for the prosecution, the counsel who appeared for the deft. raised these objections thereto: First, that on the hearing of the information charging the offence as having been committed on the 5th Oct. and divers other days, evidence could not be received as to what took place on the 8th Nov; secondly, that owing to the words "and on divers other days," it was too general, and thereby placed the deft. in the difficulty of being unable to defend himself against other charges of the same offence; and, thirdly, that those words laid more

[BAIL.]

REG. v. TOTT.

[BAIL.]

than one offence, in contravention of the 10th section of the 11 & 12 Vict. c. 43. The justices, however, decided against the objections, and the case was proceeded with. Evidence was given by the prosecution to show that the deft. kept and used his house for the purpose stated in the information on the 5th Oct. and the 8th Nov., and it was established to the satisfaction of the justices that he did so keep and use the same on the 8th Nov., but not on the 5th Oct., or any other day. The justices were of opinion that, under the authority of the 11 & 12 Vict. c. 43, the information was sufficient, and that the variance between the information and the evidence on the part of the informant was not material; and, after having heard the arguments of counsel, they retired, and on their return convicted the deft. of the offence committed on the 8th Nov. The deft. being dissatisfied with such conviction, as being erroneous in point of law, demanded a case for the opinion of her Majesty's judges of the Court of Q. B., which the justices hereby state and sign accordingly."

The 3rd section of the 16 & 17 Vict. c. 119, enacts that "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned (described in sect. 1), or either of them, and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid . . . shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty not exceeding one hundred pounds as shall be adjudged by such justices," &c.

*Mellish*, Q.C., for the resp., contended that the conviction was good, and was founded upon a valid information, for that the offence being a continuing one, and not consisting of the doing of a particular act, it may well be described as committed on a certain day, and on divers other days and times, as upon an indictment for a common nuisance; that the app. being convicted of having committed the offence on the 8th Nov. was warranted by the information which covered that day, and that the 9th section of the 11 & 12 Vict. c. 43, rendered the misstatement of time in an information in such a case immaterial.

*Torr*, for the app., argued that the conviction was bad, as not being warranted by the information, it not being competent to the justices to convict of an offence committed on the 8th Nov., when the day laid in the information was the 5th Oct. [*WIGHTMAN, J.*—The offence is of keeping open a house for the purpose of betting; each time there is betting there is evidence of the house being kept for that purpose, and if that is found to have taken place on a particular day, it is evidence that on that day the house was kept open for that purpose. The day laid would seem to be immaterial, if within the time stated during which the house is kept open for the purpose.] The information was bad, as alleging the commission of several offences, the 10th section of the 11 & 12 Vict. c. 43, directing that every information shall be for one offence only. Upon a subsequent information for a similar offence committed between the 5th Oct. and the 16th Nov., he would be unable to protect himself, for he is convicted only of an offence upon the 8th Nov.: (*Paley on Convictions*, 155; *Martin v. Pridgeon*, 28 L. J. 179, M.C.)

*Mellish*, in reply, referred to the last proviso in sect. 1 of the 11 & 12 Vict. c. 43.

*WIGHTMAN, J.*—That proviso certainly cures any defect arising from a variance between the information and the evidence. It seems to me that the information would have been perfectly good if one day only, the 8th Nov., had been stated in it as the time when

the offence was committed, and I think that though the information lays the offence not on that day, but on the 5th Oct., and on divers other days and times, it is still well laid. *Conviction affirmed.*

Monday, May 6.

(Before *WIGHTMAN, J.*)

REG. v. TOTT.

*Alehouse*—Refusing to admit a police-officer—Out-house—Second conviction—Penalty—4 & 5 Will. 4, c. 85, s. 7.

*A police-officer has, under sect. 7 of the 4 & 5 Will. 4, c. 85, a right to enter any portion of premises licensed to sell beer or spirituous liquors, though such premises are merely an outhouse, and a refusal to permit him to do so is an offence within that section.*

*For a second offence under the above section the punishment is suspension of the licence alone, and the convicting justices have no power to add a pecuniary penalty.*

This was a case stated by the Middlesex Sessions upon an appeal against a conviction of a metropolitan police magistrate, under sect. 7 of the 4 & 5 Will. 4, c. 85. The case was as follows:—

By the 4 & 5 Will. 4, c. 85 s. 7, it is enacted: "That it shall be lawful for all constables and officers of police, and they are hereby authorised and empowered, to enter into all houses which are or shall be licensed to sell beer or spirituous liquors to be consumed upon the premises, when and so often as such constables and officers shall think proper, and if any person having such licence as aforesaid, or any servant or other person in his employ or by his direction, shall refuse to admit, or shall not admit, such constable or officer of police into such house or upon such premises, such person having such licence shall for the first offence forfeit and pay any sum not exceeding 5*l.*, together with the costs of the conviction, to be recovered within twenty days next after that on which such offence was committed, before one or more justices of the peace, and it shall be lawful for any two or more justices, before whom any such person shall be convicted of such offence for the second time, to adjudge (if they shall so think fit) that such offender shall be disqualified from selling beer, ale, porter, cider, or perry by retail for the space of two years next after such conviction, or for such shorter space of time as they may think proper."

*William Tott* (app.) was, by a licence in the form contained in the schedule to the said Act, duly licensed to sell beer, ale, &c., in order that it might be consumed in a dwelling-house of the said *William Tott*, situate in Bow-common-lane, in the parish of Bethnal-green, in the county of Middlesex, and in the premises thereunto belonging. Next to the house was a yard, and at one side of the yard adjoining to, but not under the same roof with it, was an outhouse used as a cellar. This was in the occupation of the app., and formed part of the premises belonging to the house, but had no direct internal communication with the house, and the only mode of getting to this outhouse was by going through the taproom and ground-floor of the dwelling-house into the yard. The app. had been previously convicted under the above section for refusing to admit the police, and was convicted of a second offence by the conviction which was now appealed against. (The conviction was here set out, charging that the app. had before been convicted of a similar offence, and it adjudged him to forfeit and pay the sum of 5*l.*, and be disqualified from selling beer, ale, porter, cider and perry for the space of two years.) The case then proceeded as follows:—

On Sunday the 17th June, at about a quarter to twelve in the forenoon, a police constable was passing the said house, and hearing several persons talking at

BAIL.]

REG. v. OWEN PRITCHARD.

[C. CAR. R.]

the bar to the potman of the app., applied for admission at the door of the house which opened into Bow-common-lane. After doing so, and before he was admitted, he heard several persons go to the back part of the premises. When the constable was admitted into the house, he heard several persons in the said outhouse, and upon going into the yard he knocked at the door of the outhouse and applied to be admitted, but the app. refused to admit, and did not admit him into such outhouse. It was contended on behalf of the app. that the section above mentioned gave the police power to enter the house of the app., but did not give them power to enter such an outhouse as that above mentioned; that therefore the refusal to admit to the outhouse was not an offence within the section. It was further contended that the conviction was bad, because it adjudged the app. to forfeit and pay 5*l.* for the offence, and also to be disqualified from selling beer, ale, &c. by retail for two years, and that the section above mentioned did not empower the infliction of a fine and suspension of the licence. The court of quarter sessions decided against both the objections and confirmed the conviction, subject to a case for the opinion of the honourable court.

The opinion of the court is therefore requested, whether under the above section it was an offence to refuse the police admittance to the above-mentioned outhouse, and whether upon a conviction of a second offence the person convicted is liable to a fine, in addition to the suspension of his licence.

Poland appeared in support of the conviction, and contended, first, that no portion of the premises was exempt from the inspection of the police officers, and that the outhouse or cellar was covered by the licence, and so was subject to be entered by the officers, as much as the dwelling-house itself; secondly, that the penalty upon a second conviction, of a suspension of the licence, was cumulative, and that were it not so, the words "if they shall so think fit" would have no meaning, for if the punishment of suspension were not thought fit, there would be then no other.

*M'Intyre*, for the app., argued, first, that the officer had no right to enter upon any premises which were not occupied for the sale of beer, &c. [WIGHTMAN, J.—Under his licence he may have sold beer in this outhouse.] Had he done so the case would have been different. Secondly, the punishment for a second offence is suspension of the licence only, and no fine is authorised to be imposed, which is the punishment alone for the first offence.

WIGHTMAN, J.—Two objections have been taken to this conviction. First, that the officer was not authorised to enter into the cellar, which was a part of the premises. The licence, however, is no doubt large enough to include the cellar, for it is in this form: "to sell beer, ale and porter by retail, in order that it may be consumed in the said dwelling-house of the said A.B., and in the premises thereunto belonging." So that there is nothing in the Act to prevent his carrying on his business in the cellar. That being so, it seems to me that the officer had authority to require to be admitted into that part of the premises; and indeed, if not, the Act would be constantly evaded, for nothing would be easier than when he finds an officer coming to his house to send his company into the cellar. That objection, therefore, I think, cannot be sustained. As to the second objection, I have very great difficulty in agreeing with the magistrate in the construction he has put upon the section. I can only take the words of the clause to mean that for the first offence a penalty of 5*l.* may be imposed, and for the second offence the licence may be suspended. It is said that for the second offence there is to be the double penalty. But if the Legislature had intended this, it should have used different words. It may be

that the penalty for the second offence is much more onerous than the first, and that the suspension of the licence is intended to be so. It is said, however, that the words "if they shall so think fit" show that a qualification was intended as to the penalty. I think not, however, and that the penalties are distinct; and that for the second offence there is no pecuniary penalty to be added to the suspension. I cannot say what was the intention of the Legislature, but there is not sufficient to show that a double penalty was intended.

*Judgment for the app.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, April 27.*

(Before POLLOCK, C.B., WILLIAMS, WILLES and BLACKBURN, JJ., and WILDE, B.)

REG. v. OWEN PRITCHARD.

*Larceny—Ownership of property—Joint-stock bank*  
—7 Geo. 4, c. 46, s. 9—7 Geo. 4, c. 64, s. 14.

*In an indictment for larceny, the property was laid to be in J. C. G., the manager of the Dudley and West Bromwich Bank. The property belonged to the banking company, a joint-stock company consisting of more than twenty partners, but no registration of it, nor appointment of any manager or public officer, was proved. The indictment was amended at the trial, by laying the property in P. W. and others; P. W. being one of the partners:*

*Held, that the ownership, as amended, was rightly laid under 7 Geo. 4, c. 64, s. 14, and that it need not have been laid in the public officer (presuming there to have been one), under 7 Geo. 4, c. 46, s. 9.*

Case stated by Channell, B. for the opinion of this court.

The prisoner, Owen Pritchard, was convicted before me, at the last assizes for Denbighshire, of stealing 8*lbs.* weight of brass.

The conviction is to be taken to be correct, subject only to the question whether the indictment sufficiently describes the ownership of the property which is the subject thereof.

The property charged to be stolen consisted of certain brasses or caps which had formed part of an engine and machinery used in the working of colliery works, known as the Llywernian Colliery works.

The indictment on which the prisoner was arraigned, and to which he pleaded, described the property as the property of "John Cleveland Green."

Edward Green was called as a witness for the prosecution. He swore, "that he was the son of John Cleveland Green; that John Cleveland Green was the manager of the Dudley and West Bromwich Bank; that he was sent by his father to reside near the colliery works; that he had the engines and works belonging to the colliery under his care at the time when the brasses and caps were severed and taken from the machinery; that he could not actually say that he was a servant of the company, but that he received from his father payment for taking charge of the machinery and works; that he believed the money came from the company; that with money he got from his father he paid the men on the works; and that the engines and machinery belonged to the Dudley and West Bromwich Company.

No registration of the Dudley and West Bromwich Company as a joint-stock company, or of the appointment of any manager or public officer thereof, was proved.

It was objected by the prisoner's counsel that the ownership of the property in John Cleveland Green was not proved.

The witness stated that Philip Williams was one of the partners in the Dudley and West Bromwich Bank;

that there were more than twenty partners or shareholders in the bank; and that it was, as he understood, a joint-stock banking company.

I was thereupon requested to amend the indictment. I did so by striking out the words John Cleveland Green, and stating the property to be the property of Philip Williams and others.

The prisoner was convicted and sentenced, and is now undergoing his sentence.

On the same day on which he was tried, and shortly before the verdict was recorded, my attention was called by the prisoner's counsel to the statutes and cases collected in Archbold's Criminal Law, 14th edit., pp. 36 and 37.

I then reserved for the opinion of this Court the question whether, upon the evidence set out, the ownership of the property was sufficiently described in the indictment as amended; and if not, whether the description in the indictment before the amendment was made was sufficient, if that question could after the amendment be properly reserved.

The question submitted is, whether the indictment as amended, or as it stood before amendment (supposing it can in its original form be referred to), sufficiently described the ownership of the property according to the evidence to sustain the conviction.

W. F. CHANNELL.

*McIntyre*, for the prisoner.—It is submitted that, after the amendment had once been made, and the verdict recorded, the judge had no power to amend further, and that the property was wrongly laid to be in Williams and others. It ought to have been laid to be in the public officer of the banking company. The 39 & 40 Geo. 3, c. 28, s. 15, provides that no other bank than the Bank of England shall be established or allowed by Parliament, and that it shall not be lawful for any number of persons exceeding six to issue notes payable on demand at any less time than six months, during the continuance of the privileges granted by that Act to the Bank of England. Then, taking this to be a joint-stock company, and to consist of more than six partners, it must have a public officer according to the 7 Geo. 4, c. 46, s. 4. And then sect. 9 enacts, "That all indictments, informations and prosecutions by or on behalf of such copartnership for any stealing or embezzlement of any money, goods, effects, &c., or other property of or belonging to such copartnership, or for any fraud, forgery, or crime or offence, committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred and carried on in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership." [WILLES, J.—Under the 7 & 8 Vict. c. 113, the property may be laid to be in the body corporate.] But there is no evidence that this company was incorporated under the 7 & 8 Vict. c. 113. [POLLOCK, C. B.—May any one go and steal their property if they have not appointed a public officer? WILDER, J.—That is, if they have not complied with the statute.] It is to be assumed that the company has acted legally and appointed a public officer. The words "shall and may" in the 9th section are obligatory; and in *Chapman v. Milvain*, 5 Ex. 61, it was held that a joint-stock banking company under the 7 Geo. 4, c. 46, were bound to sue in the name of their public officer. In *Reg. v. Beard*, 8 C. & P. 143, which was referred to in the judgment in *Chapman v. Milvain*, Coleridge, J. intimated an opinion that a registered joint-stock banking company was not bound to prosecute in the name of their public officer, but the point was not argued. [BLACKBURN, J.—How do you reconcile your construction of the 7 Geo. 4, c. 46, s. 9, with sect. 14 of the subsequent Act, 7 Geo. 4, c. 64?—And in order to remove the difficulty of stating the names of all the

owners of property in the case of partners and other joint owners, be it enacted, that in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be, &c.; and this provision shall be construed to extend to all joint-stock companies and trustees." That means all lawful joint-stock companies, not such an one as this, regulated by a peculiar statute. In Archbold's Pleading and Evidence in Criminal Cases, 35, 12th edit., it is said that it would seem now to be settled that the property must be laid in a public officer of the company. 2 Russ. on Crimes, 104, was also referred to.

V. Williams, for the prosecution, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the question submitted to us, whether the indictment as amended sufficiently described the ownership of the property, must be answered by saying that it did. The 7 & 8 Geo. 4, c. 64, s. 14, expressly applies to the case of partnership and joint owners, and to all joint-stock companies and trustees, and provides that it shall be sufficient to name one of such persons, and to state such property to belong to the person so named and another or others, as the case may be. It cannot be supposed that, although their banking business may not have been carried on according to law, they are not possessed of the property. They were the possessors of it, and the possession of it was properly laid to be in the one named and others, within the meaning of the 7 Geo. 4, c. 64, s. 14. The conviction, therefore, will stand.

WILLIAMS, J.—I am of the same opinion. *Chapman v. Milvain* would bind us to the extent that it is a civil action the words "shall and may," in 7 Geo. 4, c. 46, s. 9, are imperative, and that an action cannot be maintained in such a case in the name of any other person than the public officer. But the question is, whether that decision applies to an indictment. The 7 Geo. 4, c. 64, s. 14, makes it plain that they do not, and that an indictment which states the property to belong to one member by name, and others, is good. That provision, it is expressly enacted, shall be construed to extend to all joint-stock companies. This is a joint-stock company, and the 7 Geo. 4, c. 64, s. 14, is the last provision on the subject.

The rest of the COURT concurring,

Conviction affirmed.

REG. v. JAMES BRANLEY.

*Larceny—False pretences—Obtaining goods by an artifice.*

Prisoner went to a colliery professedly to buy a load of the best soft coal; the cart was accordingly loaded by the prosecutor's servant with that description of coal. It was the prisoner's duty then to have gone with the cart to the weighing machine and have it weighed, and then to have paid the weighing clerk for it. He, however, previously to going to the weighing machine, covered over the top of the coal in the cart with a very inferior description of coal, called "slack," and then went with the cart to the weighing machine, and told the weighing clerk that he had got "slack," who weighed the cart and charged for it as containing "slack" only. The prisoner paid for the coal as "slack," and left the colliery:

Held, that the property in the soft coal had not been parted with, and that the prisoner could be convicted of larceny.

Case reserved for the opinion of this court.

At the last Nottinghamshire quarter sessions held at Nottingham, James Bramley was indicted for feloniously stealing, on the 19th day of Nov. last, at Basford, 15 cwt. of coal, of the value of 8s. 6d., the property of Thomas North.

The prosecutor was the owner of a colliery. The prisoner was a higgler, and in the habit of coming to the colliery to purchase coal. Both coal and small coal or slack were sold by retail at the colliery to higgiers and others, but it was proved that none (except to certain private customers of Mr. North, with whom an account was kept) was allowed to be taken away until it had been paid for, and that when the carts were loaded they were taken to the prosecutor's weighing machine in the colliery yard, where the weight and price of the coals having been ascertained, the coals were paid for to the prosecutor's clerk in charge of the weighing machine.

The weighing machine is at the entrance of the prosecutor's yard, and so placed that carts entering and passing out of the yard have to pass the machine, and within view of the clerk in charge of it, and as the carts go into the yard empty they are weighed. On returning loaded they are again weighed, and from the gross weight so ascertained the weight of the empty cart is deducted, and the residue is taken to be the net weight of the coals in the cart.

The prisoner, having frequently before the day in question fetched coals from the prosecutor's yard, was acquainted with the above regulations, and knew that he would not be permitted to take coals out of the yard until they had been weighed and paid for as above mentioned.

The price of soft coal was about double that of slack.

On the day named in the indictment the prisoner brought his cart to the colliery, and said, "I want a load of the best soft coal." The cart was loaded with the best soft coal by a servant of the prosecutor, whose business it is to load the carts of the customers, assisted by the prisoner himself.

Having finished loading the coals, the prosecutor's servant went away to his work in another part of the yard, leaving the prisoner to take his cart to the weighing machine to be weighed, which ought at once to have been done.

Near the place where the coals were so loaded was a heap of slack, and after the prosecutor's servant had left the prisoner as before mentioned, the prisoner (as appeared by a statement subsequently made by him) placed a quantity of this slack on the top of the load of soft coal, thereby covering over the coal, and making the cart appear to be loaded with slack only.

The prisoner then took the cart to the weighing-machine, and the clerk in charge of the machine said to the prisoner, "What have you got?" He said, "Slack." The clerk, seeing only slack in the cart, thereupon weighed the cart and charged the prisoner for the load as slack, and the prisoner paid such charge and went away with his cart. Had the cart contained slack only, the amount paid by the prisoner was all that would have been due from him; but, as the fact was, the sum paid by the prisoner was considerably less than the real price of the load.

Shortly after the prisoner had gone away the weighing clerk having communicated with the prosecutor's servant, who had loaded the prisoner's cart with the coal, as before mentioned, sent after the prisoner, who was overtaken with the cart on the highway, proceeding towards Nottingham. The prisoner returned with the messenger to the prosecutor's yard, and was charged by the clerk with obtaining soft coal as slack. The prisoner said to the clerk, "What's the difference and I will pay you, and we will have no more bother about it." The clerk said, "Oh, shan't we?" Prisoner said, "It's the first time I have done

[MAG. CAS.]

anything of the kind before, and I'll never try it any more." The clerk told the prisoner the difference in the price between slack and the best soft coal, and the prisoner paid the clerk. The prisoner said, "You have not said anything about it, have you?" The clerk said, "I have, and shall say more." The prisoner then went away, and the clerk gave information of the facts to his employer.

The prisoners's counsel submitted that there was no case to go to the jury to charge the prisoner with stealing the coal, and that if there was any offence committed, it would be obtaining the coal under false pretences.

The Court overruled this objection, and told the jury that if they were of opinion that the prisoner at the time when he went to the colliery for the coal intended fraudulently to take the same away and appropriate it to his own use on paying for the soft coal the price of slack only, and that he actually carried out his intention by fraudulently placing slack over the soft coal, and making the false representation above mentioned to the weighing clerk, they might convict the prisoner of larceny of the coal.

The jury found the prisoner guilty of larceny, but the court of quarter sessions respited judgment until the next quarter sessions, and discharged the prisoner upon his own recognisance, with two sureties, to appear at the next sessions to receive judgment, should the Court for Crown Cases Reserved be of opinion that he was properly convicted.

The opinion of the Court for the Consideration of Crown Cases Reserved is requested whether the prisoner was rightly convicted of larceny?

Case for the prisoner.—It is admitted that the conviction of the prisoner for larceny was wrong. Although the evidence might be sufficient to support an indictment for obtaining the coal by false pretences, the authorities show that it is not sufficient to support larceny. The distinction between false pretences and larceny is laid down in 2 East, P. O. 688, and a number of cases cited, which show that where the intention of the prosecutor is to part with the property in the thing obtained by the prisoner, it is a case of false pretences; and where the intention is to part with possession only of the property, it is a case of larceny. In *R. v. Parkes*, 2 East P. O. 67, the deft. bought goods and desired them to be sent to him with a bill and receipt, and the shopman who took them left them upon being paid for them by two bills, which turned out to be mere fabrications. The judges held that this was not larceny, because the prosecutor had parted with the property as well as the possession. So in *R. v. Jackson*, Russ. & Moo. 119, where the prisoner was indicted for stealing a diamond brooch and other articles, and it appeared that they had been pledged, and that the prisoner obtained them and some money from a pawnbroker's servant, by pretending to deposit another pledge of greater value in lieu of them, it was held that it was not larceny, because the servant, who had a general authority from the master, parted with the property and ownership, and not merely with the possession. [WILLIAMS, J.]—The difference between that case and the present is this: the pawnbroker's servant, having a general authority, was induced to part with the property in the old pawn; but in the present case the cart was not to be allowed to go out of the prosecutor's yard without payment of the price of the coal.] This is the converse of the ordinary case of obtaining money by false pretences. The court must be satisfied that the prisoner could not have been convicted of obtaining the deft.'s coal by false pretences. If the soft coal had been of nearly the same value as the slack, would it have amounted to larceny? Here there is strong reason for saying that the property in the soft coal had been parted with. [WILDE, B.—Suppose the case of a shop, in one part

of which the customer selects the goods, and then has to take them to another for the purpose of having the bill made out and paying for them, but that instead of taking the goods to that part to have the bill made out and paying for them, the man slips away with the goods without paying for them.] In such a case there would be no consent at all to the man's taking away the goods. [WILDE, B.—Here the weighing clerk consented only to the carrying away slack, not the soft coal which was invisible.] Here it is contended, the clerk intended to part with the cart load of coal which was standing before him.

*Boden*, for the prosecution, was not called upon to argue.

POLLOCK, C. B.—We are all of opinion that the conviction was right. This case does not at all differ from that which was suggested by my brother Wilde—viz. where a man receives goods in one part of an establishment, and has to take and pay for them in another part, but he slips away without paying for them. In such a case it cannot be said that the goods are absolutely delivered to him, and therefore the man acquires no property in them. In this case the soft coal was delivered to the prisoner by the prosecutor's servant for the purpose of being taken to the weighing-machine to be weighed and there paid for. The prisoner, when the servant was away, covered the soft coal with slack, and took it to the weighing-machine, and caused it to be weighed and paid for as slack. It cannot be said that there was any permission to take away the soft coal, or that it was paid for or delivered. Suppose the case of a mine consisting partly of silver and partly of lead, if a man professing to take away a certain quantity of silver, were to cover it over with lead and then smuggle it out and pay for it as lead only, that would be merely a mode of concealing and stealing the silver.

WILLIAMS, J.—I am of the same opinion. It was contended that this is a case of false pretences, and not a case of larceny; but the distinction has been settled to be that where the owner, of property, by means of a trick or subterfuge, is induced to part with the possession, it amounts to larceny; but where he intends to part with the property, it is a case of false pretences. In the present case the jury have found that the prisoner went to the colliery with a preconceived and dishonest intention of obtaining possession of the soft coal; and having so obtained it, instead of taking it to the weighing-machine to be weighed, and paying for it as soft coal, he used the artifice of covering it over with slack, and by that trick altogether prevented the weighing clerk from seeing the soft coal was beneath the slack. The prisoner had no permission to take away the soft coal without paying for it; and indeed the weighing clerk was altogether ignorant of the fact that any soft coal was beneath the slack. Instead of obtaining any property in the soft coal, the prisoner obtained the possession of it merely. The case was, therefore, one of larceny.

The rest of the Court concurring,

— Conviction affirmed.

Saturday, April 27.

(Before POLLOCK, C.B., WILLIAMS, WILLES and BLACKBURN, JJ., and WILDE, B.)

REG. v. URIAH WEEKS.

*Coining—Having possession of a mould—2 Will. 4, c. 24, s. 21—Guilty knowledge—Previous offence.*

*The prisoner, jointly with several others, was indicted for a felony, viz., for knowingly and feloniously having in their custody and possession a mould (for coining) of the obverse side of a half-crown. The mould and other coining materials, and also all the persons charged, with the exception of the prisoner, were found and*

*taken in a house occupied by the prisoner. At the time of the capture, the police were attacked, and attempts made to destroy the coining materials, and the prisoner then came to the house, and entered the house, notwithstanding some of the others called out to him "that the police were there." He was then captured. It was also proved that the prisoner, about thirteen days before, had passed a bad half-crown, but it did not appear that that half-crown was made in the mould found in the house:*

*Held, that there was sufficient evidence to be left to the jury on the charge of felony, and that the evidence of the passing of the bad half-crown was admissible to prove guilty knowledge.*

Case reserved by Blackburn, J. for the opinion of this Court.

Uriah Weeks was indicted before me at the last Monmouth assizes, along with John Loveridge, Elizabeth Loveridge, Mary Weeks, and Valentine Trew, for knowingly and without lawful excuse, feloniously having in their custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown.

On the trial it was proved that the prisoner Uriah Weeks had for about a month occupied a house in Poole. On the night of the 15th March the police went to that house, and on entering found the prisoners John Loveridge, Elizabeth Loveridge, Mary Weeks, who was the wife of the prisoner Uriah Weeks, and Valentine Trew. The two men attacked the police and attempted to keep them at bay, whilst the two women snatched up something from the table which they threw into the fire. The police overpowered the men in sufficient time to preserve part of what the women were endeavouring to destroy, which proved to be fragments of a plaster of paris mould of a half-crown, parts of which were still wet.

The men Loveridge and Trew were taken into custody to the police station by some of the police whilst the others remained to take charge of the women and search the house.

Uriah Weeks shortly afterwards came to the house. The women called out to him that the police were there. He nevertheless came in and was taken into custody.

On searching the house, which was a house with two rooms on each floor, a quantity of plaster of paris was found in a cupboard up stairs, along with several bottles containing liquids, and some bags with different powders in them; but no evidence was given of what their contents were. There was also found in a cupboard in a room down stairs an iron ladle such as might have been used for melting metal, and on the hearth in one of the rooms upstairs was found a small portion of white metal, and amongst the cinders some plaster of paris moulds.

It was proved that Uriah Weeks had on the 2nd March, thirteen days before the night in question, passed a bad half-crown, but there was no evidence to show that the bad half-crown which he passed had been made in the mould found in his house on the 15th of March.

An objection was taken on behalf of Uriah Weeks, that there was no sufficient evidence to show that he had the possession of the moulds.

By 2 Will. 4, c. 24, s. 21, it is enacted that where the having any matter in the custody or possession is in that Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house, &c., whether occupied by himself or not, every such person shall be deemed to have such matter in his custody and possession within the meaning of this Act.

I left the case to the jury, who found the prisoner Uriah Weeks guilty, and in answer to a question from

[ROLLS.]

HUGHES v. THE METROPOLITAN BOARD OF WORKS.

[ROLLS.]

me said that they were satisfied that he knew the mould was in his house.

He was afterwards tried and convicted of uttering the base half-crown.

Sentence was passed upon him of twelve months' imprisonment for that offence, and concurrently with that imprisonment penal servitude for three years for the felony; but, as I had some doubts whether there was sufficient evidence to justify a conviction on the felony, I respited the sentence of penal servitude till the opinion of this Court could be obtained upon the point.

The question for the opinion of the Court is, whether there was sufficient evidence to be left to the jury on the charge of felony.

No counsel appeared for the prisoner.

G. R. N. Somerset, for the Crown, was stopped.

POLLACK, C. B.—We are all of opinion that there was enough evidence to be left to the jury to enable them to say whether the mould was knowingly and feloniously, and without lawful excuse, in the custody and possession of the prisoner, and that the conviction for the felony must be affirmed. It was found in a house of which he was the master, and it was there apparently for a felonious purpose. In order to prove the *scienter* evidence of other substantive offences of any sort having a tendency to prove guilty knowledge may be given. If a man is charged with the commission of one felony, and his commission of another felony has a tendency to prove guilty knowledge on his part, no doubt you may give evidence of that fact collaterally. This conviction, therefore, must be affirmed.

*Conviction affirmed.*

## ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

Thursday, March 21.

HUGHES v. THE METROPOLITAN BOARD OF WORKS.

The 19 & 20 Vict. c. 120 (*An Act for the better Local Management of the Metropolis*) sects. 135-144, and sects. 150-153—*Land or easement, purchase of.*

*The Metropolitan Board of Works have, under the above-stated sections of their Act, an optional right of purchasing for the purposes of that Act, either land or easements in land, upon payment of compensation for damages (if any) done in the formation of their works.*

*The North London Railway Company v. The Metropolitan Board of Works, 1 John. 405, followed.*

The plt. in this case had obtained an injunction to restrain the defts. the Metropolitan Board of Works from making a sewer through his land without his consent, or until proper compensation had been made to him. It appeared that he was entitled to a piece of land at East Dulwich; and that the defts., in pursuance of the powers contained in the 18 & 19 Vict. c. 120, had some time since commenced the construction of the southern high level sewer. That sewer, as planned, was carried under the plt.'s land. The defts., however, had not given him any notice of their desire to purchase or take on lease the land, or any right or easement over it; but the plt. ascertained that some part of his land, or a right or easement therein, would be required by the defts. for the purposes of their Act. He accordingly instructed his solicitor to write in Dec. 1860 to the defts., stating that he had originally bought the land for the sole purpose of building, and had laid out the ground accordingly; in consequence of which he would sustain permanent damage by the contemplated sewerage works. He estimated the extent of that damage at the amount of 9*l.* 12*s.* per annum, with re-

spect to ground-rent, for which he accordingly claimed the sum of 240*l.*, being twenty-five years' purchase on the rent—but he stated that he was willing to treat with the defts. forthwith, and in case of difference he was desirous of having the compensation settled by arbitration, and he required the defts. not to proceed with the works till his claim was settled. In reply to that letter the defts. wrote to say that the Board of Works sanctioned the erection by the plt. of buildings over the line of sewer passing through his land; and that they would construct such works around it, for the foundation of the houses and the protection of the sewer, as might be deemed necessary. Under those circumstances, the defts. presumed that the plt. would not make any claim for compensation on that head. The plt. replied that he objected to the prosecution of the intended works on his land before his original claim had been disposed of. The defts., however, on the 16th March, entered upon the land and began their works; whereupon the bill in this suit was filed, and the plt. obtained an *ex parte* injunction to restrain the defts. from making or continuing to make the sewer without his consent, or until a proper compensation should have been paid to him in respect of the land, right, or easement required by the defts. for the construction of the sewer.

The general scope of the sections of the defts.' Act, the 19 & 20 Vict. c. 120, on which the decision of the case mainly rested, may be shortly stated as follows:—

The 135th and next sections of the Act regulate the duties of the Metropolitan Board of Works; and by the 135th section the main sewers are vested in the board, with full powers to make and maintain other sewers in connection therewith. By the 136th section plans of those sewers are to be submitted to the commissioners of her Majesty's works. By the 137th and subsequent sections down to the 144th, the Metropolitan Board of Works are empowered to make and do various things and matters with reference to those works, and jurisdiction; and by the 144th section they are enabled to take by agreement or gift any land, rights in land or property, for their special purposes.

By the 150th section the Metropolitan Board of Works and district boards and vestries are authorised to make any works, and buy or take on lease any land, or any right or easement in or over land, and to effect other things for the purposes of their Act; but they are prohibited from carrying water by supply pipes into any house or factory for domestic, manufacturing, or commercial purposes. By the 151st section certain provisions of the 8 & 9 Vict. c. 18, are incorporated with the Metropolis Local Management Act: by the 152nd section the powers conferred by the Lands Clauses Act, "of purchasing and taking lands otherwise than by agreement," are incorporated, but in a qualified manner only, with the powers of that Act (18 & 19 Vict. c. 120); and no land, or right or easement in or over land, for the purposes of that last-mentioned Act, is to be compulsorily taken by the board without the sanction of a principal Secretary of State. And by the 153rd section previous notice of the intention of the board to take such land, right or easement, with plans of the proposed works, are to be given to or furnished for the information of the owners, lessees, or occupiers of such property, together with the terms on which any compensation for damage is to be assessed.

The case now came on upon a motion by the defts. to dissolve the injunction.

R. Palmer, Q.C. and Charles Hall, in support of the motion, contended that by the 135th section of the 18 & 19 Vict. c. 120, the defts. had full power to execute any works within the terms of the section (making compensation for the damage occasioned thereby), without first purchasing or obtaining the



land or easement therein, under the sects. 150-153; although such works might involve the taking of such land or easement. The latter clauses were only enabling clauses, giving the Board of Works the right of taking the land itself, where they preferred that course to proceeding under the 135th section. They relied upon the case of *The North London Railway Company v. The Metropolitan Board of Works*, 1 John. 405, as precisely in point, and in their favour. The defendants were willing to pay whatever compensation might be awarded to the plaintiff in respect of the damage occasioned to his property by their works.

Colt, Q.C. and F. S. Draks appeared for the plaintiff and opposed the motion. The construction put upon the statute by the other side would virtually enable the defendants to confiscate any property they might require for the purposes of their Act, which could not have been the intention of the Legislature. If the defendants required a legal easement in land they must pay the owner for it.

The MASTER of the ROLLS.—I have no doubt that this case is governed by the decision of Wood, V.C., which was referred to in the argument. If it had not been for that decision, I should have thought it right to give further consideration to this matter. It appears to me, however, obvious that the 135th section of the Metropolitan Local Management Act gives powers to the defendants distinct from those contained in the 150th and two following sections. The 135th section, by itself, gives powers to the Metropolitan Board of Works to make sewers as they may think fit. If that section is controlled by any subsequent one, it must be so by clear and distinct words. But the only controlling word which I can see in the subsequent sections, is the word "easement." Now I very much doubt whether, when that word "easement" was mentioned in the Act, it was intended to refer to the kind of easement stated in this bill. I must own the inclination of my opinion is that it was not so intended, and so also Wood, V.C. seems to have thought, after hearing a most elaborate argument. The exercise of the optional right given to the defendants by the statute, of proceeding under the 135th or other sections, does not involve any question of honesty or dishonesty on their part, but depends upon this consideration whether, when contemplating the making of the sewer, they can make it without affecting the surface, or may find it more convenient to drive it nearer to that, in which case it may be necessary for the board to take the land and buy the easement. If that latter course should ultimately be the one which the board must pursue, they would have to proceed under the 150th and 153rd sections: if the former, under the 135th section, and the only question then would be one of damages. Those, however, are to be settled according to their amount by the justices of the peace, or by arbitration, under the provisions of the Lands Clauses Consolidation Act. That being so, the defendants appear to me to have acted within the powers given to them by their Act, and as they are quite willing to pay such compensation for the damages sustained by the plaintiff as may be settled; and as their plan does not involve the taking of the land or the easement under the 150th and 153rd sections, there is no necessity for them to proceed by public advertisement. The defendants have only done what they are justified in doing, and the injunction must be dissolved with costs.

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs., Barristers-at-Law.

Monday, April 22.

DRAPER (app.) SPERRING (resp.)

*Nuisance—Sheep droppings in market—Liability of owner of tolls to remove—18 & 19 Vict. c. 121, s. 2 and 12—"Recurring nuisance."*

*The app. claiming to be the owner of markets and fairs held in the town of Crewkerne, erected a sheep-pen in front of a house in the said town and took toll for sheep exposed for sale therein. After the removal of the sheep their droppings and urine remained, and a complaint was lodged against app. by the resp. (who was inspector of nuisances) in respect thereof. For fifty-five years and upwards the inhabitants of the houses before which the sheep were penned had been in the habit of clearing away the droppings, and app.'s servants never cleared them away, except in cases where houses before which the pens were placed were unoccupied.*

*The justices being of opinion that app. was a person by whose "permission or sufferance" the nuisance was created, and that the ground inclosed by app. with hurdles for the aforesaid purposes was "land or tenement" within the meaning of sect. 12 of the Nuisances Removal Act, and that the nuisance was a recurring nuisance within the said Act, issued their prohibition to the app.*

*Held, on appeal, that the justices were right.*

This was a case by way of appeal from the decision of justices, stated for the opinion of this court under 20 & 21 Vict. c. 43, s. 2.

### CASE.

At a petty sessions holden at Crewkerne, in and for the division of Crewkerne, in the county of Somerset, on the 16th day of June 1860, before us the undersigned two of her Majesty's justices of the peace in and for the said county, the following complaint was heard and determined by us the above-named parties being present. The complaint was preferred by John Sperring, the inspector of nuisances, appointed by the nuisances removal committee for the tything of Crewkerne (hereinafter called the resp.) against Martha Draper (hereinafter called the app.) under sect. 12 of the Act 18 & 19 Vict. c. 121, being the Nuisances Removal Act for England 1855, and charged that on the 3rd day of April 1860 there was on a certain pavement or causeway situate in Sheep-market-street, in Crewkerne aforesaid, in front of a messuage or dwelling-house in the possession of Sidney Morris Cornelius, an accumulation or deposit of dung or filth caused by the penning and standing of sheep on the said pavements on Saturday the 31st day of March previously, being a market-day at Crewkerne aforesaid, and that the same not being washed or cleared away after the removal of the said sheep, was a nuisance or injurious to health, and that the said nuisance was caused by the act or default of the app., by reason that the app. used or occupied the said pavement or causeway for letting pens for the standing of sheep thereon, for hire and reward, and had on the said 31st day of March allowed sheep to stand and be penned for a long space of time on the said pavement or causeway, and had received tolls and profits in respect thereof, and that in consequence of such standing or penning, the said dung or filth was deposited and left, and the app. had neglected to cleanse or wash away the same and to remove the said nuisance so thereby created, and that although the said nuisance had since the said 3rd day of April been removed or discontinued there was reasonable ground for believing that the same or the like nuisance was likely to recur on the said premises. And upon such hearing we, the said justices, considering that the cause of nuisance complained of did exist at

C. B.]

DRAFER v. SPERRING.

[C. B.]

the said pavement on the said 3rd day of April and was caused by the act, permission, or default of the said Martha Draper, and that though the same had since been removed a similar nuisance would be likely to recur on the said premises, did by our order in writing bearing date the said 16th day of June prevent the app. from allowing to remain on the said premises after the sheep are removed therefrom, any dung or filth which shall be deposited or left on the said premises by reason of the penning or standing of such sheep thereon, being by the act or sufferance, and for the profit of the said Martha Draper. And if our said order of prohibition should be infringed, then we did authorise and require the said nuisance removal committee for the tything of Crewkerne aforesaid, from time to time to enter upon the said premises, and to do all such works, matters and things as should be necessary for carrying the said order into full execution according to the said Nuisances Removal Act for England 1855. And whereas the app., being dissatisfied with our determination upon the hearing of the said complaint, as being erroneous in point of law, hath, pursuant to sect. 2 of the stat. 20 & 21 Vict. c. 43, applied to us in writing within three days after the said determination to state and sign a case setting forth the facts and grounds of such our determination as aforesaid, for the opinion thereon of Her Majesty's Court of Common Pleas at Westminster. Now therefore we, the said justices, in compliance with the said application of the app. and the provisions of the statute aforesaid, do hereby state and sign such case as aforesaid as follows:—At the hearing of the aforesaid complaint, it was proved on the part of the plt., the resp. in this appeal, that on the 3rd April last a nuisance existed on the pavement facing and adjoining a house in Sheep-market-street, Crewkerne, occupied by Sidney Morris Cornelius, in consequence of sheep having been penned there on the previous Saturday, the 31st March, which was a market day; that the nuisance was occasioned by sheep droppings and urine, and was likely to recur; that on the said 31st March the sheep were put up by Richard Lacey, who was employed for the purpose by Thomas Taylor March, the market bailiff of the app.; that the app. claims to be the owner of the markets and fairs held in the town of Crewkerne, and to receive tolls in respect thereof; that on the said 31st March the said market bailiff received of a Mr. Harding a toll of 5s. for 100 sheep, part of which were penned on that day on the aforesaid pavement; that the hurdles used for penning the said sheep belonged to the app.; that on large market days the pens extend over the pavement two or three feet into the road, and on fair days eight or nine feet into the road; but on the said 31st March only the pavement and a shallow open gutter between the pavement and the road were inclosed by the pens; that there is on market days an accumulation of droppings from cattle in the public road where they are exposed for sale; that there are surveyors of the highways of the parish of Crewkerne; that toll is always paid to the market bailiff for sheep sold in the market, even if they are not penned; that the toll for sheep is 1s. a score at the markets and 1s. 6d. at the fairs. It was contended on the part of the defts., the app. in this appeal, that there is no occupation or ownership in the app. within the Nuisances Removal Act for England 1855; that the toll is inherent to the market claimed by the app., and that she is entitled to an easement; that it is not a messuage, land, or tenement, within the interpretation clause of the Nuisances Removal Act; that the right or privilege of a fair or market is only a temporary easement, and the enjoyment of it is not an occupation within the 2nd section of the Act; that there being surveyors of the highways, and the nuisance being on the highway, the

liability to cleanse it is between the occupiers of the houses and the surveyors of highways; that the toll is payable in respect of the animal, and not for the occupation of the land. It was proved on the part of the app. that a toll of 1s. a score was payable for sheep penned at the market, even not sold; that for the last fifty-five years and upwards the droppings of the sheep have been swept away by the occupiers of the houses against which the sheep were penned, and that the market bailiff never cleared them away, except any that might be on the pavement which some against the house of the app. in Sheep-market-street, and these droppings he only cleared away at such times as the house was unoccupied; that sometimes the droppings have been allowed by the occupiers of some of the houses to remain until washed away by the rain; that occasionally some of the occupiers of houses in Sheep-market-street, instead of employing their own servants to clean the pavement after a market, paid a man to do it.

The poor-rate book for the parish of Crewkerne was put in, and in it the app. was rated as follows:—

Names of Occupiers.	Name of Owner.	No. referring to Map.	Name or Description of Property Rated.	Situation.	Quantity.	Estimated Rental.	Ratable Value.
Draper, Martha.	Herself	14A.	The Market house and Market place.	Market place.	39	00 0	40 0
		273A	The Market House and Fairs of Crewkerne.	Duke William Barton, West-street.	1	1 10	...
			Hurdle House.	.....	...	...	1 1

We being of opinion that from the app.'s exercise of the right she claims to erect hurdles on a market day at Crewkerne aforesaid, and to inclose ground with such hurdles without the consent of the resp.; and from her allowing the ground when so inclosed to be used for the purpose of penning sheep, during the time of which penning the ground could not be used as a highway, and the nuisance having been created in consequence of the penning of sheep, she is a person within the 12th section of the Nuisances Removal Act for England 1855, by whose permission or sufferance the nuisance arose, and the ground while so inclosed is land or tenement within the meaning of the Act. And we therefore gave our determination against the app. in the manner above stated.

The question of law arising on the above statement is, whether the ground over against the house of Sidney Morris Cornelius in Sheep-market street, Crewkerne, which the app. inclosed with hurdles on the 31st March last, was whilst so inclosed land or tenement within the meaning of the Nuisances Removal Act for England 1855; and whether the inclosing of the ground by the app. and her allowing sheep to be penned thereon rendered her liable under the 12th section of the same Act, as the person by whose act, default, permission, or sufferance the nuisance arose; whereupon the opinion of the Court of Common Pleas is asked on the said question of law, whether or not we the said justices were correct in our determination as aforesaid, and as to what further should be done or ordered by the said court in the premises. (Signed.)

*Welsby* for the app.—By the interpretation clause of the Nuisances Removal Act 1855, 18 & 19 Vict. c.121, s. 2, the word "owner," includes any person receiving the rents of the property in respect of which that word is used from the occupier, or as trustee, or agent, or receiver, or sequestrator, or who would receive the same if such property were let to a tenant, &c. The word "premises" extends to all messuages, lands, or tenements,

C. B.]

THE GUARDIANS, &amp;c., CAMBRIDGE UNION v. PARR.

[C. B.]

whether open or inclosed, whether built on or not, and whether public or private, &c.; the word "person," and words applying to any person or individual, apply to and include corporations, whether aggregate or sole, &c. The justices have acted under sect. 12, which enacts, that where a nuisance is ascertained by the local authority to exist, or where the nuisance in their opinion did exist at the time when the notice was given, and although it since may have been removed or discontinued is in their opinion likely to recur or be repeated on the same premises or any part thereof, they shall cause complaint thereof to be made before a justice of the peace, who shall thereupon issue a summons requiring the person through whose act, default, permission, or sufferance the nuisance arises or is continued, or if such person cannot be found or ascertained the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, who shall inquire, &c., and if it be proved to their satisfaction that the nuisance exists, or did exist at the time when the notice was given, or if removed and discontinued, &c., that it is likely to recur, or to be repeated, the justices shall make an order in writing, &c., on such person, owner, or occupier, for the abatement, or discontinuance, or prohibition of the nuisance as hereinafter mentioned, and shall also make an order for the payment of all costs, &c. There is here an absolute right for persons to resort to the market bringing their sheep to be penned and sold; and there is no occupation or ownership by the app. within the meaning of the Nuisances Removal Act. Neither can it be said this is a recurring nuisance, for app. is not at all liable. How can the lord of the market be said to be a person who is owner of the premises where the alleged nuisance was committed, so as to be liable to remove it. The app. is not an owner within the definition laid down in the interpretation clause. The only act of the app. was to put up by an agent the hurdles for penning the sheep. There was no evidence that she has the soil; so she is not an owner within the meaning of the statute. She may be a lessee of the franchise, but that is not enough.

*Kingdom for the resp.*—It should be observed that the justices do not leave for the court the question whether this was a recurring nuisance, therefore it will not be necessary to enlarge upon that point, nor contend that this is "land" within the meaning of the statute. This is a case where the grantor of a market places sheep in a particular spot; the market is not in any particular spot within the limits included in the franchise. [WILLES, J.—There is strong evidence that highways are subject to market rights.] The nuisance is clearly by the act, default, permission, or sufferance of the app., and she is therefore within the words of the 12th section. He referred to *Curwen v. Salkeld*, 3 East, 538.

*Welsby*, in reply, referred to a learned note by Parke, B., in *The Mayor, &c. of Macclesfield v. Chapman*, 12 M. & W. 18.

ERLE, C.J.—I am of opinion that the adjudication of the justices in this matter was right, and it ought therefore to be affirmed. The case shows that this was a complaint against the app., as owner of a market. She set up hurdles and penned in sheep before the houses of the resp., and thus caused the nuisance. The contention by the resp. is, that the app. having the profits from the sheep-pens, should also bear the duty of removing the nuisance arising from the sheep so penned. The right to the soil and occupation is not before us. The pen is erected on the pavement. With regard, then, to the first question put by the case to the court, I should answer it in the affirmative, holding that this was, whilst inclosed by hurdles, "land or tènement" within the 12th section of the Act. The justices also put a second question, which was, whether the inclosing of the ground by the app. and her allow-

ing sheep to be penned thereon rendered her liable as the person "by whose act, default, permission, or sufferance" this nuisance arose. Now, the pavement in question is part of the street, and app. chooses to pen sheep in front of resp.'s house. She is called on to remove the nuisance caused by the droppings of the sheep, and has not done what she was called on to do, but disputes her liability to do it. This is, in my opinion, substantially a recurring nuisance. I am not satisfied the justices were wrong, our judgment will be therefore for the resp.

WILLES, J.—I am of the same opinion. At first I was strongly disposed to accede to Mr. Welsby's argument that the app. was entitled to enjoy her right according to the grant under which she is authorised to receive tolls from persons bringing their sheep into the market. But on considering the facts more closely that does not appear to be the correct view. The app. claims a right, not only to take tolls, but to make an inclosure; what she did was to make an inclosure by hurdles, in which sheep were penned, and so a nuisance arose in that place. It is quite clear that the owner was not bound to provide that accommodation, and the persons bringing their sheep to the market have no right to it except by permission of the owner of the market. It is an exercise of proprietary right, distinct from the general franchise. [His Lordship referred to *Mayor of Northampton v. Ward*, 2 Stra. 1238.] I think the app. comes within the language of the statute, which may even interfere to some extent with the enjoyment of the franchise. As to the argument that the owner of a franchise ought not to be interfered with in such a case as this, I do not think that has any force.

BYLES, J.—I am also of the same opinion; our judgment will therefore be for the resp.

*Judgment for the resp. with costs.*

Attorney for app. *William Sandys*, for W. and J. *Sparkes*, Crewkerne.

Monday, April 22.

THE GUARDIANS OF THE POOR OF THE CAMBRIDGE UNION (apps.) v. PARR (resp.)

*Vagrant Act*, 5 Geo. 4, c. 83, s. 4—"Running away"—Desertion of children by mother—5 Geo. 1, c. 8, s. 1.

*A widow residing in a borough applied to and obtained from the relieving officer of the union an order for the admission of herself and her two children, aged seven and four years, to the workhouse; and in the evening of the same day she took them to the outer gate of the workhouse, rang the bell, placed the order of admission in the hands of the eldest child, and went away leaving the children at the gate; they were admitted to the workhouse, and continued chargeable; their mother did not leave the neighbourhood, but returned to the borough and there resided.*

*On complaint made under the Vagrant Act*, 5 Geo. 4, c. 83, s. 4, the justices dismissed the information on the ground that the facts proved did not amount in law to a "running away and leaving her children chargeable" within the meaning of the Act:

*Held, on appeal, that the justices were right.*

This was a case stated by way of appeal from the decision of justices, for the opinion of this court, under stat. 20 & 21 Vict. c. 43, s. 2.

CASE.

It was proved before us that the resp., being a widow, on the 1st Nov. 1860, applied to the relieving officer of the said union, and obtained an order for the admission of herself and her two children, aged respectively seven and four years, into the workhouse of the said union, situate at the borough aforesaid, and at six o'clock in the evening of the same day she took them to the outer gate of the said union workhouse

G. B.]

HOLLIDAY v. THE VESTRY OF ST. LEONARD, SHOREDITCH.

[C. B.]

and rang the bell; she then put the order for admission into the hands of her eldest child, and immediately went away, leaving the said two children at the gate. The porter who answered the bell saw a woman (who was proved to be the resp.) in the act of leaving the said gate, and that when he arrived at such gate she had left, and the two children were waiting there with the said order for admission to the said workhouse, and that he thereupon admitted the said two children, and they continued in the workhouse and chargeable to the common fund of the said union from that time until the time of hearing the said complaint.

The resp. did not, either at or after the time of the alleged offence, leave the said borough where the said workhouse is situate, and where she usually resides.

The ground of our determination to dismiss the said complaint was, that the facts proved against the resp. did not amount in law to the offence charged in the information.

The question for the opinion of the Court of C. P. is, whether the leaving of her children by the resp. under the circumstances proved, was a running away and leaving her children chargeable within the meaning of the Vagrant Act, 5 Geo. 4, c. 83.

Given under our hands at the borough of Cambridge aforesaid, the 21st day of Nov. 1860.

Couch for the apps.—The words of sect. 4 of the Vagrant Act, 5 Geo. 4, c. 83, are, "Every person running away and leaving his wife, or his or her child or children chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township, or place, shall be deemed a rogue and vagabond, and be liable to imprisonment and hard labour for a time not exceeding three calendar months." The words "running away" in that section cannot be construed literally. The substantial words are "leaving his wife, or his or her child or children, chargeable" to the parish. [BYLES, J.—She simply goes to her house; she does not conceal herself within the borough.] It is submitted that the younger of the two children, which is within the age of nurture, cannot be separated from the mother even with her consent; and here she has deserted it. The overseers were bound to receive and relieve the children, and if the court should hold that this statute does not apply, the parish authorities could have no power to compel the mother to be with her children and take care of them: (*Reg. v. The Inhabitants of Birmingham*, 5 Q. B. 210.) By applying for and obtaining an order for admission to the union workhouse, the mother made the workhouse the home of herself and children; and she therefore did run away and leave them; it is not necessary that she should leave the parish. In stat. 5 Geo. 1, c. 8, s. 1, the words used are different from those in the Vagrant Act; they are "divers persons run or go away from their places of abode into other countries or places, and sometimes out of the kingdom, leaving their wives or child or children, and some mothers run or go away leaving a child or children upon the charge of the parish." Under that statute it has been held that the parent leaving or deserting the child or children, must leave the parish: (*Burn's Justice*, tit. "Poor," 106.)

No counsel appeared on behalf of the resp.

ERLE, C.J.—I am of opinion that the decision of the justices in this case, dismissing the complaint, was right; and it must therefore be affirmed. The words of the statute were evidently directed against parents who "run away," leaving their children chargeable to the parish. I think that, to satisfy the meaning of the statute, the parent must have absconded, or have concealed herself, or absented herself by going a long distance. Here the woman, residing at her accustomed abode, obtained an order for the admission of herself and two children to the union workhouse; she took the children there, and left them with the order of admission in their hands at the gate of the work-

house, and then returned to her usual residence. I do not think this enough to justify her conviction under the Vagrant Act, as a person who runs away within the meaning of the 4th section. The judgment of the court will therefore be for the resp.

BYLES, J.—I am quite of the same opinion. I cannot help thinking that the Act Mr. Couch referred to expresses legitimately the same meaning as the section of the Vagrant Act now under consideration.

*Judgment for the resp.*

Wednesday, May 22.

HOLLIDAY v. THE VESTRY OF ST. LEONARD, SHOREDITCH.

*Liability of vestrymen acting under the Metropolis Management Act (18 of 19 Vict. c. 120,) for the acts of their workmen.*

*The surveyor appointed by the vestry to look after the highways in the parish employed men to do some work in one of the streets, who left some stones in such a position as to cause the cart in which the plt. was driving to be upset, whereby he sustained serious damage:*

*Held, in an action against the vestrymen, that, as they were acting gratuitously as a public body, and did not participate in the wrong done, they were not liable.*

This was an action brought against the vestry of Shoreditch for damage done to the plt. by reason of some stones being left in one of the public streets in that parish, which caused a cart in which the plt. was riding to be upset.

The declaration stated that the defts., on the 12th Sept., in a certain street called Shaftesbury-street, in the parish and county aforesaid, laid, put and placed a quantity of stones on and above the level of the surface of the said street, and wrongfully, carelessly and negligently suffered and permitted the same to be left and remain in the said street, on and above the level of the surface thereof, during the night, the same being a dark one, without a sufficient or any light or signal at or near to the said stones, to cause the same to be seen by persons driving in and along the street, and without having any watchman or person to take care of the same, and without having any board or protection, and without taking any reasonable or proper means or precautions to prevent the said last-mentioned persons from driving against or upon the said stones, and being injured thereby, and by means of the premises, the plt., who was then riding and being driven in a cart in the said street on the said night was driven, and the said cart ran against and came into collision with and upon and against the said stones, and the deft. was cast and thrown from and out of the said cart, down to and upon the ground, and was much hurt, bruised, wounded and injured, and was put to expense, to wit, 150*l.*, in and about endeavouring to get healed, &c.

Pleas:—Not guilty.

The action was tried before Erle, C.J. and a special jury, at the sittings after last Hilary Term, when the verdict was found for the plt., leave being reserved for the defts. to move to enter a verdict for themselves, or a nonsuit, on the ground that there was no evidence to support the verdict, and also that there was no evidence to show that the defts. were liable.

A rule having been obtained accordingly,

Shee, Serjt. showed cause.—The question is, whether the surveyor was not the servant of the parish, and as such, whether he did not employ the workmen; if he was, then this comes within the rule of law that where a person employs men to do any act, and damage occurs thereby, the person so employing is liable, and the vestry are therefore liable: (*Ruck v. Williams*, 27 L. J. 357, Ex.) Then as to there being no funds out of which damages could be paid, it does not follow that because the Act does not show out of what funds

C. B.]

HORWOOD v. POWELL.

[BAIL.]

the damages are to be paid, that therefore there is no liability: (*Kendal v. King*, 17 C. B. 483; *The Southampton and Itchen Bridge Company v. The Local Board of Health of Southampton*, 28 L. J. 41, Q.B.)

*Francis and Galloway* followed on the same side.—The case of *Scott v. The Mayor of Manchester*, 2 H. & N. 41, is a direct authority. There an action was brought against the defts., a municipal corporation, who were empowered by Act of Parliament to construct gas-works and supply gas, for damage done to the plt., the declaration alleging that they employed workmen to lay down the pipes, who so negligently conducted themselves that a piece of metal was projected against the plt., and it was held that the defts. were liable. Surely, then, it must be equally of advantage to the parish of Shoreditch that their roads should be well paved as to the inhabitants of Manchester to have gas, and therefore that case is an authority to show the defts.' liability. In *Jones v. Bird*, 5 B. & Ald. 837, which was an action brought against the defts., who were employed under the Commissioners of Sewers, Bayley, J. says: "It is contended that the defts. are protected, if they acted *bonâ fide* and 'to the best of their skill and judgment; but that is not enough. They are bound to conduct themselves in a skilful manner, and the question was properly left to the jury to say whether the defts. had done all that any skilful person could reasonably be required to do in such a case." They also cited *Laugher v. Pointer*, 5 B. & C. 547; *Alston v. Scales*, 9 Bing. 3; *Davis v. Curling*, 8 Q. B. 226; *Gibbs v. The Liverpool Docks*, 3 H. & N. 164; *Whitehouse v. Fellowes*, 4 L. T. Rep., N. S., 177; and distinguished between the present case and *Hall v. Smith*, 2 Bing. 157; *Harris v. Baker*, 4 M. & Sel. 27; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crouther*, 2 B. & C. 703; *Overton v. Freeman*, 11 C. B. 867.

*Raymond* (*Watkin Williams* with him) in support of the rule.—In 1 Chitty on Pleading, 87, 7th edit., it is said that trustees and commissioners acting gratuitously in the execution of Acts of Parliament for the benefit of the public, and entrusted with the conduct of public works, are not liable for an injury occasioned by the negligence or unskilfulness of workmen and contractors necessarily employed by them in the execution of the works. I do not know whether they contend that this proposition is not law, or that the present case does not come under it. *Hall v. Smith* is an authority in our favour, and has been recognised in the later cases, and is mentioned in *Humphreys v. Meers*, 1 Man. & Ry. 187; and was also recognised in the case of *Duncan v. Findlater*, 6 Cl. & Fin. 894, and shows that what is laid down in Chitty is good law. They also cited *Lane v. Cotton*, 1 Ld. Raym. 647; *Whitfield v. Lord Despencer*, 2 Cowp. 754.

ERLE, C.J.—I am of opinion that this rule should be made absolute. The action was brought for injury sustained by the plt. by reason of his being upset out of a cart over a heap of stones left on a highway, by workmen employed by the surveyor who was appointed by the defts. (the Vestry of Shoreditch) to look after the highways in the parish, and the question of law which we have to decide is, whether the members of the vestry are liable for the damage. The vestry acted under the provisions of an Act of Parliament. The men employed by their surveyor did the wrong which occasioned the damage. Now it is agreed on both sides that if a private individual had left these stones he would have been liable, and the question is, whether persons who give their services gratuitously are liable, they being ignorant of the work which was going on, and not giving their attention to it. I am of opinion that they are not. The principle has been recognised, and the law has for a very long time been established, that persons discharging a public duty and acting gratuitously, and having no

share or participation in the wrong done, are exempted from liability. In the case of *Hall v. Smith*, which is the first of a long string of authorities, it was held that commissioners entrusted with the conduct of public works were not liable in damages for an injury occasioned by the negligence of artificers employed under their authority, provided they were doing that which by Act of Parliament they are empowered to do. And this has been held to be the law down to the case of *Duncan v. Findlater*, which was an appeal to the H. of L. against the decision of the Court of Session in Scotland; and the H. of L., reversing the decision of the Scotch Court, held that trustees appointed under a public road Act were not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road. In that case the Lord Chancellor, referring to the difference between the Scotch and English law, said, "It is important to preserve the law of Scotland where it really differs from that of England; but where that is not so, and no principle of conflicting law is involved, it is a reproach to any system of law that there should be in matters of the same kind, and on subjects of the same legislation, a different rule of construction applied in one part of the kingdom and in another." Mr. Williams has drawn our attention to the fact, that in the above case no evidence whatever was offered to connect the trustees directly with the cause of the accident in question, and that being so, that the H. of L. held that they were not liable. This is the law under which the present defts. come, they being guilty of no personal default. As to the case of the *Itchen Floating Bridge Company v. The Local Board of Health of Southampton*, which was relied upon by the plt., the distinction between that and the present case is, that in that case it was implied by the Act under which the board acted that an action for a wrong might be maintained against them. Then the *Manchester* case does not fall within the rule, as there, although the defts. who were a municipal corporation, individually acted gratuitously, yet the corporation and the township derived a profit from the carrying on of the works. The case of *Gibbs v. The Trustees of the Liverpool Docks* is somewhat similar, as although it was not there said that the trustees had any profit, yet vessels coming into the docks had to pay tolls, and as the trustees received money for the accommodation, they had so right, with the knowledge of the docks being in dangerous condition, to allow them to continue so. As to the cases of *Boulton v. Crouther* and *Sutton v. Clarke*, they show that where persons do that which they are authorised to do by Act of Parliament, although damage accrues to private individuals in consequence of such acts, yet as long as they are not guilty of negligence they are not liable, and it would be a contradiction to empower them to do certain things and then say they should not do them; but in exercising such powers they must take care not to act wantonly or oppressively. The case of *Duncan v. Findlater* is an express authority that persons acting gratuitously as a public body are not, as in the present case, to be held responsible, and I think therefore that this rule should be made absolute.

WILLES and BYLES, JJ. concurred.

*Rule absolute.*

## BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law

Wednesday, May 8.

(Before WIGHTMAN, J.)

HORWOOD (app.) v. POWELL (resp.)

*Turnpike toll—Exemption from under sect. 1 of the 4 & 5 Vict. c. 33—Travelling more than 100 yards on the road—When toll demandable. If a person is travelling along a turnpike-road with an animal upon which a turnpike toll is payable, he is*

[RAIL.]

TAYLOR v. CARR AND PORTER.

[RAIL.]

liable to pay the toll, though he has not travelled 100 yards thereon, if in fact he is then about to travel more than that distance:

*The resp. came upon a turnpike-road at a distance of twenty yards from a toll-gate, and when he arrived at the gate, toll was demanded which he refused to pay, and passed through without paying it, he at the time intending to travel more than 100 yards upon the said turnpike-road, and afterwards actually travelling more than that distance. Upon an information against him for forcibly passing through the gate without paying the toll, the justices refused to convict, on the ground that he was not liable to pay, not having passed 100 yards on the road when the toll was demanded:*

*Held, that the justices were wrong, and that the toll was payable as demanded.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a refusal by justices to convict the resp. for passing through a turnpike-gate without paying the toll. The case was as follows:—"At a petty sessions, holden at Bicester, in and for the two divisions of the hundred of Ploughley, in the county of Oxford, on the 4th Jan. 1861, an information preferred by Richard Horwood, hereinafter called the app., under sect. 41 of 3 Geo. 4, c. 126, charging for that the said Richard Powell, of the parish of Brill, in the county of Buckingham, butcher, did, on the 19th Dec. last, at the parish of Piddington, in the said county of Oxford, forcibly pass through a certain toll-gate, on a certain turnpike-road there, called the Piddington toll-gate, on a certain turnpike-road there situate, called the Thame and Bicester turnpike road, with a horse and cart, in which the said Richard Powell was then riding, without paying the toll, to wit, the sum of 4<sup>d</sup>. then and there payable for the said horse, by reason whereof the payment of the said toll was then and there avoided, contrary to the statute in such case made and provided, was heard and determined by us the said justices respectively being then present, and upon such hearing we dismissed the said information. And whereas the app. being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf. Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:—Upon the hearing of the information it was proved on the part of the plt. that the turnpike toll-gate in question was duly erected under the local Act, 1 Vict. c. 46, intituled "An Act for repairing and maintaining the road from Aylesbury to Thame, and from Thame to Oxford, Shillingford, Postcombe, and Bicester in the counties of Buckingham and Oxford," and that a toll of 4<sup>d</sup>. for a cart drawn by one horse was authorised by that Act, and that a table of tolls was duly put up at the toll-house, and that on the 12th Dec. 1860 the deft. Richard Powell came with a cart drawn by one horse upon the turnpike-road, the Thame and Bicester turnpike-road, at the point A on the accompanying plan [a plan was annexed], which is twenty yards only from the turnpike-gate. That the toll of 4<sup>d</sup>. was demanded of him by the collector at the gate, which toll he refused to pay, and forced the gate open and passed through, and afterwards passed upwards of 300 yards along the turnpike-road towards the point B on the plan. It was contended on the part of the deft. that he refused to pay toll on the ground that when it was demanded of him he had not passed 100 yards on the turnpike-road. The Act 4 & 5 Vict. c. 33, s. 1, enacts, that

[MAG. CAS.]

no toll shall be demanded for any horse, &c., which shall only cross any turnpike-road, or shall not pass above 100 yards thereon. We the said justices were of opinion that to render a person liable to pay toll at a turnpike-gate, he must have passed above 100 yards upon the said road before he came to the gate where the toll is demanded, and that, as the deft. had only when he came to the turnpike-gate where the toll was demanded, passed twenty yards on the turnpike-road, he was not liable to toll, and that the distance he passed along the road after going through the gate did not render him liable to pay toll at that gate. We gave our determination against the app. The question of law arising on the above statement for the opinion of the court is, whether the deft. was liable to pay toll demanded of him at the toll-gate in question.

*McIntyre*, for the app., contended that the resp. did not bring himself within the words of the exemption, "or shall not pass above one hundred yards thereon," which do not mean, shall not pass 100 yards before the toll is demanded; that the toll is payable in respect of his travelling more than 100 yards upon the road, and not because he happens to pass through a turnpike-gate.

*Joyce*, for the resp., argued that the toll is payable only at the gate, and that the resp. not having, when he was at the gate, travelled more than 100 yards upon the road, no toll was then demandable from him. [WIGHTMAN, J.—It is quite clear that you ought to pay the toll somewhere.] He might be liable to pay it ultimately, but the question is, was he bound to pay it, having travelled on the road only twenty yards? I submit, however, that he was, under the circumstances, not liable to pay it at all. [WIGHTMAN, J.—If he comes to the gate and says, "I am going to such a place, which is not 100 yards upon the road," the gate-keeper will take the toll at his peril.] The trustees of the road can protect themselves by erecting gates wherever they please upon the road.

WIGHTMAN, J.—It appears to me that, giving a reasonable construction to the statute, the justices were wrong, and that the resp. was liable to pay the toll. He was *prima facie* liable, unless he can show that he comes within the exemption. Now he says that because he has not travelled 100 yards before coming to the gate, he is not liable. It is agreed, however, that he was going more than the hundred yards. If he really was not about to pass more than 100 yards, he was not liable; but here in fact he was about to pass more than that distance. The exemption clause does not state, "or shall not pass above one hundred yards thereon before coming to the gate." If it did, it would be different. The justices were wrong, and the toll was payable.

*Case to be remitted to the justices, with the opinion of the court that they ought to have convicted.*

May 6 and 7.

(Before WIGHTMAN, J.)

TAYLOR (app.) v. CARR AND PORTER (resps.).

*Master and servant—Rules of a factory—Violation of—Loss of wages—Compensation before justices.*

*The app. was a weaver in the mill of the resps., and subject to the following rules, viz.:*—1. "A fortnight's notice will be required from all persons working in this establishment previous to leaving their employment, and a fortnight's notice will be given by the proprietors to all persons before discharging them (except for bad conduct or wilful neglect), and any person or persons leaving without giving such notice will forfeit all their wages in hand, and also be liable to be proceeded against according to law. 2. Any person or persons absenting themselves on account of sickness or any other cause, must immediately give notice to their overlooker; in default thereof all wages then earned will be forfeited, and such person

3 B

or persons will be liable to lose their work." The app., on Monday, the 6th Aug., asked leave of absence for half a day, which was granted, on condition that she got another weaver in her place, and she promised to be at her work at six o'clock the next morning; she did not return until after that time, and she had not provided a competent person to supply her place. Upon her applying for her wages (8s. 2d.) then due, they were refused, on the ground of being forfeited under the above rules; and upon the resp. being summoned before justices for the recovery of the amount, they, being of opinion that the app. had acted contrary to the above rules, dismissed her complaint:

*Held*, that the justices were wrong in dismissing the complaint for such cause, for that the app. had not violated the said rules.

This was a case stated under the 20 & 21 Vict. c. 43, upon a dismissal by justices of a complaint for wages. The case was as follows:—

On the 27th Nov. 1860 the defts. Carr and Porter were summoned before two justices for the borough of Blackburn, for that they, the said Carr and Porter, had refused and did then refuse to pay to Mary Taylor the sum of 8s. 2d. as the wages justly due and owing to the said Mary Taylor for work and labour done and performed by her for the said Carr and Porter, and at their request.

Upon the hearing of the said complaint Mary Taylor stated that on Monday the 6th Aug. she asked leave of absence for half a day, which was granted, on condition that she got another weaver in her place. She promised to be at her work at six o'clock next morning, but did not return until dinner time, when she was told that another weaver had taken her place. Complainant admitted that she was acquainted with the rules, and had read them. On the following Saturday she applied for her wages, which were refused. On the Wednesday night following she again applied to the overlooker for the wages that were due, and it was agreed that the wages should be paid after she had given a fortnight's notice, and served the fortnight. The week at this mill ends on Wednesday night, and complainant stated that it was arranged that she might return to her looms at the beginning of any week. She went the following day (Thursday) at half-past one, and was not allowed to work. For the defence it was stated that complainant did not get a competent person to take her place, and that leave was consequently refused, and she went without leave; that the looms had been kept standing a great part of the time when she was absent; that complainant was in liquor when she did return on the following Tuesday afternoon; and that on the following Wednesday week it was agreed that she should return the next morning (Thursday) at six o'clock, but she did not come until half-past one in the afternoon. The complainant contended that her case did not come within the meaning of rule 1 (absenting herself without notice), and that she was entitled to the wages that were owing at the time she left work. The magistrates having heard the complaint, and being of opinion that the complainant had acted contrary to the rules of the said mill in the first instance by absenting herself from half-past twelve o'clock on Monday, the 6th, until half-past one o'clock on Tuesday the 7th Aug. last, and in the second instance by not acting in accordance with her agreement, and entering on her work at six o'clock in the morning on Thursday the 16th Aug. aforesaid, decided that she was not entitled to recover the said sum of 8s. 2d., and dismissed the case accordingly.

The rules referred to in the case were as follow:—

"1. A fortnight's notice will be required from all persons working in this establishment previous to leaving their employment, and a fortnight's notice will be

given by the proprietors to all persons before discharging them (except for bad conduct, or wilful neglect), and any person or persons leaving without giving such notice will forfeit all their wages in hand, and also be liable to be proceeded against according to law.

"2. Any person or persons absenting themselves on account of sickness or any other cause, must immediately give notice to their overlooker; in default thereof all wages then earned will be forfeited, and such person or persons will be liable to lose their work.

"CARR and PORTER.

"Garden-street Mill, Blackburn, Jan. 1, 1869."

Torr for the app.

Keays for the resp.: (*Ex parte Baker*, 26 L. J. M. C. 173; *Ridgway v. The Hungerford Market Company*, 3 Ad. Ell. 171.)

The arguments sufficiently appear in the following judgment. *Cur. ad. vult.*

May 7.—WIGHTMAN, J.—The question in this case is, whether the decision of the magistrates determining that the applicant in this case, Mary Taylor, was not entitled to her wages by reason of some breach by her of the rules which are to be observed by all persons employed in the works of Carr and Co., was a right decision or not. Now the justices appear to have decided the case partly upon the rules and partly upon the breach of the agreement. The justices say, "We the undersigned justices having heard the case, and being of opinion that the complainant had acted contrary to the rules in the first instance by absenting herself from the Monday at half-past twelve till Tuesday, at half-past one; and in the second instance for not acting in accordance with the agreement in pursuing her work on Tuesday, she is not entitled to her wages," and they dismissed the case. With regard to the second ground, it was not argued or suggested that for the mere breach of duty in not returning at six in the morning of Tuesday she was not entitled to her wages; but it was put only, and argued only, upon the question of her case falling within the first or second rules to be observed; and it was contended that under the particular circumstances of this case, she was disentitled to recover her wages, on the ground that on Monday, the 6th Aug., she had asked leave of absence for half a day, which had been granted on condition that she should appoint another weaver in her place, and she promised to be at work at six the next morning. It was said the leave was withdrawn, because she had not fulfilled her promise in getting a weaver to perform her duty. But there is not one of either of these rules that applies to the case of a person absenting without leave, unless it be the first rule, which says a fortnight's notice will be required before leaving. It appears to me that that rule does not apply to an occasional short absence, but to leaving the establishment entirely. A fortnight's notice would hardly be required in the case of a person intending to go out for a few hours. It appears to me, if the case comes within either of the rules, it must come within the second rule, and that is, that any person absenting himself must give notice to the overlooker, or such person will be liable to lose that week. Now, in this case, it is said that the absenting herself without giving notice was by absenting herself from half-past twelve on Monday the 6th, until half-past one on Tuesday the 7th. Now there is no doubt there was ample notice given of her intention to go. No doubt about that; and it seems to me the question will here arise upon her non-attendance at six o'clock on the morning of the next day, when she was to have returned, and did not return. These, no doubt, are exceedingly stringent rules, because they deprive the persons who have earned their wages of the benefit of them; and preclude them from receiving them in case of a breach, which it was said this was, in not coming in at the time to receive her wages. Now, it is said.

[BAIL.]

REG. v. THE INCUMBENT, &amp;c. OF GOOLE, YORK.

[Q. B.]

independently of the rule, there was a ground upon which she might also lose her right to the wages she had already earned, and that is that for her misconduct. She had been discharged; and, no doubt, if guilty of misconduct, she might be discharged; and if discharged before the completion of her work she would not be entitled to any part of her wages, because the work was not complete. *Ridgway v. The Hungerford Market Company* was cited. It seems to me that case, and the principle upon which it was decided, is hardly applicable to this case, because that was a case where the wages were to be paid by time; and if the time was not fulfilled, they were not earned. But here the wages are not in respect of time, but of piece-work—work done; and “time” is only applicable to the time of payment and to the service rendered. Therefore it seems to me that that case is not applicable to this, which relates to the absenting herself from half-past twelve on Monday until half-past one on the Tuesday. Now it was a question, so far as the absenting herself on Monday was concerned, whether she had or not left. One question of fact would be whether they had refused her leave or not after they found she had provided an insufficient person to act for her? But assuming they did, it seems to me the question, under the second of these rules, is not whether she went without leave, but whether she went without notice. Any person absenting himself on account of sickness or any other cause must immediately give notice to the overlooker, and in default of notice will forfeit his right. No doubt there was ample notice given that she was going. What penalty she might incur otherwise than under these two rules, that is not a question for us now to consider. Undoubtedly, it may be, the master is fully justified in refusing to take her on afterwards; but it seems to me that from half-past one o'clock on Monday and the rest of the day she can hardly be said to have gone without notice to the overlooker. She went with full and ample notice. But then it was in the course of the argument suggested by Mr. Kaye, that independently of that she was to have returned at six in the morning, and she did not return till half-past one. It appears to me that that was a continuous absence; that she had never returned to her employ, and absented herself; for if she left at half-past one on the Monday and stayed out not until six o'clock in the morning of Tuesday, but until half-past one of that day, and if in the first instance she had given notice of the first part of the time during which she was absent, that would suffice for the purpose of entitling her to the wages, notwithstanding the rule, though no notice was given of the second absence, the continued absence from six o'clock in the morning till half-past one on that day. That being the question, it is taken as one continued absence. There was then notice given to the overlooker; then she overstayed the time she had agreed to in any view of the case; but still it appears there was no want of notice within the meaning of the rule. Therefore, on that ground, it seems to me the decision of the magistrates was wrong in this case, and they ought not to have dismissed it. It does not fall within either of these rules; and it was not argued that it came within any other, except the general rule I have adverted to, which only applies to time and not to piece-work. The magistrates, therefore, were not justified in dismissing the case.

*The case to go back to the justices with the opinion of the court that they ought not to have dismissed the complaint.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HENRIET, Esqrs., Barristers-at-Law.

Wednesday, May 8.

REG. v. THE INCUMBENT AND CHURCHWARDENS OF THE PARISH OF GOOLE IN THE COUNTY OF YORK.

*Vestry—Election of churchwardens—Refusal of chairman to take show of hands—Manner of polling—Affidavits—Mandamus.*

*At a vestry meeting to elect churchwardens, after the election of the rector's churchwarden, two persons were proposed and seconded for the office of parishioners' churchwarden. The chairman refused to take a show of hands, but proceeded to write down the names of the ratepayers present, and the number of votes they were entitled to, and then declared A. B. duly elected. The proceedings were protested against and a poll demanded, but the chairman refused to grant one, and declared the meeting at an end.*

*The Court refused to grant a mandamus commanding the election of a churchwarden, it not appearing by the affidavits that any one had by the irregular proceedings been prevented from voting, or that any practical injustice had resulted from it.*

This was a rule calling on the Rev. David Bell, incumbent of Goole, in the county of York, and the churchwardens of the said parish, to show cause why a writ of mandamus should not issue, commanding them to convene a meeting of the inhabitant ratepayers duly qualified to vote at the election of churchwardens of the said parish, and proceed to the election of churchwardens of the said parish for the remainder of the present year.

It appeared from the affidavit in support of the rule that at a vestry meeting of the ratepayers of the said parish, held pursuant to notice on the 5th April 1861, for the purpose of electing churchwardens, the Rev. D. Bell, the incumbent, in the chair, after the chairman had elected his own churchwarden, two persons, named John Luddington and John Humble Rockett, were proposed and seconded by ratepayers of the said parish to fill the office of the other churchwarden for the ensuing year; whereupon the Rev. D. Bell refused to take an election by show of hands, although requested so to do by several ratepayers, but proceeded to write down the names of the ratepayers present, and the number of votes each was entitled to, and declared the said John Luddington to be duly elected churchwarden. Jesse Dalby, a ratepayer, protested against these proceedings, and, immediately after the result of the election was declared by the chairman, demanded a poll, but he refused to grant one, and declared the meeting at an end. Sufficient time was not allowed to enable all the ratepayers of the said parish (in all about 750) to vote at the said election, the whole polling having been completed in about an hour. No application was made to adjourn the meeting.

*Temple, Q.C. (P. Thompson with him) showed cause against the rule.—The meeting for the election of churchwardens was duly called by a proper notice, and a poll was well and sufficiently taken; when a poll was demanded by Dalby, the election was at an end, and the result declared. [CROMPTON, J.—At a polling every voter must have an opportunity of being present. Closely.—That is the point.] (St. Saviour's, Southwark, Lane's Rep. 2; Prideaux on Churchwardens; Parson's Counsellor.) [CROMPTON, J.—In the election of a member of Parliament, for instance, if all agree to elect one man, it is not necessary to proceed to a poll, but if there is a poll it must be kept open the proper time. COCKBURN, C.J.—The writ of mandamus is a discretionary writ, and, unless Mr. Cleasby can show us that some persons who wished to vote have been prevented, we should not*



Q. B.]

CANDLISH AND ANOTHER v. SIMPSON AND ANOTHER.

[Q. B.]

exercise our discretion by granting the writ.] A reasonable time would have elapsed when all present had voted and no one else came up, and in the present case no adjournment was demanded. [COCKBURN, C. J.—The adjournment was a matter to be decided by the chairman.] The affidavits do not say there were other voters who were desirous of coming to vote, and who would have come and voted if there had been an adjournment. It must be shown that some one was prevented from voting: (*Reg. v. Rector, &c., St. Mary, Lambeth*, 8 Ad. & Ell. 356.) [COCKBURN, C. J.—The difficulty is, was this a poll at all, or was it merely substituted for a show of hands? CROMPTON, J.—Was there any real poll? There might be a polling of those present, but not of the whole parish.] Those present were *prima facie* the parish for the purpose of voting; 58 Geo. 3, c. 69, s. 3, shows that the poll is properly taken of the persons then present.

*Cleasby*, Q.C. in support.—Whether a poll was taken at all; and if taken, whether it was sufficiently taken, that is the question at issue? When a poll is taken, every person must have a reasonable opportunity of exercising his right to vote. The chairman is bound to grant a poll when demanded, and the proper course then is to adjourn, and appoint a subsequent day to hold it: (*Campbell v. Mawd*, 5 Ad. & Ell. 865.) [COCKBURN, C. J.—I find no authority for saying there should be an adjournment; on the contrary, in 12 Ad. & Ell., Lord Denman says, the poll should be held immediately.] When a poll is granted there should be reasonable opportunity given for all to attend. [COCKBURN, C. J.—The difficulty is, that your affidavits do not show that any one really was prevented from voting.] At all events they show illegality. [BLACKBURN, J.—If there is no injustice done, but the manner of voting was a mere irregularity, ought we to grant this, which is a discretionary writ?] *King v. The Consistorial, &c., Court of Winchester*, 7 East, 573; there a *mandamus* was granted, the closing of the poll having been four o'clock on the second day, and the number of electors 180. [BLACKBURN, J.—There, *de facto*, people were kept out.] In *Wood v. Baker*, the poll was kept open three days, and it was held not long enough. Here the closing of the poll at the end of an hour was clearly illegal.

COCKBURN, C. J.—I entertain no doubt that the proceedings adopted by the rector were irregular. He appears to have proceeded *per saltum* in taking a poll at once, without having first proceeded to a show of hands, and afterwards proceeded to take a poll in the usual manner; and if we could see that any practical mischief would arise, I should have thought that we ought to have directed a fresh election; but the granting of the writ now asked for is discretionary with the court. Now the affidavits do not profess to communicate to us that any ratepayer was prevented from giving his vote by the course taken by the rector, or that any injustice arose from it; and I can perfectly understand that the majority of the ratepayers were indifferent, for it seems that in this parish it had been determined to raise the necessary amount for repairs by a voluntary effort without resorting to a rate, and therefore we may well suppose the majority of ratepayers were indifferent; for this reason I don't think we ought to grant a *mandamus* for the irregularity in the voting. On the whole, we think that the purpose of the applicant will be fully answered by our saying that we think it was substantially an irregularity, and that this is not the proper formal mode of proceeding; and if we could have seen that there had been any injustice or wrong the writ would have gone.

CROMPTON, J.—I think we should have granted this writ if any one had been excluded from voting; but this writ is discretionary, and a slip in the affidavits, which omit to show that any one has been prejudiced by this proceeding, seems to have brought the case within

that of *Rees v. Lambeth*. I have a strong opinion that the parishioners had not the opportunity of voting they ought to have had; but, as no absolute injustice is shown, we do not think we should grant the writ.

HILL and BLACKBURN, JJ. concurred.

Rule discharged.

Friday, May 3.

CANDLISH AND ANOTHER v. SIMPSON AND ANOTHER.  
*Alehouse—Excise licences—Right to grant—Justices—County—Municipal borough.*

*Borough justices of a municipal corporation not having a separate court of quarter sessions have no power to grant licences to sell excisable liquors by retail under the 9 Geo. 4, c. 61, but the county justices have such power exclusively.*

This was an action brought by the plts. against the defts. for the recovery of 5*l.* for that the defts. unlawfully disturbed and hindered the plts. in the exercise of their right and franchise as two of her Majesty's justices of the peace in and for the borough of Sunderland, in the county of Durham, the plt. John Candlish being also mayor of the said borough.

The municipal borough of Sunderland is one of the places named in schedule A., annexed to the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, and consists of the parish of Sunderland-near-the-Sea, part of the township of Bishopwearmouth, and the townships of Bishopwearmouth Panna, Monkwearmouth, and Monkwearmouth Shore.

At the passing of the Municipal Corporation Act, the parish of Sunderland-near-the-Sea, and the said several townships of Bishopwearmouth, Bishopwearmouth Panna, Monkwearmouth, and Monkwearmouth Shore, formed part of the north petty sessional division of Easington ward, in the county of Durham, and even at the passing of the said Act, and thence hitherto, and have been and still are rated to the several rates and assessments levied and assessed by her Majesty's justices of the peace in and for the county of Durham upon the several parishes and townships within and comprising the said county, except the rate levied for the maintenance of the police of the said county.

By an order of general quarter sessions, made the 18th Oct. 1841, under the Act 9 Geo. 4, c. 43, for the county of Durham, the said parish and townships forming the borough of Sunderland were, together with the townships of Burdon, Dawdon, Ford, Fulwell, Hylton, Ryhope, Silksworth, Seaham, Southwick and Tunstall, formed into a petty sessional division of Easington ward, and by another order of general quarter sessions, made on the 3rd Jan. 1859, for the county of Durham, the said townships, with the exception of Dawdon and Seaham, were, with other townships, formed into the Seaham petty sessional division of Easington ward. With this exception, the Sunderland petty sessional division now remains as formed by the order of the 18th Oct. 1841. No separate court of quarter sessions has ever been held in and for the borough of Sunderland, nor has there ever been any gaol or house of correction in the said borough.

From 1836 downwards to the present time the council of the borough have appointed various persons successively to act as high constables in and for the said borough. On the 15th Sept. 1836 a separate commission of the peace was, for the first time under the provisions of the Act 5 & 6 Will. 4, c. 76, granted by his late Majesty to the said borough, and ever since that time justices assigned to act as justices of the peace in and for the said borough have continually been appointed under renewed commissions, and such justices have acted as such in and for the said borough, and are hereafter called "The Borough Justices." The usual petty sessions in and for the borough was, after the grant of the said commission of the peace

[Q. B.]

CANDLISH AND ANOTHER v. SIMPSON AND ANOTHER.

[Q. B.]

held by the mayor and other borough justices, and other justices being justices of the peace acting in and for the county of Durham, on each day in the week until the year 1842, when the council of the borough erected a police-court as required by the Act 5 & 6 Will. 4, c. 76, s. 100. Subsequent to this the mayor and other borough justices have held their petty sessions on each day in the police-court, and at the same sessions certain of the justices for the county of Durham, acting in and for the Sunderland division of Easington ward, several of whom are also in the borough commission, have acted with the mayor and other borough justices, there being sixteen justices in the commission for the borough, of whom nine are also acting county justices.

The usual petty session in and for the said north division and the said Sunderland division of Easington ward respectively were previous to and after the grant of the borough commission of the peace held every Saturday, in the justice-room of the Exchange-buildings, until the erection of the police-court in 1842, and have since that time been holden in such police-court.

The justices so acting are hereinafter called "The County Bench of Justices."

Informations against publicans licensed for houses situated in the borough for offences committed by them contrary to the tenor of their licences have always been adjudicated upon by the justices sitting daily at the police-court in petty sessions for the borough, such justices being as aforesaid, besides the mayor of the borough, those justices who are in the commission as well of the said borough as for the said county, and those who are in the commission for the borough only, and those who are in the commission for the county only, and the court so formed is hereinafter called "The Borough Bench of Justices."

On the 24th Aug. 1837 the Borough Bench of Justices held a general annual licensing meeting in pursuance of the Act 9 Geo. 4, c. 61, specially for the said borough (the precept of holding such meeting having been directed to the borough high constable), and granted alehouse licences for the borough, and from 1837 to 1850 inclusive, held such meetings and granted such licences to persons applying for the same.

On the 27th Aug. 1851 the County Bench of Justices acting in and for the Sunderland petty sessional division held at the police-court in Sunderland a general annual licensing meeting, in pursuance of the Act 9 Geo. 4, c. 61. The said borough justices and county justices did not hold in that year separate licensing meetings, but held one court only, at which the mayor of the borough presided, and all applications for licences to keep inns and alehouses within the borough of Sunderland were heard and adjudicated upon by the court at which the said borough justices and the said county justices acted and voted. At this meeting none of the alehouse licences granted were signed by the justices who were justices only for the borough, but by the justices for the county, and all such licences showed on the face of them that they were granted by the justices of the county of Durham acting in and for the Sunderland division of Easington ward. This mode was adopted by the then borough justices, because doubts were suggested to them as to their right to hold a separate licensing meeting for the borough. The same course was pursued in 1852, 3, 4, 5, 6, 7 and 8, with this exception, that the county justices refused to allow the mayor of the borough to preside while the bench were hearing applications for licences within the borough, and under these circumstances, and in consequence of the said doubts, the mayor and borough justices considered themselves as virtually excluded, and ceased to attend the licensing meetings convened by the county justices.

On the 18th June 1859 the county justices acting in and for the Sunderland division of Easington ward, by their precept in writing bearing date that day, and directed to the high constable of the Sunderland division of Easington ward, appointed the 27th Aug. at eleven o'clock to be the day and hour, and the police-court Bishopwearmouth to be the place, for holding the general annual licensing meeting under the Act 9 Geo. 4, c. 61, for the division, which division included the borough of Sunderland as before mentioned. No appointment for a general annual licensing meeting for the borough was made for the borough by name, but the appointment was made in general words for the division, and due notices of such meeting were given and served by the high constable of the division according to the provisions of the Act 9 Geo. 4, c. 61.

On the 29th July 1859 the said borough bench of justices, by their precept in writing dated that day, and directed to the high constable of the said borough, appointed the said 27th Aug. at eleven o'clock of the forenoon to be the day and hour, and the said police-court to be the place, upon and in which the general annual licensing meeting under the said Act, 9 Geo. 4, c. 61, in and for the borough of Sunderland, should be held, and Joseph Stainsby acting as high constable for the said borough, caused due notice of such meeting to be given and served according to the provisions of the said Act.

On the day and at the hour last aforesaid, at the said police-court, the plt. John Candlish being then as aforesaid mayor of the said borough, and the plt. Joseph Brown being a justice of the peace for the borough only, with certain other justices acting in and for the said borough, and being duly qualified for the purpose according to the said Act, 9 Geo. 4, c. 61, and then and there sitting as the justices of the borough bench, took part in holding, according to appointment, a general annual licensing meeting for the borough, and together with such other justices for the said borough granted several alehouse licences, and but for the acts and claims of the defts. would have continued to hold such meeting and to grant other alehouse licences in pursuance of their right and in execution of their duty as justices of the peace in and for the borough.

The defts. being justices in and for the said county of Durham, and being there with other justices of the county bench acting in and for the said Sunderland division, present in the said police-court, prevented the plt. and other borough justices then present from holding the said meeting, and required and compelled them to desist, and the defts. and other county justices claimed to be themselves as county justices exclusively entitled to hold the meeting. The defts. and the other county justices present then and there proceeded to hold and held a meeting as a general annual licensing meeting in and for the said Sunderland division, and the defts. and the other county justices excluded the plt. and the other borough justices from, and would not suffer the plt. and the other borough justices present to take part in, the said meeting, or vote in determination of the questions raised thereat. The pls. and the borough justices present then read in court, and entered in their minute-book, a protest against the county bench of justices granting or having a right to grant any licences for keeping inns and alehouses within the borough, but notwithstanding this protest the defts. and the other county justices heard and adjudicated upon a great number of applications by persons living in the said borough for licences to keep inns and alehouses, and grant such licences to a great number of them.

The defts. say that, acting for themselves and the other county justices, under the circumstances stated in the case, they were justified in their acts.

The question for the Court is, under the circum-

Q. B.]

DAY v. HEMINGS.

[Q. B.]

stances above stated, had either the county or borough justices exclusive jurisdiction for the purpose of granting alehouse licences for the borough of Sunderland? If the court should be of opinion that the county justices had such exclusive jurisdiction, then judgment of *non pros.* shall be entered for the defts. without costs of suit. If the court should be of opinion that the borough justices had such exclusive jurisdiction, or that they and the county justices had concurrent jurisdiction, then judgment is to be entered for the plt. for 5*l.* without costs of suit.

*Mansley (D. Seymour with him)* for the plt. — It is contended on behalf of the plt. that the borough justices have either a concurrent jurisdiction with the justices of the petty sessional division, or that they have exclusive jurisdiction to grant licences, under the 9 Geo. 4, c. 61, within the borough of Sunderland. The 9 Geo. 4, c. 43, regulates the creation of petty sessional divisions of a county. Then the 9 Geo. 4, c. 61, an Act of the same session of Parliament, in the first section enacts, "that in every division of a county, and in every hundred of every county not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, city and town corporate in England, there shall be annually holden a special session of the justices of the peace, to be called the general annual licensing meeting," &c. And in sect. 2, "That in every such division or place as aforesaid there shall be holden twenty-one days before each such annual meeting a petty session of the justices acting for such county or place, for the purpose of appointing the time for the annual meeting," and the justices are to direct their precept to the high constable of the division or place for which such meeting is to be holden; and the section then enacts what he is to do. This shows that the justices of a town corporate are to have power to appoint a general annual licensing meeting for the borough, a town corporate being one of the places specified in sect. 1. [O'CONNOR, J. — But the petty sessional divisional justices have also similar authority, as there is no *non obstantes* clause in the borough commission of the peace; and then it comes to the old case of *Rex v. Sainsbury*, 4 T. R. 451, which decided that whichever set of justices first appoints the licensing meeting acquires the jurisdiction so as to exclude the others.] On the other side it is contended that the borough justices have no jurisdiction to grant alehouse licences unless the corporate town has a separate court of quarter sessions; but no reason is assigned for this limitation, and the statute does not require it. [WIGHTMAN, J. — It must be a corporate town which has justices of the peace acting for it. COCKBURN, C. J. — Both sets of justices seem to come within the terms of the section, and they would therefore have concurrent jurisdiction.] Sect. 7 enacts that whenever at any of the meetings for any liberty, &c., or town corporate there shall not be present at least two justices acting in and for such liberty, &c., or town corporate, it shall be lawful for the county justices acting adjoining to such liberty, &c., or town corporate, to act within such liberty or place, and with the justices thereof, for the purpose of granting or transferring licences, &c. [O'CONNOR, J. — That section was absolutely necessary in places in which the commission of the peace has a *non obstantes* clause.] In *Brown v. Nicholson*, 5 C. B. N. S., 468, it was held that an alehouse licence granted by borough justices was good, and in that case *Reg. v. Dale*, 23 L. J. 44, M. C.; 1 Deas. 37, was cited.

*Lusk (A. Liddell with him)* for the defts. — The true construction of 9 Geo. 4, c. 61, is submitted to be, that the borough justices, acting in and for a town corporate, have jurisdiction only when a separate court of quarter sessions exists. In *Reg. v. Dale* that was held to be the true construction of the Act. All the

machinery required by 9 Geo. 4, c. 61, for the purpose of carrying out the Act, cannot exist except in towns having a separate court of quarter sessions. By sect. 2 the justices are to direct their precept to the high constable of the division or place. There is no such officer in a borough not having a separate court of quarter sessions. [O'CONNOR, J. — By sect. 37, the interpretation clause, "high constable" includes any person acting as such.] (*James v. Green*, 6 T. R. 228; *Weatherhead v. Drewry*, 11 East, 168.) Sect. 21 cannot be carried out except in a town corporate which has a separate court of quarter sessions; so also sects. 22, 26, 28 and 33 point to the same construction. In *Brown v. Nicholson* it was found as a fact in the case that it had always been the custom for the borough justices in Maidenhead to grant such licences for the borough. It is manifest that it was not intended by 9 Geo. 4, c. 61, to give the two sets of justices concurrent jurisdiction.

COCKBURN, C. J. — Although by the 1st section of 9 Geo. 4, c. 61, it would seem to be clear that both sets of justices are within its terms, and therefore that they might have concurrent jurisdiction, yet the subsequent sections show that the machinery for carrying out the entire Act is wholly wanting in a town corporate, unless it possesses the requisite officers, deriving their authority from the court of quarter sessions. The borough of Sunderland does not appear to be such a corporate town which has such officers as the Licensing Act requires for carrying out its provisions.

*Mansley* was heard in reply.

*Judgment for the defts.*

Tuesday, June 4.

DAY v. HEMINGS.

*Printing presses—Registering with the clerk of the peace—Necessity for—* 39 Geo. 3, c. 79, s. 23—7 & 8 Vict. c. 71, s. 11.

By the 39 Geo. 3, c. 79, s. 23, any person having any printing press is to cause notice thereof to be given to the clerk of the peace acting for the county, stewardry, riding, division, city, borough, town, or place where the same shall be intended to be used . . . under a penalty of 20*l.* for keeping or using such press. By the 7 & 8 Vict. c. 71, s. 11, the quarter sessions for the city of Westminster are abolished, and all the duties of the officers thereof are transferred to the county of Middlesex. To an action for work and labour (printing) brought by a printer carrying on business in Westminster, the deft. pleaded, thirdly, that the printing was done after the passing of the above Acts, and that the plt. had not delivered any notice to the clerk of the peace for Middlesex; fourthly, that the printing was done after the passing of the 39 Geo. 3, c. 79, and that the plt. had not delivered any notice to the clerk of the peace for the city of Westminster:

Held, upon demurrer, that the pleas were bad, as each plea should have negatived that notice was given neither to the clerk of the peace for the city of Westminster, nor to the clerk of the peace for Middlesex.

Seem, that the pleas would have been good if properly pleaded.

This was a demurrer to the third and fourth pleas. The declaration was for money payable by the deft. to the plt. for goods sold and delivered, and for work and labour done and materials provided, and money paid by the plt. to and for the deft., at his request; and for money payable by the deft. to the plt. for the deft.'s use and occupation by the plt.'s permission of certain rooms and apartments or chambers of the plt.'s; and for money found to be due from the deft. to the plt. on accounts stated between them.

The third plea stated "that the alleged work and labour was done as and in composition and presswork

Q. B.]

DAY v. HEMINGS.

[Q. B.]

by the plt. as a printer, and as and in a certain printing press of the plt., and by and with certain types for printing of the plt., and not otherwise, to wit, within the city of Westminster, in the county of Middlesex, and the said materials alleged to be provided by the plt. consisted of divers quantities of paper printed upon by the plt. at and in the said press, and by and with the said types for printing of the plt., and not otherwise, to wit, within the city of Westminster, in the county of Middlesex, aforesaid; and the deft. further says, that the said work and labour, so consisting of composition and presswork as aforesaid, was so done, and the said materials, so consisting of paper printed on as aforesaid, were so provided after the expiration of forty days from the day of the passing of an Act of Parliament, entitled "An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices," and made and passed in the 39th year of the reign of our late Sovereign Lord King George the Third; and also after the passing of a certain other Act of Parliament entitled "An Act to amend an Act of the 39th year of King George the Third, for the more effectual suppression of societies established for seditious and treasonable purposes, and for preventing treasonable and seditious practices," and to put an end to certain proceedings now pending under the said Act, and made and passed in the second year of the reign of her Majesty Queen Victoria; and also after the passing of a certain other Act of Parliament entitled "An Act for the better administration of criminal justice in Middlesex," and made and passed in the eighth year of the reign of her Majesty Queen Victoria; that the plaintiff, having the said printing press and types for printing, did not at any time after the expiration of forty days from the day of the passing of the said first-mentioned Act, up to the day of commencement of this suit, cause a notice thereof, signed in the presence of and attested by one witness, to be delivered to the clerk of the peace acting for the county of Middlesex, where the same were intended to be used, or his deputy, contrary to the form of the statute firstly above mentioned, nor did the plt. at any time after the expiration of the said forty days as aforesaid obtain from the said clerk of the peace acting for the said county, or his deputy, a certificate in the form described in the schedule to the first-mentioned statute annexed, but the said plt., without having delivered such notice and obtained such certificate, and after the expiration of forty days next after the passing of the statute first above mentioned, kept the said printing press and types for printing, and used the same, "to wit, in the said composition and presswork, and in printing the divers quantities of paper as aforesaid, contrary to the form of the statute in such case made and provided. The fourth plea stated the said alleged work and labour was done as and in composition and presswork by the plt. as a printer, and at and in a certain printing press of the plt., and by and with certain types for printing of the plt., and not otherwise, to wit, within the city of Westminster; and the said materials alleged to be provided by the plt. consisted of divers quantities of paper printed upon by the plt. at and in the said press, and by and with the said types for printing of the plt., and not otherwise, to wit, within the city of Westminster aforesaid; that the said work and labour so consisting of composition and presswork as aforesaid was so done, and the said materials, consisting of diver quantities of papers so printed upon as aforesaid, were so provided after the expiration of forty days from the day of the passing of an Act of Parliament, entitled "An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing

treasonable and seditious practices," and made and passed in the 39th year of the reign of our late Sovereign Lord King George the Third; and also after the passing of a certain other Act of Parliament, entitled "An Act to amend an Act of the 39th year of King George the Third, for the more effectual suppression of societies established for seditious and treasonable purposes, and for preventing treasonable and seditious practices, and to put an end to certain proceedings now pending under the said Act," and made and passed in the 2nd year of the reign of her Majesty Queen Victoria; that the plt., having the said printing press and types for printing, to wit, within the said city of Westminster, did not at any time after the expiration of forty days from the day of the passing of the said first-mentioned Act of Parliament up to the day of the commencement of this suit, cause a notice thereof, signed in the presence of and attested by a witness, to be delivered to the clerk of the peace acting for the said city of Westminster, where the same were intended to be used, or his deputy, contrary the form of the statute firstly in this plea mentioned, nor did the plt. at any time after the expiration of forty days as aforesaid obtain from the said clerk of the peace acting for the same city, or his deputy, a certificate in the form prescribed in the schedule to the said first-mentioned Act annexed; but the said plt., without having delivered such notice and obtained such certificate, and after the expiration of the said forty days, kept the said printing press and types for printing of the plt., and used the same, to wit, in the said composition and presswork, and printing the said divers quantities of paper as aforesaid, contrary to the form of the statute in such case made and provided.

By the 39 Geo. 3, c. 79 (An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for the better preventing treasonable and seditious practices), it is by sect. 23 enacted, "That from and after the expiration of forty days from the day of passing this Act, any person having any printing press or types for printing shall cause a notice thereof, signed in the presence of and attested by one witness, to be delivered to the clerk of the peace acting for the county, stewardry, riding, division, city, borough, town, or place where the same shall be intended to be used . . . and every person who, not having delivered such notice, and obtained such certificate as aforesaid, shall from and after the expiration of forty days next after the passing of this Act, keep or use any printing press or types for printing . . . shall forfeit and lose the sum of 20*l*."

By the 7 & 8 Vict. c. 71, s. 11, the quarter sessions for the city of Westminster are abolished, and all powers in relation to them are transferred to the county of Middlesex.

*Stroston* (Chances with him) now appeared in support of the demurrer, and contended that the third and fourth pleas were no bar to the action; for that, although by the 39 Geo. 3, c. 79, s. 23, a penalty was imposed upon the owner of a printing press if it is not registered, that fact would not render any work done by such press illegal: (*Smith v. Mawhood*, 14 M. & W. 452; *Wetherall v. Jones*, 3 B. & Ad. 221; *Johnson v. Hudson*, 11 East, 180; *Bensley v. Bignold*, 5 B. & Ald. 335; *Taylor v. The Crowland Gas Company*, 10 Ex. 293). [CROMPTON, J.—Here you did certain work, which the statute says you shall not do unless you register.] The work was legal in itself, though it may have been done by an illegal instrument. There is another objection. The third plea does not negative registering in Westminster pursuant to the 39 Geo. 3, c. 9, by the clerk of the peace of Westminster. If the plt. had registered his press with the clerk of the peace for Westminster before the 7 & 8 Vict. c. 71, it would have been sufficient. It is true that the fourth plea negatives registering with the clerk of the peace

for Westminster, but it does not negative registering with the clerk of the peace for Middlesex, since the passing of the 7 & 8 Vict. c. 71; so that each plea taken by itself is bad upon this ground.

*Grant*, in support of the demurrer, was called upon to answer this objection. He contended that the plt. should have re-registered in Middlesex, and that the pleas sufficiently showed that there was no registration. [COCKBURN, C.J.—There is no provision that the printer shall re-register. CROMPTON, J.—Having once registered, the registration remains. You should have shown that he had not registered in either place. One plea will not help the other. You are squeezed between the two pleas.] *Judgment for the plt.*

Attorney for the plt., *F. Roll*.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYO Esqrs.,  
Barristers-at-Law.

#### SITTINGS AFTER EASTER TERM.

*Saturday, May 11.*

TOWNSEND (app.) v. READ (resp.)

*Highway—Surveyor's accounts—5 & 6 Will. 4, c. 50, s. 44—Appeal from justices—20 & 21 Vict. c. 43, s. 2—Misconduct in drawing case for opinion of court.*

*A complaint was made before justices sitting in special sessions for highways by a person chargeable to the highway-rate, objecting to certain items in the accounts of the surveyor of highways under the 5 & 6 Will. 4, c. 50, s. 111. The justices examined the surveyor upon oath, and ultimately made no order respecting the items objected to, but signed at the foot of the accounts a verification, &c. The complainant appealed:*

*Held, that the case was within sect. 44 of the Highways Act, 5 & 6 Will. 4, c. 50, empowering the justices to hear the complaint and make such order thereon as to them should seem meet; and therefore an appeal lay to this court under 20 & 21 Vict. c. 43.*

*The court will not, on a mere suggestion by the app. at the argument that there has been misconduct or negligence in drawing a case, send it back to be re-stated or amended.*

This was a case stated for the opinion of this court under 20 & 21 Vict. c. 43, by way of appeal from the decision of justices for the county of Wilts, sitting at special sessions. It appeared that the resp. was the salaried surveyor of highways in and for the parish of Swindon in the said county. On the 29th March 1860 he laid his accounts before the vestry, and afterwards on the same day before the magistrates in special sessions, and thereat, at the time of the verification of such accounts, the app. being a person chargeable to the highway-rate of the said parish, made a complaint against the resp. objecting to certain items in his accounts, under the 5 & 6 Will. 4, c. 50, s. 111. The justices heard such plaint and examined the resp. upon oath, and after adjourning the special sessions from time to time, till May 24, ultimately made no order respecting the items in question, but signed at the foot of the accounts a verification ordering that a sum of 15*l.* (another disputed item) "be struck out of such accounts, leaving a balance of 107*l.* 13*s.* 2*d.* due to such surveyor," which balance included the items now in dispute.

*Macnamara* for the app. — This case ought to be sent back to be re-stated or amended under sect. 7 of 20 & 21 Vict. c. 43. The case was drawn up by the clerk to the justices, who is the partner of the resp.'s solicitor. Complaint was made at the time of the manner in which the case was drawn. It is stated that these costs objected to were incurred for law proceedings without showing how. That is not

sufficient; it ought to have been brought within sect. 111 of the Highway Act, 5 & 6 Will. 4, c. 50.

*WILLIAMS, J.*—I do not think the court can enter into the question you have suggested as to whether there has been misconduct or negligence in drawing the case; if we find the materials insufficient, we can send the case back to be amended, but not on a mere suggestion that it is improperly drawn.

*Macnamara.*—The other side will no doubt contend that this is a case which ought not to have been stated at all; but it is submitted that the case is, first, within the preamble to 20 & 21 Vict. c. 43; and, secondly, it is within the 2nd section of that Act (*Reg. v. The Justices of Cambridgeshire*, 8 Dowl. 89.) It will be seen by the case that though the justices in reality made no order, they ultimately verified the accounts, adding "we do order that a sum of 15*l.* be struck out." There was obviously a decision by the justices in the matter, and thus the case is within the statute last referred to. But were this not so, and it were a fact that the justices had refused to adjudicate, that alone is a ground for appeal to this court. The point it is desired to raise, but which in reality the case does not raise, is that the costs have not been allowed by two justices or the vestry, as they ought to have been. (He referred to sect. 111 of the Highway Act, 5 & 6 Will. 4, c. 50, requiring that the expenses incurred by the surveyor should be agreed to.)

*Phipson.*—I do not at all object to the case going back to be re-stated on the merits.

*KEATING, J.*—We have no materials before us for deciding the point.

*WILLIAMS, J.*—We had better hear you on the preliminary objection.

*Phipson* referred to the preamble and sect. 2 of 20 & 21 Vict. c. 43. This is not a complaint or an information and complaint upon which justices have jurisdiction to act in a summary manner: (5 & 6 Will. 4, c. 50, s. 44.) It appears by the case that the resp. was examined upon oath before the justices, and that is never done in cases where they have power to adjudicate in a summary way: (*Reg. v. The Justices of Leicestershire*, 8 E. & B. 57; *Reg. v. The Justices of Derbyshire*, 1 E. B. & E. 73.) This was a discretionary tribunal to deal with a simple matter of account, with power given to it to examine the surveyor upon oath; it would have been an absurdity to give an appeal in such a matter. [*KEATING, J.*—If the statute 20 & 21 Vict. c. 43, does not give us appeal to the court in this case, it will fall short of the purpose for which the Legislature intended it.] The app. must show that this was a matter in which the justices had power to act summarily before he can bring it within that statute so as to have an appeal here: (*Wheeler v. The Overseers of Birmingham*, 30 L. J. 175, M. C.) [*KEATING, J.*—The words of the statute are large; they are "any matter," &c.] That means any matter where the justices have summary jurisdiction.

*Macnamara* in reply.—This is what is generally understood to be a case for the summary jurisdiction of magistrates. If deprived of this, the app. has no other remedy; he can only come here with a case: (*Rev. v. The Justices of Somersetshire*, 5 B. & C. 816.)

*WILLIAMS, J.*—We think that the justices had jurisdiction to hear this case, and that the app. had a right to come here under sect. 2 of 20 & 21 Vict. c. 43. That Act is general in its language, enabling the courts at Westminster to act in assistance of justices of the peace by way of correcting any error they may have made, or by giving them advice as to what the law is in any information or complaint where there is "a hearing and determination by a justice or justices of the peace of any information or complaint

[CHAN.]

Re WARD.

[CHAN.]

which he or they may have power to determine in a summary way." Now, by sect. 44 of the Highway Act, 5 & 6 Will. 4 c. 50, it is enacted that any person chargeable to the highway-rate may make his complaint before justices of the peace sitting in special sessions, "and the said justices are required to hear such complaint, &c., and to make such order therein as to them may seem meet." So this case seems to fall within the very words of the Act of Parliament, for this is a complaint made by a person having a right to make complaint before justices sitting in special sessions, who have power to hear such complaint, and make such order therein as to them may seem advisable. As to the objection of insufficiency of statement of the case, let it be referred back to the justices for amendment.

WILLES, BYLES, and KEATING, JJ. concurred.

*Case referred back for amendment.*

Attorney for app., *W. Moon*; for resp., *Clarke, Gray and Co.*

## COURT OF APPEAL IN CHANCERY.

Reported by C. H. KENE and THOMAS BROOKSBANK, Esqrs., Barristers-at-Law.

Wednesday, June 5.

(Before the LORD CHANCELLOR (Campbell).)

Re WARD.

Coroner—Misbehaviour—Practice on removal of—23 & 24 Vict. c. 116.

*When a precept is issued and a jury is summoned to attend the inquest, the coroner is bound to proceed with the inquiry, and cannot dismiss the jury without doing so.*

*The refusal to proceed with an inquest under such circumstances is a misbehaviour within the meaning of the stat. 23 & 24 Vict. c. 116.*

*On an order for the removal of a coroner from his office, the old practice still prevails of issuing the writs de coronatore ezeorando and de coronatore eligendo at the same time.*

This was a petition presented under the Act 23 & 24 Vict. c. 116, by certain freeholders and justices of the peace for the county of Stafford, the object of which was to obtain an order for the removal of Mr. Ward from his office as one of the coroners of the same county.

The petition stated that on the 4th Jan. last a jury was by the direction of Ward summoned to hold an inquest, at three o'clock p.m., at the Royal Oak Inn, at the town of Cannock, in Staffordshire, upon the body of a person of the name of Joseph Brindley, who had been found dead in his house situate in that town. That the jury summoned as aforesaid attended at the hour appointed, and that they waited until past five o'clock before Ward arrived at the inn. That he was drunk when he so arrived there, and refused (without giving a sufficient or proper reason for such refusal) to hold the inquest, and that in consequence thereof the said inquest which ought to have been held was never held; that the said Ward was on the 21st Jan. 1861 summoned and convicted before the justices of the peace for having been drunk at the time and place last mentioned, and adjudged to pay a fine of 5s. within one week, which fine had never been paid. That at the general quarter sessions holden at Stafford in and for the county of Stafford, on the 9th April last, an order was made by the justices of the peace then and their assembled "that the clerk of the peace do forthwith take the necessary steps to present a petition to the Lord Chancellor for the removal of Mr. Ward from his office of a coroner for the county of Stafford, on account of his having been convicted of drunkenness on the occasion of holding an inquest at Cannock, in the said county of Stafford." That by the Act

[MAG. CAS.]

of 23 & 24 Vict. c. 116, it is enacted that county coroners should be paid by salary instead of by fees, mileage and allowances; and by the 6th section of the same Act, it is enacted, that "it shall be lawful for the Lord Chancellor, if he shall think fit, to remove for inability or misbehaviour in his office any such coroner already elected or appointed, or hereafter to be elected or appointed." The petition then prayed the removal of Ward from his office as coroner, and for directions for the appointment of a new coroner in his place and stead. Affidavits were filed in support of the petition, and there was a great deal of conflicting evidence as to the sobriety of Mr. Ward at the time in question. It was suggested by Mr. Ward and his witnesses that the appearance of intoxication might have been produced by extreme cold, but that it certainly was not caused by drink.

*Amphlett, Q.C. and C. M. Roupell* appeared in support of the petition.

*Daniel, Q.C. and McMahon* contra.

Authorities cited:—23 & 24 Vict. c. 116; *Ex parte Parnell*, 1 J. & W. 451.

The LORD CHANCELLOR (without calling for a reply).

—This is a most serious case, and a very painful duty is cast on me. By the ancient law the L. C. had jurisdiction over coroners, and it was his duty to listen to any complaint that might be made against them in the discharge of their duty. By an Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, c. 116, s. 6, there is a statutory enactment upon the subject, "It shall be lawful for the L. C., if he shall think fit, to remove for inability or misbehaviour in his office any such coroner already elected or appointed, or hereafter to be elected or appointed." I do not think that this leaves a discretion in the L. C. The proceeding having been instituted, he is bound to hear all the evidence on both sides, and unless it is clearly and satisfactorily proved that the charge has been substantiated, and that the coroner has been guilty of misbehaviour in his office, he has the pleasure of declaring "not guilty;" but if he is convinced judicially upon the evidence that there has been a charge which is made and is substantiated of misbehaviour of the coroner in his office, he is bound, according to the sacred oath he has taken, to find the charge to be substantiated and to remove the coroner from his office. This is a very ancient and important office in the realm of England. The coroner next to the sheriff is the most important civil officer in the county, and he performs the duties of the sheriff, when the sheriff is disabled from doing so, and there are peculiar duties ascribed to him, more particularly to inquire into the manner in which persons have come to their deaths, where there is any reason to suppose that that may not have been by natural means; and on that inquiry a jury being sworn, the jury have all the rights of a grand jury to find a verdict of murder, and on that finding the party accused may be tried, and may be sentenced to death. A charge has been brought against Mr. Ward, one of the coroners for the county of Stafford. Some complaint is made, which rather surprises me, of the hardship of the mode of dealing with this accusation. The petitioners have done as the Act of Parliament points out. They have made their complaint to the L. C. They, in their petition, which has been served on Mr. Ward in the clearest and most distinct manner, tell him what the charge is which he has to answer. He has had ample opportunity of bringing forward all the evidence that could be adduced in his favour, and I hope that sufficient weight will be given to all the evidence which he does adduce. Now the charge is, that one Joseph Brindley having died suddenly, and there having been a precept for an inquest, which was promptly and properly issued, and a jury being summoned to inquire into the manner in which Joseph Brindley came to his death, that Mr.

Ward was guilty of misbehaviour in his office in the manner in which he behaved when the jury had been assembled. The charge is, that he was then in a state of intoxication, and that then he refused to proceed to complete the inquest without any reason whatsoever, and from improper motives. Now, with regard to the intoxication, I must say that the weight of evidence seems to me to be considerably against him. There are the five jurymen, and the two witnesses who were to attend as witnesses at the inquest, who speak in the most decisive manner with regard to his being in a state of intoxication; and I must say that the conduct of Mr. Ward himself seems to me to give corroboration to that charge; for I cannot imagine that a man who was in possession of his intellectual faculties could have behaved so improperly as Mr. Ward did behave on that occasion. Well, then, the precept having been issued, I again say that, according to the law of England, the jury being assembled, it was the duty of the coroner to swear the jury, and to call all the witnesses that could be brought forward, and to inquire into the manner in which the deceased had come to his death. What is the reason that Mr. Ward, by his counsel, assigns for not then doing his duty? Why, that on his way from Stafford to Cannock he met some person, whose name he does not know, who told him there was no occasion for holding the inquest; and it is supposed, for that reason, he can honestly change his mind, and think that an inquest is no longer necessary. I cannot consider that, if he was really in the possession of his faculties, he could honestly have so conducted himself. But you have from the evidence, which I think is not contradicted, and which seems to me to be conclusive, that he gave another reason for it; he said, "I am now upon a salary, and I will not carry on the inquest in cases of this sort, in which the magistrates would have disallowed the fees;" rather intimating that, if he were still to receive fees, he would have gone on with the inquiry, but as he was now upon a salary which hardly enabled him decently to perform the duties of his office, that that inquiry should no longer proceed. I will say that a man who, if he was really in possession of his faculties, and they were not impaired by intoxication, could so put an end to an inquiry that had really been commenced, and ought to have been carried to its proper conclusion, has been guilty of misbehaviour in his office, and ought to be removed. I therefore am of opinion, and I give my judgment, that he has been guilty of misbehaviour in his office, and that he be removed from the office of coroner for the county of Stafford. There is not the slightest foundation for any imputation cast upon the petitioners. They are gentlemen of all parties and without any bias on their minds, and simply wishing to discharge their duty; and I must say that I am not in the slightest degree influenced by the conviction before the magistrates, but that I look at the evidence before me, and I do not look at any imputation that has at any period of time been brought against Mr. Ward.

*Amplett.*—In *Re Parnell* there was a writ de coronatore exonerando, and a writ de coronatore eligendo, issued at the same time.

The LORD CHANCELLOR.—If that was the old form that will still be pursued.

Solicitors, *White and Sons, and Chinery.*

### V. C. STUART'S COURT.

Reported by JAMES B. DAVIDSON, Esq., of Lincoln's-inn, Barrister-at-Law.

Wednesday, May 22.

THE ATTORNEY-GENERAL v. PASCALL.

*Appropriation of funds subscribed in answer to general public appeals—Information.*

*Sums of money were raised by general public subscrip-*

*tion, in answer to three printed circulars or "appeals," headed "Deplorable spiritual destitution," in the parish of Clerkenwell; and the first two of which set forth the names of trustees, of a committee, treasurers, secretaries and bankers. The first circular stated that the committee desired in the first instance to seek remedial measures for one section, viz. that of the north or Pentonville end of the parish; that the present appeal was for the north, and that the objects were, among others, to defray the expense of a new parochial Act of Parliament, to compensate the incumbent of Clerkenwell for any loss he might sustain by the severance of the Pentonville chapel of ease from the south end, to enlarge the chapel so as to supply, if possible, 1000 free sittings, to provide an endowment fund, and to erect a parsonage-house and schools. The second circular stated that the plans of the committee were so far altered that they now sought funds for at least three new churches, with an endowment fund, free sittings, schools, and parsonage-houses. The third circular stated the first object of the committee to be, "the erection of three new churches, the first to be erected in Pentonville."*

*Of the funds subscribed, part were employed in building schools, and establishing benefit societies, and the remainder was invested. A new church was in the course of erection in the Pentonville district, and a second was proposed to be built in the southern district of Clerkenwell:*

*Held, on the construction of the three circulars, that the fund (which was insufficient to complete the erection of the Pentonville church alone) ought to be applied towards the completion of the church in course of erection, and that no part of it ought to be devoted to the building of the proposed church in the southern district of Clerkenwell.*

This information was filed by the Attorney-General at the relation of the Bishop of Ripon, the Bishop of Durham and the Hon. Arthur Kinnaird, against James Pascall, the Rev. Anthony Lafroy Courtenay, and the Rev. Robert Maguire.

In the year 1853 a printed appeal was extensively circulated in London and in the country, headed "Deplorable spiritual destitution. Clerkenwell Church Extension and Spiritual Relief Committee." It set forth the names of the Earl of Shaftesbury, of the relators, and of the Rev. Daniel Wilson as trustees of certain other persons as a committee, and of the deft. James Pascall as treasurer; and after referring to the extent of the population of the parish of Clerkenwell, and stating that the north and south wings of the parish, containing a population of 25,000, were as detached from each other as any two distant parishes in London—that at the north or Pentonville end there were 12,000, at the south or Holborn end there were 13,000—and referring to a local Act of Parliament to which the destitute condition of the parish was thereby attributed, and stating that the committee felt their inability to cope with difficulties so gigantic as a whole, and they therefore desired, in the first instance, to seek remedial measures for one section, viz. that of the north; that if the committee should thereafter be called, by an accession of personal or pecuniary aid, to act for the south as well as the north of the parish they would not shrink from the responsibility, but that the then present appeal was for the north, proceeded as follows: "The objects to be embraced are the following:—1. To defray the expenses of obtaining an Act of Parliament to supersede the existing one, obsolete and opposed to the requirements of the neighbourhood as it is: this is estimated at 500*l.*; 2. To compensate the incumbent for any loss he may sustain by the severance of the chapel of ease from the south end; 3. To enlarge the chapel so as to supply, if possible, 1000 free sittings for the poor; to provide

an endowment fund for ordinary repairs; and to erect a parsonage-house; 4. To build Sunday, juvenile and infant schools, so much wanted by this large population." Subscriptions and donations were then solicited; and it was stated that the same would be received by the deft., the Rev. A. L. Courtenay, the officiating minister of the chapel of ease; by the deft. James Pascall, Esq., treasurer; by G. C. Steet, Esq., the hon. secretary, or by either of the bankers in the joint names of the trustees.

By an Order in Council, dated in April 1854, Pentonville was constituted an ecclesiastical district.

Pending the operations of the Church Building Commissioners to procure the severance of Pentonville from the rest of the parish, a second printed appeal was issued, headed similarly to the last, and setting forth the names of the same persons as trustees, committee, treasurer, secretaries and bankers respectively. It proceeded as follows:—"The committee beg to add that, their first appeal having fully explained why Clerkenwell stood still, by reason of the local Act, while other parishes were dividing and subdividing, deem repetition needless, especially as their concern is with the future. They stand pledged first to promote the severance of the north and south ends of the parish, and the erection of a church in Pentonville, in order to facilitate the assignment of districts throughout the parish. These plans are so far altered by the suggestion of influential friends, that they now seek funds for—1. The erection of at least three new churches; 2. An endowment fund for the same, as very many free sittings will be required; 3. Schools proportioned to the population; 4. The erection of parsonage houses;" and, after stating that all sums were lodged in the names of the trustees, and the expenditure was subject to their supervision," stated that subscriptions and donations would be received by the defts. the Rev. A. L. Courtenay, James Pascall, and G. C. Steet.

In the month of Aug. 1854 a third printed appeal was circulated, headed "Deplorable spiritual destitution of the parish of Clerkenwell," which stated that the committee now sought funds for—1. The erection of three new churches, the first to be erected in Pentonville; 2. An endowment fund for the same, as very many new sittings will be required; 3. Schools proportioned to the population; 4. The erection of parsonage-houses. It further set forth that the following had been accomplished during the preceding nine months:—1. Pentonville is now an ecclesiastical district or benefice, by the Act of her Majesty in Council, on the 7th April last. It now has its own incumbent, curate, wardens and other officers; and it is gratifying to know that the legal expenses at first contemplated have not been required, whereby a saving of from 500*l.* to 1000*l.* has been effected. 2. That noble institution, the Church Pastoral Aid Society, in consideration of the spiritual destitution and poverty of the district, has granted 100*l.* for a curate. 3. There is now the prospect of a site (at a cost of about 2000*l.* if the purchase could be completed shortly) for the church to be erected for this new district; as at present there is only a small chapel with 600 sittings (for a district of 12,000 souls), with no accommodation for the poor. 4. The subscription list already reaches to 1000*l.*" The appeal then stated that all sums received were vested in the names of the trustees therein mentioned, being the same persons as were stated to be the trustees in the first appeal, and that the expenditure was subject to their supervision.

The Rev. Daniel Wilson never accepted the trust; and the Earl of Shaftesbury retired.

In answer to the three appeals immense sums were contributed, and with the aid of a portion of the fund thus raised five new schools were established, addi-

tional services, scripture readers, bible and prayer-book depositories, a provident fund, a clothing club, a maternity society and other benefits; and in the year 1855 the residue of the funds was invested in the purchase of stock in the names of the relators and the deft. James Pascall, and such sum with accumulations amounted in June 1860 to 913*l.* 14*s.* 10*d.* Three per Cent. Annuities.

In the year 1854 the committee authorised their solicitors to treat with the Rev. Mr. Faulkner (since deceased), who was then the incumbent of the parish, as to the compensation which should be paid to him out of the fund for the loss sustained by him as incumbent from the severance of Pentonville from the parish of Clerkenwell. Upon the severance, the Rev. A. L. Courtenay was appointed the incumbent of Pentonville. He had paid 130*l.* out of his own resources to Mr. Faulkner as such compensation as aforesaid, and this sum he claimed to be reimbursed.

A new church was in the course of erection in the Pentonville district, the site of which had been conveyed to the Ecclesiastical Commissioners. Another new church was proposed to be built in Allen-street, in the southern part of the parish of Clerkenwell. The Rev. Mr. Courtenay claimed that the residue of the fund should (after repayment of the 130*l.* and interest to himself) be applied to the completion of the Pentonville church, as being the primary object for which the committee was formed and the appeals were circulated.

The deft. the Rev. Mr. Maguire claimed that one moiety of the fund should be applied towards the erection of the proposed new church in the southern district of Clerkenwell.

The money had been paid into court under an order of his Honour, and the information now prayed that a proper scheme might be settled for the application of the moneys. They were admitted to be wholly insufficient, after reimbursing Mr. Courtenay, to complete the building of the Pentonville new church.

Mr. Pascall, by his answer, said, he believed that there was really no necessity for a new church in the Pentonville district, the fact being that Pentonville chapel, of which Mr. Courtenay was incumbent, was but a very short distance from, and in the same district as, the said proposed new church. He also insisted that Mr. Courtenay had no right to be reimbursed the sum so paid by him out of the trust-fund; for Pentonville chapel was formerly a chapel of ease to the parish church; the incumbent of the parish did duty there, partly by himself and partly by deputy; and, on the arrangement for a severance of Pentonville chapel from the parish of St. James, Clerkenwell, it was arranged that Mr. Courtenay, who was the then deputy and afterwards the incumbent appointed on the severance, should take the whole of the pew rents of the chapel, and pay Mr. Faulkner 65*l.* per annum by way of compensation. He also submitted that a portion of the trust-fund ought to be applied for the benefit of the schools.

The Rev. R. Maguire, by his answer, said he believed that the statements in the first appeal, made with reference to the deplorable state of the parish of Clerkenwell, related exclusively to the southern part of the parish, and did not apply to the northern. He believed there was in fact really no necessity for the new church in the Pentonville district, as Pentonville chapel, where Mr. Courtenay officiated, was but a very short distance from and in the same district as the proposed new church. He believed that the site of this proposed new church in the southern district of Clerkenwell parish had been already purchased, and that the building would soon be commenced. He submitted that Mr. Courtenay was not



V.C. S.]

REG. v. PICKFORD.

[C. R.]

entitled to have the fund applied to the purposes for which he claimed the same.

*Malins, Q.C. and Fry* appeared for the Rev. Mr. Courtenay;

*Hardy* for the deft. Pascall;  
*Bacon, Q.C. and Drake* for the Rev. Mr. Maguire;  
*Woodroffe* for the relators; and  
*Wickens* for the Attorney-General.

The VICE-CHANCELLOR.—The true construction of these very loosely-framed documents, which are called appeals, seems to show, I think, that the primary purpose—that is to say, the thing first contemplated as most urgently required, and to effect which the money was asked for—was the building of a church at Pentonville. The expressions are very loose, and the documents are oddly framed, but it is impossible not to see that the first thing for which the money was wanted was the benefit of Pentonville church. At any rate it seems to me impossible, upon the whole case, to say that—when the money was paid by the persons who were encouraged to subscribe it by these appeals—if the trustees, or those having the custody of it, seeking to apply it for the purposes for which it was subscribed, had given all that has now been collected for the building of the church now in the course of erection, that would have been a misapplication of the funds. The question now is, whether, when the matter comes before the court, with purposes so defined as they are by these appeals, this court, assisted by the opinion of a certain portion of the body who had a discretion, should say that the whole fund may or ought not properly to be applied to finish the church now in the course of erection, or that any part of it should not be reserved for building the church contemplated in another district of the same parish, for which it is said a site has been obtained. Upon the whole case it seems to me, there being a discretion in the court, that that which was wished by these trustees who are relators is the better mode of applying the fund, and is that which will be the most certain way to secure its application towards the primary object for which it was contributed, whilst it is clearly within the purposes for which the money was subscribed. Therefore, instead of dividing the fund for an object which after all was possibly, perhaps probably, not contemplated, and looking to the amount of the fund, I think the better course will be to do what the relators suggest, viz., to direct that the whole fund (subject to the deduction which I am about to mention) be applied towards the erection of the church which is now being built. The deft. Mr. Courtenay claims the sum of 130*l.* as due to him out of the fund, in order to reimburse him for a sum equivalent to that amount which he has paid to Mr. Faulkner, who was the incumbent of the whole parish before it was divided into districts; and I think, in spite of all that has been urged by Mr. Bacon, it is very plain that Mr. Courtenay was dealing with this committee in such a way that when he paid this money he paid it on the faith and expectation that he should be reimbursed. I certainly think, although Mr. Courtenay derived a benefit from the application of the money, that he is entitled to have it repaid to him. The costs of all parties must be taxed and paid out of the fund.

*Woodroffe* asked for the costs of the relators as between solicitor and client, on the ground of their being trustees, but

The VICE-CHANCELLOR refused.

The costs of the Attorney-General were provided for separately.

Solicitors: for the relators and for the Rev. A. L. Courtenay, *Hilliard, Dale and Stretton*; for the deft. Pascall and the Rev. R. Maguire, *Boulton and Sons*.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. R. HERTSFLET, Esqrs., Barristers-at-Law.

Wednesday, April 24.

REG. v. PICKFORD.

*Order of affiliation—Application for a summons—Death of justice granting it—Subsequent application for another summons after the year—Order.*

*When an application is made to a justice to issue a summons in bastardy under the 7 & 8 Vict. c. 101, s. 2, that justice only has authority to issue such summons.*

*An application to a justice for a summons within a year after the birth of a bastard child will not authorise another justice in issuing a summons upon such application.*

*Where, therefore, a woman made application to a justice within a year after the birth of a bastard child, and a summons was accordingly issued by him, but was not served in consequence of the putative father having absconded, and nothing was therefore done upon it, and the said justice died, and subsequently, but after the expiration of a twelvemonth from the birth of the child, the putative father returned, and an application was then made to another justice of the same division for a summons, which was granted, and an order of affiliation thereupon made which recited the first application, the issuing of the summons, its not having been served on account of the absconding of the man, and the death of the justice:*

*Held, that the order was bad, as it was not founded upon a summons issued upon a complaint made within a twelvemonth of the birth of the child, and as the original application to the justice who subsequently died could not be connected with the subsequent summons.*

This was a rule to quash an order of affiliation returned into this court upon certiorari. The order was in the following form:—

“Cheshire to wit.—At a petty session of her Majesty's justices of the peace of the county of Chester, acting in and for the petty sessional division of Prestbury, in the hundred of Macclesfield, in the same county of Chester, holden at the County Police Office in Macclesfield, in the said county, in and for the said division, on Tuesday, the 21st day of August 1860, before us, Charles Richard Banastre Legh, John Dixon and John Upton Gaskell, Esquires, three of her Majesty's justices of the peace in and for the same county.

“Whereas, Jane Mason, of the township of Bollington, in the said county, single woman, did, on the 15th day of June 1858, at Macclesfield, in the said county, make information and complaint to Thomas Swanwick, Esquire, one of her Majesty's justices of the peace in and for the said county, and acting in and for the said division, that she was a single woman, and then resided within the township of Bollington, in the division and county aforesaid, and that on the 25th day of March 1858, she was delivered of a male bastard child, which was then living; and she charged William Pickford, of the township of Bollington, in the said county, labourer, with being the father of such child, and she then and there made application to the said justice for a summons to the said William Pickford, to appear at a petty session of the peace in and for the said division, to answer her complaint in the premises, and thereupon the said justice issued his summons accordingly to the said William Pickford to appear and answer the said complaint at the said petty session to be holden on a day therein mentioned, to wit, on the 29th day of June 1858. And whereas the said William Pickford, at the time of such application being

Q. B.]

REG. v. THE INHABITANTS OF AUGHTON.

[Q. B.]

made, had absconded from Bollington aforesaid, and his abode was then and has ever since until the month of July last continued unknown to the said Jane Mason, and the said summons could not be served on the said William Pickford. And whereas the said Thomas Swanwick died on the 3rd day of Aug. 1859, and afterwards, to wit, on the 14th day of July last, the said Jane Mason made application to Thomas Wardle, Esq., one of her Majesty's justices of the peace in and for the said county, and acting in and for the said division, for a summons to the said William Pickford to appear at a petty session of the peace in and for the said division, to answer her complaint in the premises, and thereupon the said last-mentioned justice issued his summons accordingly to the said William Pickford to appear and answer the said complaint at the said petty session holden this day. And whereas the said William Pickford hath been duly served with the said last-mentioned summons, six days at least before this day, but he doth not appear thereto, and Jane Mason is now present for the purpose of obtaining from us the said justices in petty session assembled an order upon the said William Pickford in the premises. Now, therefore, it being proved to us, upon oath, that the said Jane Mason is a single woman, and was at the time of application for the said first and last-mentioned summons as aforesaid, and still is, residing within the said township of Bollington, in the division and county aforesaid, and that on the said 25th day of March 1858 she was delivered of the said male child, and that such child was born a bastard, and is still living. And we having also heard the evidence upon oath of the said Jane Mason the mother, and other evidence upon oath as produced by her, and the evidence of the said Jane Mason, the mother, being corroborated in some material particulars by other testimony to our satisfaction, and we also having had the other facts and circumstances herein contained proved upon oath to us, do hereby adjudge the said William Pickford to be the putative father of the said bastard child. And having regard to all the circumstances of the case, we do hereby order that the said William Pickford shall pay unto the said Jane Mason, so long as she shall live and be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, and after her death, or unless she shall be of unsound mind, or confined in any gaol or prison, or under sentence of transportation, then unto such person as two justices may appoint, to have the custody of the said child, pursuant to the statute in such case made and provided, the sum of two shillings weekly and every week from the time of making the application first aforesaid until the said child shall attain the age of thirteen years, or shall die, or the said mother shall marry; and do hereby further order the said William Pickford to pay to the said Jane Mason the sum of nine shillings and sixpence, being the costs incurred in obtaining this order, and the sum of ten shillings for the midwife.

"Given under our hands and seals at the Petty Sessions aforesaid.

"CHARLES R. B. LEGH. (L.S.)

"JOHN DIXON. (L.S.)

"JOHN UPTON GASKELL. (L.S.)"

T. W. Saunders showed cause.—This order is good. The first application was made within the twelve months after birth to a justice, and was in time. It is true the summons was not served, but the reason was that the deft. absconded, which was no fault of the prosecutrix. It may be said that the summons might have been nevertheless served at the last place of abode, but the deft. had no such place of abode; at all events it lies on him to show that he had, and his affidavit does not state one. The first summons thus proved abortive from no fault of the prosecutrix, and

the justice who issued it died before the second application was made. It was competent to make the second application after the twelve months, when it was found that the deft. was again within the jurisdiction, for the statute had been fully satisfied by the first application being made within the twelve months. [CROMPTON, J.—The only question will be, if the second summons can be considered a continuation of the first. Must the judgment not be on the first application and summons?] If the application is in time it is immaterial that the summons issues after the twelve months: (*Potts v. Cambridge*, 27 L. J. 63, M. C.; *Ex parte Harrison*, 19 L. T. Rep. 114.) [CROMPTON, J.—The difficulty is to see how the second summons could be issued by a different justice from the one who entertained the first application. BLACKBURN, J.—The statute seems to contemplate that the same justice should issue the summons.] The mere issuing of the summons must be a mere matter of form, and as the application was made to the justice of the same division it cannot be material who issued it. [BLACKBURN, J.—But does the statute say that? It is not a common law jurisdiction this, but the creature of statute. The statute does not seem to give jurisdiction to any justice but the one who entertained the first application.] The words of the statute on that point may be treated as directory. [HILL, J.—The statute limits the power, and no other justice can issue the summons.] At all events, the order made which recites all the circumstances of the first application may be taken to cure any informality caused by the death of the justice. The second application was a continuation of the first. If the justices could enter continuances on a roll, there could have been little doubt of that, and it would defeat the object of the statute to hold this order bad.

*Kenealy*, contra, was not called on.

By the COURT.—Looking at the terms of the statute, and considering that we cannot look upon the second as any continuation of the first application, this order must be quashed, but without costs.

*Order quashed without costs.*

Wednesday, May 1.

REG. v. THE INHABITANTS OF AUGHTON.

*Poor-law—Order of removal—Children of a parent who is irremovable—Fraud upon the parent—Children within the age of nurture—9 & 10 Vict. c. 66, s. 3.*

*A widow whose parish of settlement was Aughton, but who was irremovable from Leeds by a five years' residence, had three children, and being unable to maintain them, the Leeds board of guardians made an order for the admission of such three children into the workhouse. A few weeks afterwards the overseers of Leeds obtained an order for the removal of these children to Aughton. The object of the board of guardians in sending them to the workhouse was their removal to their place of settlement. They were sent there with the consent of their mother, but she was not informed that the result of separating her children from her would be their removal to Aughton. Each of the children at the time of the order of removal was under seven years of age:*

*Held, that under the circumstances the separation of the children from the mother was a fraud upon her, and that the order of removal was bad:*

*Held, also, that as the children were within the age of nurture, the mother could not consent to their separation from her.*

This was a case stated by the recorder of Leeds, upon an appeal against an order of removal of Sarah Lambert, aged six years, and of Ann Lambert and Emily Lambert (twins), aged four years, from the township of Leeds to the township of Aughton. The

order was confirmed with costs, subject to a case which was stated as follows:—

The paupers are the legitimate children of Mary Lambert, the widow of Edward Lambert, by the said Edward Lambert, who died in June 1855, at Leeds, being then settled in the township of Aughton, in which township the said Mary Lambert, the mother of the three paupers and the said pauper children were also all settled derivatively from the said Edward Lambert. Mary Lambert, the mother of the paupers, went to reside at the township of Leeds with her said husband about seventeen years ago; and at the time of his death, in June 1855, she was irremovable from the said township under the provisions of the 9 & 10 Vict. c. 66, by reason of having resided with her said husband more than five years in the said township. Immediately after the death of her said husband, the said Mary Lambert applied to the overseers of the said township of Leeds for relief, and from that time, for nearly four years, orders were given by the board of guardians for out-of-door relief, such orders being for limited times respectively, and renewed from time to time until April 1859, and such relief was received by Mary Lambert for her children under the said orders. The children all resided with their mother the said Mary Lambert, in the said township of Leeds, who, with the out-door relief given to her, supported herself and her said children by her labour, and who attended properly as a mother to her said children, sending the eldest to the national school at Leeds when she could. In April 1859 the last order for out-door relief to the said Mary Lambert and her children expired. Being unable to maintain her said children the mother of the pauper again applied for relief to the board of guardians a few days after, and received an order for the admission of her children into the workhouse. Her three children were admitted into the workhouse of the said township of Leeds with the consent of their mother, but she was not informed that the result of separating her children from her would be their removal to Aughton, the township of their settlement, nor was her consent to such removal asked. The ultimate object on the part of the board of guardians of their being taken into the workhouse, was their removal to their place of settlement. The paupers were in the workhouse six or seven weeks before the order for their removal to Aughton, the township of their settlement was made by two magistrates for the borough of Leeds, on the 14th May 1859, which is the order now in question, and the recorder found that the order of removal was taken out by the overseers of Leeds, without fraud, unless the above facts necessarily of themselves constitute fraud. The mother of the paupers, being irremovable, still resides in the township of Leeds, and supports herself by her industry. The three children ordered to be removed to Aughton, the place of their settlement, are all under the age of seven years. It was contended, on the part of the said appa., first, that as the mother of the paupers might not lawfully be removed from the respa. township by reason of her *status* of irremovability, the warrant for the removal of her said three children could not lawfully be granted, and was contrary to the 3rd section of the 9 & 10 Vict. c. 66, and that the order was therefore bad; secondly, it was contended that under the 11 & 12 Vict. c. 111, reciting and amending the 9 & 10 Vict. c. 66, s. 1, the mother of the said paupers being irremovable by reason of the provisions of the said last-mentioned statute, the said paupers could not lawfully be removed from the said township of Leeds, from which their mother was irremovable, and that the order was therefore bad; and thirdly, it was contended that the said paupers being all three within the age of nature, were irremovable without the mother at common law, and that

as the mother could not by law be removed, the order for the removal of her infant children without her was therefore bad. If the court should be of opinion that, under these circumstances, the three pauper children were removable to the township of their settlement without their mother, then the order aforesaid shall stand confirmed. If the court should be of opinion that, under these circumstances, the three pauper children were irremovable to the township of their settlement without their mother, then the order of removal, and the order of sessions confirming the same to be quashed."

By sect. 3 of the 9 & 10 Vict. c. 66, it is enacted, that "no child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father, may not lawfully be removed from such parish;" and by sect. 1 of the 11 & 12 Vict. c. 111, it is enacted, "that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act."

*Moule* appeared in support of the order of sessions, and argued that, as the children were not, at the time of the order of removal, residing with their mother, but were actually in the workhouse, the 3rd section of the 9 & 10 Vict. does not apply, and that they were rightly removed to their place of settlement: (*Reg. v. Combe*, 25 L. J. 59, M.C.; 5 ELL & BL 892. [BLACKBURN, J.—The judges in that case put it upon the footing that the child had been abandoned. CROFTON, J.—What is the use of the 3rd section of the 9 & 10 Vict. c. 66, if this course is correct? It would, in fact, be to repeal that section.] They cannot effect a separation if the mother and children are together. Here the removal to the workhouse was with the consent of the mother. [COCKBURN, C.J.—It was a fraud upon her, and, I think a very scandalous one. She was not aware of the object of removing her children to the workhouse. The overseers took them there not to relieve them, but to send them away. She was kept in ignorance of their intention.] But there was a separation in fact. [COCKBURN, C.J.—But is this such a separation as we ought to countenance? The mother finds she cannot maintain her children, and the overseers say they will take them into the workhouse. She thinks that there she will be enabled to see them, and consents, and they take them away accordingly. If they had said to her, "We will take them in order to send them to their place of settlement," and she had then assented, that may have been within the case of *Reg. v. Combe*.] Neither assent or dissent is found in the case. [COCKBURN, C. J.—But she does not assent. If they took away the children without telling her they intended to send them away, it was a fraud upon her.] They were bound to take them to the workhouse. [BLACKBURN, J.—But as these children were within the age of nature, *Reg. v. Birmingham*, 5 Q.B. 210, shows that she could not consent to their separation. It is the right of the children.]

*Overend*, Q.C. and T. C. Foster were not called upon.

By the COURT.—The orders must be quashed.

*Orders quashed.*

Q. B.]

*Ex parte* MANSERGH—REG. v. JOHN PARKER AND GEORGE PARKER.

[C. CAS. R.]

Tuesday, June 11.

*Ex parte* MANSERGH.

*Court-martial—Removal of proceedings by certiorari. A certiorari to remove the proceedings of a court-martial upon a person in the military service of the Crown, sentencing him to be dismissed from her Majesty's service, will not be granted even on the ground of want of jurisdiction, as it concerns his military status only, which entirely depends upon the will of her Majesty.*

Lush (with whom was *Mundell*) moved for a rule to show cause why a *certiorari* should not issue to the Judge Advocate-General to bring up into this court the proceedings on the trial of Major Mansergh, by court-martial, at Calcutta, on the 2nd Aug. 1858. It appeared that Major Mansergh had been convicted upon a charge of writing a letter to his commanding officer in India, in offensive and insulting language, and had been sentenced by the court-martial to be dismissed from her Majesty's service for that offence. The object of the present application was to bring up the proceedings, with a view to their being quashed, upon the ground that the court-martial had no jurisdiction to try him, or to pass such a sentence. In 1858, Major Mansergh was a captain in the 6th Foot regiment of the line, serving in India, and on the 25th April 1858 an order came for his regiment to go into the interior of India to aid in crushing the rebellion. Major Mansergh went to Calcutta to make arrangements to go with his regiment, and on the 26th April reported himself to his commanding officer, Colonel Barnes, who was not with the regiment, but at Fort William, as being ready to proceed. Several messages passed, and Major Mansergh expressed himself anxious to go, but at length Colonel Barnes notified to him that he had been promoted to be major of the 15th Regiment of Foot, and that he must hand over his company to another officer. Major Mansergh had, in fact, been promoted on the 19th Feb. 1858, but no orders had been given to Colonel Barnes to notify the fact to him, and the effect of the notification was that his services in India were dispensed with, and he was under the necessity of coming home to England, where the 15th Foot regiment then was. Irritated by the conduct of his commanding officer Colonel Barnes, Major Mansergh wrote a letter to him on the 27th April, in which he used the offensive and insulting language complained of. On the 28th April he was arrested upon the charge, and in the month of August he was tried and convicted, and sentenced to be dismissed from the Queen's service. The learned counsel contended that the court-martial in India had no jurisdiction to try Major Mansergh, inasmuch as upon the 25th April he had ceased to be a captain of the 6th Regiment of Foot, and was no longer under the jurisdiction of the Commander-in-Chief in India, who had therefore no authority to direct his trial by a court-martial. The *War-office* admitted that on the 26th April his connection with the Indian army ceased, for, on his arrival in England last year, he wrote to have his expenses home allowed, and received an answer to the effect that, on the 26th April 1858, he had ceased to belong to the Indian establishment. The learned counsel then referred to the Mutiny Act and Articles of War, and contended that the Commander-in-Chief had no power to order a court-martial, except in the case of soldiers actually under his command at the time, and that the court-martial must consist of the superior officers of the accused. In the present case Major Mansergh was not under the command of Lord Clyde at the time, nor were the officers who formed the court-martial his superior officers. The warrant issued by her Majesty, under which Lord Clyde acted, and which gave him power to direct court-martials for the trial of officers and soldiers under his command, was also re-

ferred to. [BLACKBURN, J.—While he remained in India, Major Mansergh must be still considered as under the command of the commanding officer.] It is competent to the applicant to show by affidavits the defect of jurisdiction, as had been done in the case of *Reg. v. Bolton*, 1 Q. B. 66, and many other cases. The proceedings are now returned to England, and are in the possession of the Judge Advocate-General, and the applicant has a right to have the proceedings quashed, if they have been taken without jurisdiction. [COCKBURN, C.J.—The court has no power to do away with the sentence; they cannot command her Majesty to restore him to her service.] The court has power to quash these proceedings, and, when that is done, it must be presumed that her Majesty will do what is right. It is the function of this court to construe all Acts of Parliament which limit the jurisdiction of inferior tribunals, and it ought not to allow a judgment to stand which was pronounced without jurisdiction. In *Grant v. Gould*, 2 H. Bl. 69, the court granted a prohibition to prohibit a court-martial from being held on a person who was not a soldier; so also in *R. v. Morley*, 2 Burr. 1040. [COCKBURN, C.J.—In this case Major Mansergh was still a soldier, and subject to military law. In the case of *John Anderson*, 30 L. J. 129, Q.B., this court, in favour of liberty, had granted a writ of *habeas corpus* to Canada to bring up the body of a negro upon the authority cited, "that by the common law it lies to any part of the King's dominions; for the King ought to have an account why any of his subjects are imprisoned." (Bac. Abr. "Habeas Corpus" (B.) 2.) [BLACKBURN, J. said the applicant might have applied to the court at Calcutta for a prohibition.] The 17th section of the Mutiny Act directs the proceedings to be sent over to the Judge Advocate-General in London, and the court ought to direct a *certiorari* to issue to bring them up in order to their being quashed. [COCKBURN, C.J.—There is no precedent for the application, and a further difficulty arises from the fact that the applicant's civil status is not affected.] *Re Poe*, 5 B. & Ad. 681 was referred to.

COCKBURN, C.J.—During the discussion the court stated their objections to the application, in order to elicit all which could be said in its favour, or which could throw any light upon a matter of very considerable importance. The result is, that the court entertains no doubt that they ought not to interfere in favour of a person who is in the military service of the Crown. If the civil rights of a person were affected by the judgment of a military tribunal which had exceeded its jurisdiction, this court ought to protect those civil rights in a case where life, or liberty, or property might be concerned. But in the present case the military status of the applicant only was concerned, and that depended entirely upon the will and pleasure of the Crown. It is open to him to apply to her Majesty, who, with the advice of the Judge Advocate-General, might do him justice. His Lordship also thought that as this was a discretionary writ, the court ought not to grant it in this case. The application is, therefore, not well founded, and must be refused.

WIGHTMAN, CROMPTON and BLACKBURN, JJ. severally gave judgment to the same effect.

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, June 1.

(Before COCKBURN, C.J., POLLOCK, C.B., MARTIN, B., WILLES, J. and WILDE, B.)

REG. v. JOHN PARKER AND GEORGE PARKER.

*Confession—Inducement by accomplice—Presence of prosecutor and police.*

*A policeman and the prosecutor went into a room where the prisoners were, and the policeman charged*

one with stealing the prosecutor's hops, and the other with receiving them, knowing them to be stolen. A third person in company with the prisoners, who had also been jointly charged with the stealing, said to one of the prisoners, "Well, John, you had better tell Mr. W. (the prosecutor) the truth." Neither the prosecutor nor the policeman dissented or remarked upon this advice, whereupon the prisoner John made a statement in the nature of a confession:

*Held, that this statement was admissible in evidence, the circumstances not being such as to exclude it or protect as a privileged communication.*

John Parker and George Parker were tried before me at the last general quarter sessions for the county of Denbigh, on an indictment charging, in the first count, the prisoner John Parker with stealing a quantity of hops, the property of Peter Walker, his master, and in the second count, George Parker with receiving the same hops, knowing them to have been stolen.

It was proved at the trial that the prisoner John and a brother named William Parker were in the service of the prosecutor, who was a brewer in Wrexham, and the prisoner George kept a public-house in Wrexham. On the 6th March a policeman named Lamb went to George Parker's house, where John and William then were, and by permission of George searched the house. Lamb found some hops in two bags in a room up stairs. He came down stairs, and sent for Mr. Walker, the prosecutor, who went with Lamb into a parlour in George's house, in which were assembled John, William and George Parker. Lamb there charged William and John with stealing the hops, and George with receiving them, knowing them to be stolen. Upon hearing this William said, "Well, John, you had better tell Mr. Walker the truth." Neither the prosecutor nor the policeman dissented from or remarked upon William's advice, whereupon John said, "I will tell the truth: I did take some hops and I must risk it." Lamb then took the three brothers to the Bridewell, and on their way there John of his own accord said: "I'll tell you how I got them hops in the small bag. I was putting some in the cask, and there was more than I wanted, and I took them. I did not think it was any harm."

The three brothers were shortly afterwards taken before the magistrates, when William was discharged, but John and George were committed for trial.

At the trial it was objected by the counsel for the prisoners, upon the authority of *Reg. v. Sarah Taylor*, 8 Car. & P. 733 (a); *Reg. v. Spencer*, 7 Car. & P. 776 (b); and *Reg. v. Pountney*, 7 Car. & P. 302 (c),

(a) In *Reg. v. Sarah Taylor*'s case the facts were these:—Upon an indictment for setting fire to the house of R. Lyford, it appeared that on the morning of the fire the prisoner, who was the servant of the prosecutor, was sent for into the parlour, in which Mrs. Lyford and Mr. Winders were, and that Mr. Winders, who was not a constable, or in any office or authority, said to the prisoner, "You had better tell how you did it," and that thereupon she made an answer. Patterson, J. said, "It was the opinion of the judges that evidence of any confession is receivable unless there has been some inducement held out by some person in authority, and in this case I should have received the evidence of the statement made to Mr. Winders if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. Lyford, who was the wife of the prosecutor, and also the mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the Inducement must be taken as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that therefore the evidence is inadmissible."

(b) In *Reg. v. Spencer*, 7 C. & P. 776, it was proved that after the prisoner David Spencer was in custody he was told by a person who was neither prosecutor nor constable, nor had any authority of any kind, that it would be better for him to confess, and that upon that he made a statement. Parke, B.—"Mr. Carrington, if you wish me to receive evidence of this confession I will do so; but I ought to tell

and other cases which he then cited, that the confessions of John, being one continuing confession, ought not to be received in evidence, as being made after an inducement to confess. That, although the inducement was not made by a person in authority, yet being made in the presence and hearing of two persons in authority, namely the prosecutor (prisoner's master) and the policeman who had just charged the prisoner, they had by their silence acquiesced in and adopted the inducement, and, that as there was no other evidence of the stealing, John could not be convicted of stealing, and George must consequently be acquitted of receiving."

I directed the jury that the inducement or advice being that of a person made at the time when he himself was charged with a similar offence as the person induced to confess, must be looked upon merely as the inducement of an accomplice; and that there having been no threat or promise of favour with respect to the offence charged against the prisoner held out by any person concerned in apprehending, examining, or prosecuting him, or by the person to whom the subsequent confession was made, there was nothing to exclude or invalidate it.

The jury found John guilty of stealing and George of receiving, but I deferred sentencing them until the opinion of the Court of Criminal Appeal should have been taken upon the point raised by the prisoner's counsel.

If the confession was under the circumstances receivable the conviction to stand, otherwise the prisoners to be acquitted.

The prisoners are out on bail.

THOMAS HUGHES, Chairman.

No counsel appeared to argue on either side.

By the Court, Conviction affirmed.

Saturday, June 1.

(Before COCKBURN, C.J., POLLOCK, C.B., MARTIN B. and CROMPTON and WILLES, JJ.)

REG. v. WILLIAM SLEEP.

*Government stores—Mark of broad arrow—Possession without knowledge of the mark—9 § 10 Will. 3, c. 41, s. 2.*

*On an indictment charging the deft. under the 9 § 10 Will. 3, c. 41, s. 2, with being in possession of naval stores marked with the broad arrow, it is necessary for the prosecution to show affirmatively a possession by the deft. with knowledge that they were marked with the broad arrow.*

Case reserved for the opinion of this court:—

At the general quarter sessions of the peace for the borough of Plymouth, holden on the 4th April 1861, before Charles Saunders, Esq., the Recorder, William Sleep was tried and convicted on an indictment charging him upon the 2nd section of the statute

you that there is a difference of opinion among the judges whether a confession made to a person who has no authority after an inducement held out by that person is receivable. Some of the judges think it is receivable, and others think that it is not so. If I receive it I shall reserve the point for the consideration of the judges, and if they should think that I should not have received it the prisoner will be pardoned. If you have no other evidence I certainly will receive it, but if you have you will consider whether you had better press it.

(c) In *Reg. v. Pountney* the constable who took the prisoner Pountney into custody was called to prove a confession made by the prisoner to the landlord of the inn to which he was taken immediately after his apprehension. It appeared that the constable was present, and had the prisoner in his custody when the confession was procured by inducement held out by the innkeeper, and that the constable who was present did not caution the prisoner in any way. Alderson, B.—"This is a point well worthy of consideration. I have a very strong opinion against its admissibility, but as there are opinions which I am bound to respect opposed to my own, I think I had better receive the evidence, and if it should become necessary I will reserve the point for the consideration of the judges."

C. CAS. R.]

REG. v. WILLIAM SLEMP.

[C. CAS. R.]

9 & 10 Will. 3, c. 41, with having been found in possession of naval stores marked with the broad arrow.

The indictment was in the usual form.

Mr. Holdsworth and Mr. Cox were counsel for the Crown. Mr. Carter and Mr. Lopes were for the prisoner.

The prisoner was an ironmonger and brazier at Plymouth. On the 9th March he delivered upon the quay to the captain of a coasting vessel, the *Active*, a cask to be carried from Plymouth to Helston, in Cornwall. The cask was marked "R. P." in chalk; but on being asked for better directions, the prisoner gave to the captain a piece of paper on which was written "Richard Pascoe, Helston, Cornwall." Before the vessel sailed, two of the metropolitan police employed at the dockyard, Devonport, seized the cask, which, on being opened, was found to contain 324 lbs. weight of copper bolts in 150 pieces.

The cask was packed with straw and shavings, and each piece or bolt was packed with straw and shavings separately, so that the pieces could not rub together or make any noise. The whole of the metal had the appearance of Government stores, and of such stores as are not allowed to be sold in the dockyard. The greatest portion of it had been passed through the fire, and round bolts had been very nearly beaten square. On some of the pieces the mark of the broad arrow was visible in the state in which they were found; from others it was necessary to clear off the rust before it could be seen. A little over 50 lbs. weight of the copper was marked with the broad arrow.

After the seizure the prisoner was charged by the police with delivering a cask containing Government stores to the captain of the *Active*. The prisoner said: "Well, I did deliver a cask of metal, but I do not think it was marked." The prisoner was also told that the cask of metal was wrapped in shavings and straw, and he said, "Yes it is. I packed it myself. I do that to keep it from knocking the head of the cask out, as I have had complaints before, as some of the casks on their arrival had their heads out." After this the cask of metal was shown by the police to the prisoner, who was asked whether that was the cask he delivered to the captain. "Yes," he said, "I have no doubt of it." The prisoner was then shown the mark of the broad arrow on some of the pieces, and asked how he became possessed of the copper, and he said, "No, he did not know of whom he bought it." There was no evidence given to justify or account for the prisoner's possession of the copper.

Upon these facts Mr. Carter strenuously urged upon the jury that in order to convict the prisoner it must be shown for the prosecution not only that the prisoner had the marked copper in his possession, but that he also knew that the copper was marked with the broad arrow, citing a report of *Reg. Cohen*, 8 Cox. C. C. 41 and contending that this had not been done.

As prosecutions on the 2nd section of the statute 9 & 10 Will. 3, are very frequent and important at Plymouth, and as cases of culpable ignorance and culpable negligence are as much within the mischief guarded against by the Legislature as where a particular knowledge of the Queen's mark upon the stores can be proved in the possessors; and as it has been held that possession of marked stores, to be excused, should be without any fault or misbehaviour in the possessor,

The Recorder asked the jury:

First, whether the prisoner was found in possession of copper marked with the broad arrow? To which the foreman answered "Yes."

Secondly, whether the prisoner knew that the copper, or any part of it, was so marked? To which the jury said, "We have not sufficient evidence before us to show that he knew it."

Thirdly, whether the prisoner had reasonable means of knowing that it was so marked? To which they answered, "He had."

Upon this finding of the jury, a verdict of guilty

[MAG. CAS.]

was recorded; and the question is respectfully submitted to the Court for the Consideration of Crown Cases Reserved, whether the verdict is right.

Judgment was respited, and the prisoner discharged upon bail to appear at the next quarter sessions for the borough.

CHARLES SAUNDERS,

Recorder of Plymouth.

The following statutes were referred to during the argument:—

The 9 & 10 Will. 3, c. 41, s. 2, enacts that such person or persons in whose custody, possession, or keeping such goods or stores marked as aforesaid shall be found, not being employed as aforesaid, and such person or persons who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of the having such goods found in his custody, possession, or keeping, shall forfeit such goods and the sum of 200*l.*, together with the costs of prosecution, one moiety to his Majesty and the other moiety to the informer, to be recovered as aforesaid, and shall also suffer imprisonment until payment and performance of the same forfeiture, unless such person shall upon his trial produce a certificate under the hand of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, qualities, or weights of such goods as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession.

The 39 & 40 Geo. 3, c. 89, s. 1, enacts, that every person or persons (such person or persons not being a contractor or contractors, or employed as in the said recited Act of the ninth and tenth years of the reign of King William the Third is mentioned) who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered to any person or persons whomsoever, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping any stores of war or naval, ordnance, or victualling stores, or any goods whatsoever marked as in the said recited Acts are expressed, or any canvas marked either with a blue streak in the middle or with a blue streak in a serpentine form, or any bawp, otherwise called buntin, wrought with one or more streaks of raised tape (the said stores of war, naval, ordnance or victualling stores, or goods above mentioned, or any of them being in a raw or unconverted state, or being new or not more than one-third worn), and such person or persons who shall conceal such stores or goods, or any of them, marked as aforesaid, shall be deemed receivers of stolen goods, knowing them to have been stolen, and shall on being convicted thereof in due form of law, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of this realm, unless such person or persons shall upon his, her, or their trial produce a certificate under the hands of three or more of his Majesty's principal officers or commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities, or weights of such stores or goods as he, she, or they shall then be indicted for, and the occasion and reason of such stores or goods coming to his, her, or their hands or possession.

Sect. 2 enacts that such person or persons (not being a contractor or contractors, or employed as aforesaid) in whose custody, possession, or keeping any of the said stores called canvas, marked with a blue streak in a serpentine form, or bawp, otherwise called buntin, wrought as above mentioned, shall be found (such canvas or bawp, otherwise called buntin, not being charged to be new or not more than one-third worn), and all and every person or persons who shall be convicted of any offence contrary to so much of the said recited Act of the 9th and 10th years of the reign of King William the Third, as relates to the

making, or the having in possession, or concealing any of his Majesty's warlike or naval or ordnance stores marked as therein specified, shall besides forfeiting such stores and the sum of 200*l.*, together with costs of suit as therein mentioned, be corporally punished by pillory, whipping and imprisonment, or by any and either of the said ways and means, in such manner and for such space of time as to the judge or justices before whom such offender or offenders shall be convicted shall seem meet, anything in the said last-mentioned Act, or in the before-recited Acts of the 9th year of King George the First, and the 17th year of King George the Second, to the contrary thereof in anywise notwithstanding.

*Carter* for the prisoner.—The case depends on the 9 & 10 Will. 3, c. 41, s. 2, and the question is whether knowledge of the mark of the broad arrow being on the stores is an essential ingredient to the commission of the offence created by that enactment. It is submitted that it is, and that the finding of the jury on the second question entitles the prisoner to an acquittal, and that the finding on the third question is immaterial. [MARTIN, B.—Is the finding on the first question right? The case was found in the possession of the captain of the ship.] That point was raised before the jury, and ought to have been reserved also.

By the COURT.—We can only take the case as stated to us by the judge.

POLLOCK, C.B.—I own I doubt whether the practice of courts, of putting questions of fact to the jury in criminal cases, and then pronouncing a verdict of guilty or not guilty, instead of the jury, is right. It is a sort of special verdict.

CROMPTON, J.—The judge asks the court whether the verdict is right; that seems to involve everything.

COCKBURN, C.J.—The question really is, whether stores having been found in the prisoner's possession without his knowledge of their having the mark of the broad arrow upon them, any offence has been committed.

CROMPTON, J.—Whether guilty knowledge should be proved affirmatively on the part of the prosecution.

*Carter*.—On that question there are decisions in favour of the prisoner: (*Reg. v. Wilkott*, 3 Cox Crim. Cas. 281; and *Reg. v. Cohen*, 8 Cox Crim. Cas. 41.)

*Collier* (*Holdsforth* and *E. W. Cox* with him).—In a case at the Maidstone spring assizes 1861, Wightman, J. ruled that it was not necessary to show affirmatively that the prisoner had knowledge of the mark of the broad arrow being on the stores. [POLLOCK, C.B.—Suppose a man to bring a cask or a portmanteau, and to ask permission to leave it in a house, would the occupier be within the statute because they might happen to contain Government stores marked with the broad arrow? COCKBURN, C.J.—Or if a man were to bring a quantity of copper bolts for sale, and among them three or four marked with the broad arrow, would he be within the section?] *Prima facie* if a man has possession of any stores marked with the broad arrow, he is within the statute, and a case is made out which calls on the prisoner for an answer. [COCKBURN, C.J.—*Actus non facit reum, nisi mens sit rea*, is the foundation of all criminal justice. CROMPTON, J.—Suppose a man were to impose upon another by putting at the top a quantity of stores not marked, and in the middle some marked with the broad arrow, would the man imposed upon come within the Act? If not, that supposition seems to arise upon this finding.] In such a case they could not be said to be in his possession, as he was not aware of it. There will be the greatest possible difficulty in protecting the public stores if it is held that knowledge of the mark of the broad arrow must be proved. (2 East's P. C. c. 16, s. 153;

2 East's P. C. 153, 765; *Reg. v. Banks*, 1 Esp. 143; *Moreton v. Porter*, 29 L. J. 213, M. C.) The intent of the statute was to dispense with the ordinary proof of guilty knowledge in these cases, and to throw on a man having possession of stores marked with the broad arrow the onus of showing that he came by them lawfully.

COCKBURN, C.J.—I am of opinion, on the case as submitted to us, that we must say that the prisoner was wrongly convicted. I certainly feel bound to say that there was evidence upon which the jury might well and reasonably have been called upon to conclude that the prisoner knew that the copper bolts were marked with the broad arrow while in his possession. But the jury have not so found. And we must consider the case now as if it had been proved that the deft. was ignorant of that fact. It has been contended that the mere possession of stores marked with the broad arrow is sufficient to constitute the offence within the statute of 9 & 10 Will. 3, c. 41. I cannot adopt that view. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into that statute, as it was held in *Reg. v. Cohen*, where this conclusion of the law was stated by Hill, J. with his usual clearness and power. It is true that the statute says nothing about knowledge, but that must be imported into the statute. Many cases may be put in which persons might have possession of stores, and in which it is clear to demonstration that they might be ignorant of the fact of their having the mark of the broad arrow upon them, and yet the argument of the prosecution would lead to their being found guilty. I quite agree that the jury might well have come to another result in this case; but they did not, and they chose to act upon the prisoner's statement, and to find a sort of special verdict, to which we must apply the law, and say that the jury, having negatived the fact of knowledge, the case comes within the decision of *Reg. v. Cohen*. We must therefore come to the conclusion, that on the finding of the jury the prisoner ought not to have been convicted.

POLLOCK, C.B.—I agree with my Lord Chief Justice that on this finding of this jury there ought to be no judgment against the prisoner. There is abundant evidence on which the jury might have found him guilty generally, and I own that I think the jury ought to have done so. But the jury say in answer to the question, whether the prisoner knew that the copper or any part of it was marked with the broad arrow, "We have not sufficient evidence before us to show that he knew it." I entirely agree that knowledge is to a certain extent essential to the crime. I must again call attention to the practice of courts leaving certain questions of fact to a jury in a criminal case, and then entering the verdict according to the finding of the facts. The word "guilty" must, in my judgment, be pronounced by the jury, and upon no set of facts sent up to us, except in the shape of a special verdict, ought this court to act. In this case the finding of the jury makes it quite consistent with the prisoner's having an innocent possession of these stores.

MARTIN, B.—The question submitted to this court is, whether the verdict was right. I think it was wrong in two particulars. First, I think the goods were not found in the prisoner's possession at all. In my judgment the 9 & 10 Will. 3, c. 41, s. 2, means that the goods must be found in the possession of the individual on his trial. If he has parted with the possession of them, and they are found, as in this case, in the custody of the captain of a vessel, I do not think he could be found guilty upon this enactment. I should have directed the jury to acquit him. On the other ground of knowledge of the mark I have no doubt. There are three decisions upon the point: the first in *Foster's Crown Law*, 449; then *Reg. v. Wilkott*, 3 Cox Crim.

C. CAS. R.]

REG. v. DAVID DAVIES.

[C. CAS. R.]

Cas. 281; and *Reg. v. Cohen*, all in favour of the view we adopt. I entirely concur in the judgment of Hill, J. in *Reg. v. Cohen*.

CROMPTON, J.—I am of the same opinion. I also think the point taken by my brother Martin that the goods must be found in the possession of the individual on his trial, a very serious one. Here there was plenty of evidence that the copper had once been in the possession of the prisoner, but still to constitute the offence they must be found while in his possession. It is not necessary to give any opinion whether the possession of a bailee, like a ship's captain, is the possession of the prisoner. That case is not before us; the other point of knowledge is the one that was really reserved for our opinion. It is sufficient for me to say that I share in the doubt of my brother Martin on the first point. On the other point I agree with the rest of the court. The authorities are strong in support of our view, and I think it is right in principle. The findings are consistent with the prisoner's innocence. The only difficulty in the case arises on the second finding. The statute seems to suppose that a man should have the means of judging from the mark of the broad arrow being upon the stores, that he ought to make proper inquiries, and not take it without so doing. In this case there is nothing inconsistent with the prisoner's having been imposed upon by another party. This case falls within the principle of the case decided in the Court of Q. B., *Hearn v. Garton*, 28 L. J. 216, M. C., where guilty knowledge was held to be necessary to constitute the offence of sending dangerous goods for carriage by railway.

WILLES, J.—I am of the same opinion. The jury have not found, either that the prisoner knew that these goods were Government stores, or that he wilfully shut his eyes to the fact. I own I regret the opinion that has been expressed on another part of the case, viz., whether these stores were found in the possession of the prisoner. The court is not called upon to express any opinion on that point, and I am unable to concur, as at present advised, in that opinion. Possession means, not merely manual possession, but a property in the thing, though in the custody of another person. That definition applies to the construction of this statute, and I do not think that a thing has ceased to be in the possession of A. because he has taken his hands off it, and those of B. may happen to be upon it. However, I desire not to be understood as giving that as my final opinion upon the point. My judgment proceeds on the other point, and I agree with the rest of the court.

COCKBURN, C. J.—I certainly understood that the question whether the possession was sufficiently proved to be in the prisoner in this case was not part of the matter submitted or to be adjudicated upon by us. Least I should be considered as sharing in the opinion of my brother Martin, I must say that I hold a diametrically opposite opinion upon it. *Conviction quashed.*

Saturday, April 27.

(Before POLLOCK, C. B., WILLIAMS, WILLES, BLACKBURN, JJ., and WILDE, B.)

REG. v. DAVID DAVIES.

*Assault—County Court bailiff in execution of duty—Warrant—Evidence of authority.*

*Upon an indictment for an assault upon a County Court bailiff in the execution of his duty, the production of a warrant of the County Court judge for the apprehension of the prisoner, is a sufficient justification of the act of the bailiff in apprehending the prisoner, without proof of the previous proceedings authorising the warrant, even though the judgment be obtained in one county and the warrant sent for execution into a different county.*  
Williams, J. dubitante.

Case reserved by Byles, J.

At the last assizes for the county of Carmarthen David Davies was indicted for an assault on James Evans, acting in the execution of his office as sub-bailiff of the County Court of Lampeter.

The violence used by the deft. did not appear to exceed what was necessary to prevent his apprehension under the warrant annexed.

It was objected by the prisoner's counsel, citing 9 & 10 Vict. c. 95, ss. 99, 104 and 114, and 19 & 20 Vict. c. 108, ss. 48 and 104, that no neglect or refusal to pay appears on the face of the warrant; and that the previous proceedings authorising the warrant were not proved.

I reserved these objections, and any other objections apparent on the face of the warrant, for the consideration of the Court of Criminal Appeal.

The prisoner was convicted of a common assault subject to the foregoing objections, and was discharged on bail. J. B. BYLES.

The documents proved at the trial were in the following form:—

"55, Warrant of commitment.

"In the County Court of Carmarthenshire, holden at Llandovery.

"No. of plaint, M. 145.

"No. of judgment-summons, No. 3.

"No. of warrant, No. 12.

"Between Rees Augustus, plt., and David Davies, deft.

"To the high bailiff and others, the bailiffs of the said court, and all peace officers within the jurisdiction of the said court, and to the governor or keeper of the gaol of Carmarthenshire at Carmarthen.

"Whereas the plt. obtained a judgment against the deft. in the County Court of Carmarthenshire, holden at Llandovery, on the 14th June 1859, for the payment of 4l. 13s. 6d. for debt and costs, upon which judgment and the subsequent process issued thereon, the sum of 5l. 3s. 3d. was at the date of the issuing of the summons hereinafter mentioned and still is due. And whereas a summons was at the instance of the plt. duly issued out of this court, by which the deft. was required to appear at this court on the 15th June 1860, to answer such questions as might be put to him pursuant to sect. 98 of the statute 9 & 10 Vict. c. 95, in relation to such debt, which summons was proved to this court to have been personally and duly served on the deft. And whereas this court, at the hearing of the said summons, ordered that the deft. should be committed to prison for twenty-five days for not having satisfied the said judgment and costs, having had sufficient means and ability so to do. These are therefore to require you the said high bailiff, bailiffs and others to take the deft., and to deliver him to the governor of the county gaol at Carmarthen, and you the said governor to receive the deft., and him safely keep in the said prison for twenty-five days from the arrest under this warrant, or until he shall be sooner discharged by due course of law.

"Dated 25th June 1860.

"THOS. JONES, Registrar of the Court.

Amount of judgment or order .....	£4	13	6
Paid into court.....	0	0	0

Amount remaining due .....	4	13	6
Costs of warrant against the goods .....	0	7	6
Costs of judgment-summons and its hearing .....	0	12	3
Poundage for issuing this warrant .....	0	9	0

Total..... £6 2 3

"This warrant remains in force one year from the date thereof. This form to be applicable to all judgments recovered at the hearing, or by default or by consent, and to all orders within the jurisdiction of the court."



C. CAS. R.]

REG. v. JOSHUA HASSALL.

[C. CAS. R.]

[Indorsed.]

M. 145.

N. 3.

Rees Augustus,  
Llandovery,  
Innkeeper,{ v. } David Davies,  
Penswen Llanyorwys,  
Shopkeeper.

"108. High Bailiff's Warrant to Registrar of Foreign Court.

"No. of plaint, M. 145.

N. 3.

"No. of warrant, N. 12.

"In the County Court of Carmarthenshire, holden at Llandovery.

"Between Rees Augustus, plt., and David Davies, deft.

"Whereas the warrant of commitment hereto annexed has been issued out of this court against the body of the above-named David Davies. And whereas the said David Davies resides out of the ordinary jurisdiction of this court, and is believed to be within the jurisdiction of the County Court of Cardiganshire, holden at Lampeter, of which you are the registrar. These are therefore to require you to cause the said warrant to be executed within the ordinary jurisdiction of the said last-mentioned County Court.

"Dated 25th June, 1860.

"RICHARD GARDNOR, High Bailiff of the County Court of Carmarthenshire, holden at Llandovery.

"To the Registrar of the County Court of Cardiganshire, holden at Lampeter."

*Giffard* for the prisoner.—The first objection is now abandoned, as the warrant produced by the officer follows the form given in the schedule to the County Court Act, 19 & 20 Vict. c. 108. It is contended, however, that the previous proceedings authorising the issuing of the warrant should have been proved. This was what is termed a foreign judgment, that is, a judgment obtained in the Cardiganshire County Court sent for execution to Carmarthenshire, and it was incumbent to show the power to make such an order. Assuming that a good warrant to arrest would be a sufficient justification in an action of trespass against the officer acting under it (*Andrews v. Morris*, 1 Q. B. 1), yet he is liable for executing a warrant which is objectionable and void (*Carratt v. Morley*, 1 Q. B. 18); and it is further necessary to show that the warrant is authorised by law: (1b.) More especially is it necessary to show the authority to issue the warrant where the personal liberty of the subject is involved. In *Rex v. Tooley*, 2 Lord Rayn. 1296, where a person assisting a peace officer to apprehend a woman was slain by one of the prisoners, it was held by a majority of the judges that it was manslaughter only if the woman was unlawfully imprisoned. This case is said, per Alderson, B., in *Warner's* case, 1 Moo. 385, to have been overruled. In *Warner's* case interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt orally to apprehend, was held not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. Foster, J., in his treatise on Crown Law, lays it down that *Tooley's* case has carried the law in favour of private persons officially interposing in cases of illegal arrest further than sound reason and policy will warrant. But *Carratt v. Morley* is conclusive to this extent, that an arrest must be taken to be unlawful if the authority for issuing the warrant is not shown, notwithstanding that an officer acting under it may be protected in a civil action on the ground that if he neglects to execute the writ he is liable to an action. Assuming the arrest to be unlawful, is there any authority for saying that a man may not set the unlawful apprehension of his person?

[BLACKBURN, J.—In *Mackally's* case, 9 Co. 65, it was held to be murder to kill an officer acting under process, though erroneous.] That doctrine is inconsistent with the authorities. [WILLIAMS, J.—*Morrell v. Martin*, 4 Sc. N. R. 430, seems at variance with *Carratt v. Morley*. There, in an action of replevin, a plea of justification under the Highway Act, setting out a warrant of justices, was held bad for not showing that the justices had jurisdiction over the matter. The case was elaborately argued, and Tindal, C. J. says, at p. 316: "Upon these grounds it appears to us that, where there is a limited authority, and a limited authority only is given, if the party to whom such authority is given extends the exercise of his jurisdiction to objects not within it, his warrant will be no protection to the officer who acts under it; and that by necessary consequence, where the officer justifies under a warrant so granted by a court of limited jurisdiction, he must show that the warrant was granted in a case which fell within such limited jurisdiction." In this case there was nothing to show jurisdiction to issue the warrant at all. In *Hawk. P.C. bk. 1, c. 31, s. 61*, it is said: "It seems to be agreed that whoever kills a sheriff or any of his officers in the lawful execution of a civil process, as on arresting a person on a capias, &c. is guilty of murder. Neither is it any excuse to such a person that the process was erroneous, for it is not void by being so, &c. Yet the killing of an officer in some cases will be manslaughter only, as when the warrant gives no authority to arrest the party, or when a good warrant is executed in an unlawful manner, &c. No doubt, where the process is erroneous only, it must be set aside before an action can be brought; but there is no case which shows that an arrest under circumstances like the present is lawful. [BLACKBURN, J.—In *Rogers's* case, *Foster's Crown Law*, 311, c. 8, s. 8, where, having said that in cases of arrests upon process by writ or warrant, if the officer give notice of his authority, and resistance is made and he is killed, it will be murder, if the notice was true and the process legal. Foster, J. goes on to say that he would not be understood to mean more than, provided the process be not defective in the frame of it and issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case. There may have been irregularity previous to the issuing; but if the officer is killed it will be murder, for he must pay obedience to it. It is sufficient upon an indictment for this murder to produce the writ and warrant without showing the judgment or decree.]

No counsel appeared for the prosecution.

*Cour. adv. eul.*

June 1.—POLLOCK, C.B.—We are of opinion that the conviction ought to be affirmed. The process of the County Court was as much a justification to the officer by virtue of the County Court Act as a writ of execution out of a Superior Court to the sheriff; and it is clear that the production of such a writ would be sufficient in a proceeding of this description for assailing the sheriff or his bailiff, without proof of the judgment: (*Foster's Crown Law*, 311.) My Brother Williams entertains some doubt, upon the ground that the statute seems to be in terms confined to civil cases; but, upon consideration, we think that the true construction of it is that above stated.

— Conviction affirmed.

Saturday, June 1.

(Before COCKBURN, C.J., POLLOCK, C.B., GROMPTON, J., WILLES, J., and WILDE, B.)

REG. v. JOSHUA HASSALL.

*Fraudulent debenture—Treasurer of a money-club—Larceny—20 & 21 Vict. c. 54, s. 4.*

A treasurer of a money-club received small weekly payments from each member, and had authority, with the secretary's consent, to lend the club money.

to members. There was a periodical division of the funds and profits among the members:

*Held, that the treasurer could not be indicted as a fraudulent bailee under the 4th section of 20 & 21 Vict. c. 54, for larceny of moneys paid in by a member.*

Case reserved for the opinion of this court.

The prisoner was tried before me at the intermediate sessions for the West Riding of Yorkshire, held at Sheffield on the 1st March 1861, upon an indictment under sect. 4 of the 20 & 21 Vict. c. 54 (the Bailee Act), which charged him with stealing the sum of 2*l.* 1*s.* 1*d.*, the property of John Farrell.

A second count charged the offence as a simple larceny.

It was proved that the prisoner and a man named Richard Shaw agreed early in Jan. 1860, to start a money-club. They succeeded in getting together a number of members, of whom Farrell, the prosecutor, was one, and the club, which was not an enrolled friendly society, continued through the year 1860 to hold weekly meetings at a public-house in Sheffield, called the Travellers' Rest.

Shaw was secretary, the prisoner was treasurer, and they, together with one Bellhouse, formed the committee of management.

The rules of the club were as follow:—"Each member had to deposit weekly a sum of not less than threepence halfpenny, nor more than threepence halfpenny. Members omitting any weekly payments to be subject to a small fine. The odd halfpence to be expended—1st, on a feast at the end of the year; and, 2ndly, in payment of the services of Shaw, the prisoner, and Bellhouse."

The prisoner alone had the custody of all moneys paid in by members, and the prisoner had authority to lend out of the club money in his hands, provided he first obtained the secretary's written consent to the loan, sums not exceeding 1*l.*, at the rate of 5 per cent. interest, and several sums were thus lent out to members within the year, and repaid with interest. The rule of the club was, that such loans could only be made to members.

On the evening of the 24th April 1860 the club money, which amounted to 39*l.* 13*s.* 1*d.*, was to have been distributed amongst the members in this way. Each member was to receive back the exact amount he had paid in, less the odd halfpence and the amount of his fines, if any. He was also to receive, in addition, to the sum he had deposited, an equal share of the total amount arising from fines and from interest on loans.

The sum of 2*l.* 14*s.* 1*d.* laid in the indictment was the exact amount paid by John Farrell, the prosecutor, into the prisoner's hands, no part of it being made up of interest or fines. On the morning of the 24th Dec., the day when the distribution of the club money was to have taken place, the prisoner told Shaw that his house had been broken and robbed of the money belonging to the club, and of some of his own. The prisoner attended the club the same evening, and said that, if time was given him, he could pay 20*s.* in the pound.

The result of an examination of the prisoner's house was, that he was given into custody on a charge of stealing the club money.

On the above facts it was contended by the prisoner's counsel, first, that the prisoner was not a bailee of the sum of 2*l.* 14*s.* 1*d.*, within the meaning of the 20 & 21 Vict. c. 54, as this money had been paid into his hands by the prosecutor in small sums, in silver and copper coins, which particular coins he was not bound to return; secondly, that the prisoner was, together with the other members of the committee, trustee of the funds of the club, and could not be indicted under sect. 4; thirdly, that the fact showed a partnership existing between the prosecutor and the prisoner, who could not therefore be convicted.

I overruled the objections, and left the case to the jury, who found the prisoner guilty, whereupon he was sentenced to twelve months' imprisonment with hard labour, until the opinion of the Court for the Consideration of Crown Cases Reserved could be taken, whether on the above facts the prisoner was rightly convicted.

WILSON OVEREND, Chairman.

*Campbell Foster* for the prisoner.—It is submitted that the prisoner was not a bailee of the money mentioned in the indictment within the meaning of the 20 & 21 Vict. c. 54, s. 4, which enacts that, "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny." The word "bailee" in that section must be construed according to its known legal sense; and so construing it, the prisoner was not a depositary of the money, which seems to come nearest to the facts of this case of any of the kinds of bailment pointed out in *Coggs v. Bernard*, 1 Sm. L. C. 82. The prisoner was not bound to return the particular coins deposited by the members of the club, but his duties were rather like those of a banker than of any other person. A banker is not a bailee of the moneys deposited by customers, but is a debtor to his customers in respect of their deposits: (*Pott v. Clegg*, 16 M. & W. 321.) [CROMPTON, J.—If anything, the prisoner was a trustee of these moneys under sect. 1 of the statute. Besides these very moneys may have been lent out to members.] The interpretation clause, sect. 17, shows that the word "trustee" means a trustee on some express trust created by deed, will, or written instrument. This is not like *Rea v. Howell*, 7 C. & P. 325, where the owner of a boat was employed to carry wooden staves from a vessel to the shore in his boat, and it was held to be a bailment. [WILLES, J.—Unless a man is entrusted with a specific thing to be returned, how can he steal it? In this case the prisoner has not stolen the money, he has stolen the debt. WILDE, B.—If the argument is correct that the prisoner was a bailee, he would be equally criminal whether he was ready to pay with other money or not.] In *Reg. v. Hoare*, 1 Fos. & Fin. 647, it was held, that a person employed to collect debts for another did not thereby become a bailee of the money, not being bound to hand over the particular sum which he had received. *Reg. v. Garrett*, 2 Fos. & Fin. 14, is also an authority to the same effect.

*L. Hamway* for the prosecution.—It is admitted that the prisoner was not a trustee within the meaning of the statute, and that, unless he can be regarded as a bailee under the 4th section, the conviction cannot be sustained. In embezzlement, a man may be convicted of stealing something not specific. [WILLES, J.—I have heard Lord Wensleydale say more than once, that a servant was bound to hand over to his master the particular money he received on his account.] That cannot be true in all instances, as where a man is travelling for different houses. There was a bailment of this money to the prisoner within the 5th head, *locatio operis faciendi*. There was something to be done with respect to it, viz., the prisoner was to lend it out, &c., and he was to receive a salary for his duties. It is not necessary, in all cases, that the specific thing should be returned. In some cases the thing may be altered by additions, or the reverse, or its nature may be changed, as in the case of cloth converted into a coat. Practically one sovereign is the same thing as another. The word "property" in the statute is to include any real or personal property into which the property which may have been the original subject of a trust may have been converted or exchanged, and the proceeds thereof, and anything acquired by such proceeds.

CROMPTON, C. J.—We are all agreed that it is

abundantly clear that this conviction cannot be sustained. The indictment is framed upon the 4th section of the 20 & 21 Vict. c. 54, which applies to baillees; and it is only necessary to say that the word bailment must be interpreted according to its ordinary legal acceptation. Understood in that sense, a bailment relates to something in the hands of the bailee which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under an obligation to return it in precisely the identical coins which he originally received. The present case, therefore, is not within the statute.

The rest of the Court concurring,

*Conviction quashed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLEY, Esqrs., Barristers-at-Law.

Wednesday, June 12.

EDMUND SMITH AND THE DISTRICT OF TODMORDEN, re LOCAL GOVERNMENT ACT 1858.

*Local Government Act 1858—Place within known boundary—Petition—Order—Extending limits—Order on appeal—Time for moving for certiorari.*

*One-tenth of the inhabitants of a place having no known or defined boundary, presented a petition to the Secretary of State under the provision of the Local Government Act 1858, defining the boundary which they desired to form into a district. The Secretary of State made an order omitting certain property, and including certain other property not mentioned in the petition, and afterwards, on the 16th Feb., the Act was adopted. Appeals were made under the 18th section of the Act, and on the 29th April the Secretary made his order, declaring that the Act should come into operation in the district defined by him at the expiration of one month from that date. The 20th section of the Act provides, that whenever any resolution has been passed in any place, the Act shall, at the expiration of two months from the date of the passing of such resolution, or in the event of an appeal, at such time as may be mentioned in the order made on such appeal, have the force of law within such place. On the 3rd June the applicant, owner of property not included in the petition, but included in the extended boundaries, obtained a rule for a certiorari to bring up the order of the Secretary of State, that the same might be quashed, on the ground that there was no jurisdiction to make such order:*

*Held, per Wightman and Blackburn, JJ., that the month having expired since the date of the Secretary of State's order of the 29th April, the application was too late.*

*Cockburn, C. J. dissents.*

This was a rule calling upon the Secretary of State for the Home Department to show cause why a writ of certiorari should not issue to bring up an order of the said secretary, bearing date the 15th Jan. 1861, purporting to settle the boundaries of the district of Todmorden, in the counties of Lancaster and York, for the purposes of the Local Government Act 1858, with a view that such order should be quashed, on the ground that the said Secretary of State had no power to extend the boundaries beyond the limits mentioned and defined in the petition and plan, signed by one-tenth of the ratepayers resident within such boundaries, as required by the 16th section of the Local Government Act 1858 (21 & 22 Vict. c. 98).

It appeared that Todmorden is a village extending into parts of four townships, and has no known or defined boundary. Certain inhabitants wishing to put the village under the operation of the Local Govern-

ment Act 1858, got up a petition, defining accurately by words and by a plan the extent and limits of the boundaries which they prayed to be formed into a district. The petition was signed by one-tenth of the ratepayers within that district, as required by the 16th section of the Act.

The Secretary of State, after having sent down Mr. Ranger, the inspector appointed for that purpose, made an order omitting certain properties prayed by the petition, but included and brought in to the district certain other properties, viz., a corn-mill at Inchfield worth 150*l.* per annum, belonging to Mr. Smith, who had obtained this rule; a cotton-mill at Square; another cotton-mill at Barewise, and a whole village of thirty-nine cottages at Square—altogether rated at more than 600*l.* per annum, none of which properties were included in the petition, nor asked to form any part of the district, and from the district of which properties neither one-tenth nor any part of the ratepayers were petitioners, and it did not appear that when these properties had been brought into the boundary the persons who signed the petition would reach one-tenth in number of the rate-payers within the boundary, including the properties in question. On the 16th Feb., at a meeting convened for that purpose, the Act was adopted. An appeal was then made by Mr. Smith to the Home Secretary, under the 18th section; but the Secretary finding he could not legally set aside his own order, however irregular, the appeal on that ground was withdrawn, and ultimately the appeals were dismissed on the 29th April last, when the Secretary of State ordered that the Act should come into operation in the said district one month after that date. Under these circumstances, Mr. Smith had obtained the present rule.

*Manisty, Q.C. (Wesby with him) now shewed cause.*—When the steps are adopted laid down by the Act, as necessary to put the Secretary of State in motion, it is for him to define the boundaries, and then it is for the inhabitants to adopt them. The affidavits in answer show that the petition was signed by one-fifth of the ratepayers residing within the boundaries of the Todmorden district as settled by the Home Secretary. The 17th section of the Act gives a power of appeal by petition against the resolution to adopt the Act, but no such appeal has here been had. [COCKBURN, C.J.]—I cannot help thinking that you do not satisfy the requirements of the Act, which says the assent of one-tenth within the boundary shall be necessary, by taking the assent of some persons beyond that boundary; the Secretary may limit, that is to say, give something less, but can he give more without interfering with that provision? WIGHTMAN, J.—Besides, as in the present case, a man beyond the boundary finds himself within it without having been consulted.] The 18th section of the Act makes the order of the Secretary of State binding. The order of the Secretary of State as the appeal, dated 29th April 1861, says that the Local Government Act 1858 shall, within one month from the date thereof, have the force of law within such district. And the 20th section says, that in the event of an appeal the Act shall, at such time as may be mentioned in the order made on such appeal, have the force of a law within such place. The applicant must stand or fall by his appeal.

*Wheeler, Serjt. (Aspinall with him) was called on in support.*—The order is wholly and radically bad; it is made without jurisdiction. [COCKBURN, C.J.]—Your application for the rule had reference to the 18th and 19th sections; but then we come to the 20th, how do you get over that? The order has been made, and the time mentioned in it has expired.] The conditions precedent have not been properly complied with, therefore the later proceedings are ineffectual and void. Jurisdiction cannot be acquired or exceeded; it must be shown on the face of the proceedings, and if

Q. B.]

PURNELL v. THE WOLVERHAMPTON WATERWORKS COMPANY.

[C. B.]

the facts be wrongly set forth they may be rectified by affidavit. The Secretary of State had power to fix a boundary co-extensive with, or of less extent than that named in the petition, but he had no power to go beyond. The 16th section must be read with reference to the other parts of the Act, and the preliminary order being defective, the subsequent order is of no avail.

WIGHTMAN, J.—I am of opinion that this rule ought to be discharged. It may be that the Secretary of State has been somewhat irregular in settling the boundary of this district, although the Act gives him power either to dismiss the petition or make an order as to the boundaries of the place, and it is a question whether he might not, under that authority, do what he has here done. But the vote adopting the Act was either good or bad. Then the 20th section says, whenever any resolution adopting this Act has been passed in any place, this Act shall, at the expiration of two months from the date of the passing of such resolution, or at such time as may be mentioned in the order made on appeal, have the force of law within such place; therefore, when the vote adopting the Act is unappealed against, it becomes law after two months. But here the motion was not made for more than a month after the dismissal of the appeal; the order of the Secretary was made on the 29th April, in which he declared that the Act should come into operation in the district at the expiration of one month from that date, and the motion for this rule was made on the 3rd June. Looking at that section, it seems to me that the time has passed, and that now it is too late to question this order.

BLACKBURN, J.—I am of the same opinion. The 16th section says that any place not having a known or defined boundary, may petition one of her Majesty's Secretaries of State to settle its boundary; that the petition shall state the proposed boundaries of the place, and shall be signed by one-tenth of the ratepayers resident within such boundaries. Now that seems to imply that the petitioners are to point out the boundaries, but then it is for the Secretary of State to settle them. Then in the fifth paragraph of the section, the Secretary of State may "make orders as to the boundaries;" that would seem that he might alter them. Here the objection is, that he has increased the limit of the boundary; on that I give no judgment either way. I am not convinced that he has or has not such power; but the present application is out of time. Whilst the order stood which mentioned this place with a defined boundary, the ratepayers might proceed to adopt the Act, and it seems that on the 16th Feb. a meeting was duly convened for that purpose, at which a resolution was carried to that effect; then an appeal was entered, and on the 29th April the Secretary of State made his final order, directing the Act to operate at the expiration of one month from that date. The 20th section says that after two months from the date of the resolution, or in the event of an appeal then at such time as may be mentioned in the order made on that appeal, the Act shall have the force of law in such place. Now the motion for this rule was made on the 3rd June, and therefore I think that, as the appeal was dismissed on the 29th April, and an order then made directing the Act to come into operation at the expiration of one month from that date, the time had passed, and the Act had the force of law in the district. It is therefore now too late to come for a *certiorari*, and on that ground alone I decide.

COCKBURN, C.J.—I entertain very serious doubts whether it is competent for a Secretary of State to extend the area of a proposed district beyond the boundaries mentioned in the petition; but although it is unnecessary to decide that, I am desirous that that question should be kept quite open for our considera-

tion if the question should arise again, and the matter is brought before us in time. On the other question I can only say that my mind is not satisfied that the provisions referred to meet the present case. I think there is considerable doubt whether they apply, and whether the whole proceedings do not fail in consequence of the illegality in fixing the boundaries. I however merely desire to express my doubts, and will not delay the decision of the case; neither do I desire that any doubt I may entertain should prevent this rule being discharged.

Croker, attorney for Mr. Smith.

Rule discharged.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYO, Esqrs.,  
Barristers-at-Law.

Monday, May 27.

PURNELL v. THE WOLVERHAMPTON WATERWORKS COMPANY.

*Wolverhampton Waterworks—Express enactment in private Act not repealed by public Act.*

In 1845 an Act of Parliament (8 & 9 Vict. c. 135) was passed for supplying the town of Wolverhampton with water, no mention being made in the Act as to the water being laid on at high pressure. In 1855 a new Act (18 & 19 Vict. c. 151) was passed for the same purpose, which by its first section enacted that the Waterworks Clauses Act 1847, should be incorporated in it, sect. 43 of which Act enacted that all the pipes to which fire-plugs should be fixed should be kept at high pressure, the company being liable to a penalty of 10*l.* for non-performance. By sect. 50, however, of the new Act, it was provided that the water to be supplied from any pipe of the company need not be laid on at high pressure.

In 1856 the two companies became amalgamated, by an Act entitled the Wolverhampton Waterworks Transfer Act, in which the Waterworks Clauses Act was incorporated.

A fire having taken place, and there not being a sufficient supply of water, the complainant, on behalf of the corporation, obtained a summons against the company, and, upon the hearing, the magistrate decided that the company were not bound to keep the water on at high pressure, as the General Act was expressly varied and repealed by sect. 40 of the Wolverhampton New Waterworks Act, and the Court

Held, upon an appeal from that decision, that the magistrate was right.

Case stated by the stipendiary magistrate of the borough of Wolverhampton.

The complainant alleged that after the making and passing of the Waterworks Clauses Consolidation Act 1847, and the Wolverhampton New Waterworks Act 1855, the defendants, and at the time of committing the offence thereafter mentioned, had certain main and other pipes belonging to them in the town and parish of Wolverhampton, in the said county of Stafford, within the limits of the last-mentioned Act, for the supply of water according to the provisions of the said Acts, and had certain fire-plugs fixed thereto for the supply of water for extinguishing fire, according to the provisions of the said Acts; yet that the defendants, on the 10th Oct. 1860, did not keep charged with water the said pipes so belonging unto them, and to which fire-plugs were so fixed, in the town and parish aforesaid, within the limits aforesaid, but then and there wholly neglected so to do, though not prevented from so doing by frost, unusual drought, or unavoidable cause or accident, or during necessary repairs.

A penalty of 10*l.* attaches to the offence.

The complainant relied upon the provisions of the

C. B.]

TAYLOR v. HUMPHREYS.

[C. B.]

following statutes, 8 & 9 Vict. c. 135 (the Wolverhampton Waterworks Act) ss. 53, 54, 55, 68 and 69. Also the Waterworks Clauses Consolidation Act 1847 (10 Vict. c. 17), particularly ss. 1, 35, 42, 43, and 85. Also the Wolverhampton New Waterworks Act 1855 (18 & 19 Vict. c. 151), the first section of which enacts that "The Company's Clauses Consolidation Act 1845, the Lands Clauses Consolidation Act 1845, and the Waterworks Clauses Act 1847 shall, except as herein otherwise provided, be incorporated with and form part of this Act." Also the Wolverhampton Waterworks Transfer Act 1856 (19 & 20 Vict. c. 57), particularly ss. 3, 6, 16 and 17.

The complainant contended that as to one of the deft.'s pipes, to which there was a fire-plug fixed, namely, the one in Temple-street, if it was supplied with water, yet that the water was not laid on under a sufficient degree of pressure to satisfy the requirements of sections 35 & 42 of 10 Vict. c. 17; and he also endeavoured to prove that as to another pipe to which a fire-plug was fixed, namely, the one in Church-street, there was no water in it on the night in question, until the service-cock in Ablow-street was turned, and the pipes thus filled and put under high pressure. The complainant also contended that by the Wolverhampton Waterworks Transfer Act 1856, whereby the works of the Wolverhampton Waterworks Company in the last mentioned Act, called "the old company," were transferred to the Wolverhampton New Waterworks Company, and which last-mentioned Act, also by sect. 3, incorporated the Waterworks Clauses Act 1847 therewith, without restriction as applicable to both undertakings, which, according to their preamble, were to be worked as one undertaking. The new company had become liable to all the duties and obligations to which the old company were subject, consequently, that sect. 40 of the New Waterworks Companies' Act was in effect repealed.

The defts. contended that they were not subject to the provisions of sect. 42 of the 10 Vict. c. 17, because in that respect such last mentioned Act was expressly varied and accepted by sect. 40 of the Wolverhampton New Waterworks Act 1855 (13 & 14 Vict. c. 74); and therefore that they were not required to keep the water under the pressure mentioned in sect. 35 of the 10 Vict. c. 17. They also contended that the Wolverhampton Waterworks Act 1845 did not apply; and that, if it did, it did not impose any penalty for the offence charged, and the same having passed before the Waterworks Clauses Act 1847, there was nothing in the latter Act which could form part of, or be incorporated with, the former Act; that the expression "special Act" in the Waterworks Clauses Act 1847, was by sect. 2 of that Act construed to mean any Act which should thereafter be passed authorising the construction of the waterworks, and inasmuch as the Wolverhampton Transfer Act 1856 is not a special Act for the construction of waterworks, there was nothing in that Act to render the defts. liable to a penalty. They also argued that, if they kept their mains and pipes constantly charged with water, they must of necessity keep the water on at high pressure, which, as they contended, was not required of them. It is admitted that the works of the old company have become entirely vested in the new company.

The magistrate found, amongst other things, that the 40th section of the Wolverhampton New Waterworks Act 1855 was not repealed by the Wolverhampton Waterworks Transfer Act 1856, and that the defts. were therefore not compellable to keep their mains and pipes charged with water under the pressure mentioned in sect. 35 of the 10 Vict. c. 17, and that the defts. were not bound to keep water laid on in their pipes and mains under a degree of pressure as enacted by the general Act of 1847, as that Act was expressly

varied and repealed by the 40th section of the Wolverhampton New Waterworks Act 1855.

Tomlinson appeared for the app., and cited *The Lancashire and Yorkshire Railway Company v. Eames*, 15 Beav. 322.

J. J. Powell for the resps.

ERLE, C.J.—The question raised before the justices of the peace was whether the company were bound to keep the water in their pipes at high pressure. The magistrate has found that they were not bound to do so, and I am of opinion that he was right; the case states that the town was supplied by two companies, the old and the new. I have looked at both the Acts, and I am clearly of opinion that the old company was not under any obligation to keep the water in their pipes at high pressure; and the new company are, by sect. 40 of this Act expressly exempted; therefore, down to the passing of the Transfer Act, when the old and the new company became amalgamated, neither company were under any obligation to keep the water on at high pressure as contended for the by the complainant. Now, as to the Act of 19 & 20 Vict. c. 57, which is the Transfer Act, sect. 3 of that Act says that the Waterworks Clauses Act 1847 is to be incorporated in it; and sect. 43 of that Act enacts that the pipes are to be charged under high pressure; but that Act provides that any special Act may vary it, but it is incorporated without variation or exception. I think there is a great deal in Mr. Powell's argument, that these public Acts do not repeal sections of other private Acts except by express enactment, and that where there is an express proviso in a private Act, it is not to be repealed by a public Act; if the Legislature had intended to repeal these private Acts they might have done so, but I think they have not, nor intended to repeal it. The effect of the Transfer Act is to annihilate the old company, and to merge it in the new, and the new company are by their own Act exempted from keeping the water on at high pressure, and therefore my judgment must be for the resps.

WILLIAMS, J.—I am of the same opinion, and quite concur with what has fallen from my Lord, and think that sect. 40 of the new company's Act has not been repealed. Mr. Tomlinson has argued that an obligation has been cast on the old company by their amendment Act, but I think in this he has failed; his argument turns upon whether the words "recited Act" mean the Waterworks Clauses Act. I am of opinion that they have not that meaning, and that the only "recited Act" is The Wolverhampton original Waterworks Act. Sect. 15 of the Transfer Act no doubt casts the same obligation on the new company as the old had, and therefore they are bound to do the same as the old, and the app. has failed to show that any such obligation as to the old ever existed.

WILLES and BYLES, JJ. concurred.

*Judgment for original resps.*

Attorneys for defts., Gregory, Rowcliffe and Sturrow.

Thursday, June 6.

TAYLOR (app.) v. HUMPHREYS (resp.).

*Innkeeper—Supplying refreshments during hours of Divine service on Sunday—18 & 19 Vict. c. 118, s. 2.—"Traveller."*

*Three persons who had walked from Birmingham, a distance of four miles, called at an inn between the hours of three and five o'clock on Sunday afternoon, and demanded refreshment, stating, in reply to the landlord, that they were travellers. They were admitted, and, after smoking and drinking there, two of them returned on foot, and the third by an omnibus to Birmingham.*

*On information laid the magistrates, considering that the men had walked the said distance for amusement*

C. B.]

TAYLOR v. HUMPHREYS.

[C. B.]

or exercise only, and were therefore not travellers within the 18 & 19 Vict. c. 118, s. 2, convicted the landlord :

*Held, that the conviction was wrong, the men being travellers within the exception in sect. 2, following Atkinson v. Sellers, 28 L. J. 72, C. P.; 32 L. T. Rep. 178.*

This was a special case, stated for the opinion of this court, under 20 & 21 Vict. c. 43.

Case.—At a petty sessions held at King's-heath, in the county of Worcester, on the 5th April 1861, Richard Taylor, licensed victualler, carrying on business at a place called Alcester Lane's-end, appeared before the undersigned James Lloyd, Richard William Johnson and Thomas Lanes, Esqrs., three of her Majesty's justices of the peace for the said county, in answer to an information under the 18 & 19 Vict. c. 118, s. 2, charging him with having, on Sunday, the 24th March then last, at the parish of King's Norton, in the said county, and otherwise than to a traveller or lodger therein, kept open his house and premises for the sale of wines, spirits, beer and other fermented and distilled liquors, between three and five o'clock in the afternoon, contrary to the statute in that case made and provided. It was proved that at a quarter-past four o'clock in the afternoon of the day mentioned in the information, five men were in the house of the deft. drinking ale and smoking; that one of the men was the driver and another the conductor of a public omnibus which runs several times daily from Birmingham to the deft.'s house and back, plying for passengers on its way, and which had been driven there that afternoon as usual; that the three other persons had walked from Birmingham that afternoon and called at the deft.'s house, a distance of four miles, and afterwards returned thence to Birmingham, two by the omnibus and the third on foot; that the deft. asked these three persons if they were travellers, and admitted them on receiving answers in the affirmative. The deft. contended that the five men, having come a distance of four miles from their homes, were travellers within the meaning of the statute, whether for business or for pleasure. We, however, considered that the three men not connected with the omnibus, having merely walked the above-mentioned distance from their homes for amusement or exercise, were not travellers within the meaning of the statutes, and that it was not the intention of the Legislature to throw open public houses on Sundays to persons living within a few miles, and who might choose to walk or ride there for pastime, and fined the deft. in the mitigated penalty of 1s. and costs.

The deft. being dissatisfied with the decision, requested us to sign and state a special case for the consideration of one of her Majesty's courts of law at Westminster, which we hereby do accordingly.

JAMES LLOYD.

RICHARD WM. JOHNSON.

THOMAS LANES.

*Hayes, Serjt. for the app.*—The question here arises under 18 & 19 Vict. c. 118, s. 2, and the consideration of the enactment in this section has been recently entertained by the court in the case of *Atkinson v. Sellers*, 5 C. B. N.S., 442; 28 L. J. 72, C. P.; 32 L. T. Rep. 178. The present case is precisely like that, unless the court will hold there is a distinction between pedestrians and persons riding in an omnibus. Here the innkeeper is found to have asked the persons whether they were travellers, and was answered that they were. Now, if the innkeeper makes such inquiry *bona fide* of strangers, and believes the answer, he is clearly not liable. What can he do more? The true test is, whether the person asking for refreshment is a resident or a stranger to the place. A person who goes away some distance from his home is a traveller, it matters not whether he has walked or

ridden. Indeed, a man who walks needs refreshment more than one who rides. The justices held that the driver and conductor of the omnibus to be regarded as travellers within the exception in the statute.

*Keane contra.*—The effect of the case of *Atkinson v. Sellers* has not been considered as closely by *Hayes, Serjt.* as he usually scrutinises cases. The court there said that the justices were not bound to convict. The case finds that the men went into the house, not for refreshment, but to smoke and drink. Now, drinking might be refreshing and necessary, but smoking is not. The object of the statute was to prevent public-houses becoming "boosing dens" on Sunday.—[ERLE, C.J.—It is the *animus* with which the publican opens his door which makes him liable to be fined.] There are two offences pointed at by the second section—keeping open the house to sell, and then selling.—[ERLE, C.J.—It is the same idea expressed in two forms of words.] It is not enough that the men told the landlord they were travellers: the landlord of a public-house is not to set the statute at defiance by simply putting the question, "Aye or no, are you a traveller?" It is a fact found by the justices that these men went to the inn for pastime and were there drinking and smoking. They cannot, therefore, be regarded as travellers within the meaning of this Act.

ERLE, C.J.—This was an appeal against the conviction of a licensed victualler by justices, for keeping open his house for the sale of beer, and for selling beer to persons, not travellers, between the hours of three and five o'clock on Sunday afternoon. We are extremely desirous to give effect to the intention of the Legislature to prevent public-houses from being kept open during the hours of divine service on Sundays, by which allurement persons are enticed away from church who otherwise might be there, and we are also anxious, so far as we can, to give full effect to the intention of the magistrates to prevent the population of towns resorting to places a small distance off where, during the prohibited hours, they may smoke and drink. But we think that the facts, as found in the case, and on which the justices convicted, do not authorise a conviction. The persons whom he admitted to his house, and to whom he gave refreshment, had walked from Birmingham a distance of four miles, and demanded refreshment, stating in answer to the innkeeper's inquiry that they were travellers, upon this he admitted them; they afterwards returned to Birmingham, two on foot and one by an omnibus. Now, if either for business or pleasure these men went such a distance into the country, they would I think be within the exception in the statute. I do not think that the Legislature intended to prohibit the giving refreshment to such persons in such a case as the present. In giving this judgment we are guided by the decision of this court in *Atkinson v. Sellers*. It is impossible to mistake the tenor of that judgment; it seems to me to lay down that when a person comes from a town distant some five miles off, and refreshment is given to him as a traveller, he is within the exception in the statute, and falls under the description of a traveller within the meaning of the Act of Parliament.

WILLIAMS, WILLES and BYLES, JJ. concurred without giving judgment.

*Stevenson, Cook's-court, for Suckling, Birmingham, attorney for app.*

*Judgment for the app., conviction reversed.*

CHAS.] ECCLESIASTICAL COMMISSIONERS v. VESTRY OF ST. JAMES, &amp;c., CLERKENWELL. [CHAS.]

**COURT OF APPEAL IN CHANCERY.**Reported by C. H. KERNE and THOMAS BROOKSBANK,  
Esqrs., Barristers-at-Law.

Saturday, May 25.

(Before the LORD CHANCELLOR (Campbell).)

**THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND  
AND COURTENAY v. THE VESTRY OF THE PARISH  
OF ST. JAMES AND ST. JOHN, CLERKENWELL.***Ecclesiastical Commissioners—Erection of church—  
Metropolis Local Management Act—"Line of build-  
ings in a street."*

*The Ecclesiastical Commissioners having acquired a site for the erection of a church within one of the metropolitan districts, the church was built, and had been raised six feet, when the vestry of the district interfered, alleging that the building was being erected several feet beyond "the regular line of buildings" in the street. An application was made for the consent of the Metropolitan Board of Works, which was refused. The erection being attempted to be continued, the vestry pulled down part of the building, and the Commissioners thereupon filed a bill for an injunction. Stuart, V.C., held that upon the construction of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 143, and the Amendment Act, 19 & 20 Vict. s. 3, the powers of the Ecclesiastical Commissioners relating to the affairs of the Church were reserved to them, and exempted them from the operation of the Local Management Act, and granted a perpetual injunction. On appeal the decision was reversed.*

This was an appeal from a decision of Stuart, V. C., granting an injunction in a suit instituted by the Ecclesiastical Commissioners for England and the Rev. Anthony Lefroy Courtenay, against the vestry of the parish of St. James and St. John, Clerkenwell, for the purpose of restraining their servants, agents and workmen from pulling down, destroying, or damaging the church in Penton-street, or the chancel thereof, or any part now erected or hereafter to be erected, and from obstructing, impeding, or interfering with the erection thereof; and the bill also prayed that the defts. might be decreed to make compensation for the damage caused to the said church or the chancel thereof by reason of the defts. having pulled down and demolished the same, and for all other the injury done to or about the same respectively by the defts., their servants, agents, or workmen. The facts were these:—In the year 1853 several leading inhabitants of the parish of Pentonville held public meetings, appointed a committee, and organised measures for severing the district, which was now the district of Pentonville, from the parish of Clerkenwell; and in the month of April 1854 Pentonville was constituted an ecclesiastical district by an order in council. Steps were then taken towards building a new church. A site was purchased in Penton-street from Major Penton by the Ecclesiastical Commissioners, in whom it was now vested; and in the month of July or Aug. 1860 a plan and description of the site and of the church to be built thereon was submitted to, and was eventually approved by the commissioners, and the site and the freehold thereof were conveyed to and vested in the Ecclesiastical Commissioners in accordance with the provisions of the Acts of Parliament. The plt. Anthony Lefroy Courtenay, who was formerly the minister of St. James's Chapel, Pentonville, situate close to Pentonville-hill, was appointed the incumbent of the new district, and in him the freehold of the church and of the site thereof would, upon its consecration, be vested. He entered into contracts and commenced the erection of the church, and a considerable number of workmen were engaged on it for some months, and the church had been reared to a height of about five feet above the level of the ground. By the

18 & 19 Vict. c. 120 (the Metropolis Local Management Act), the defts. were constituted a body corporate, and certain powers and authorities were thereby given to them for (amongst other things) maintaining the regularity of the line of buildings in the streets within their district, and it was enacted by sect. 143 that "no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed thirty feet, or within thirty feet of the highway, where the distance of the line of buildings therefrom amounts to or exceeds thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway; and in case any buildings be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate to cause the same to be demolished or set back, as the case may require, and to recover the expenses incurred by them from the owner of the premises in manner provided by this Act."

The defts., within whose district the church was situate, interfered with the building thereof, alleging that the church was being erected about ten feet beyond the regular line of buildings in Penton-street, and that the building as proposed by the plan was an infringement of the Act of Parliament, and interdicted by the 143rd section, and they threatened and intended forcibly to level to the ground a large portion of the chancel of the church, and had, in fact, sent a number of workmen upon the site, who had to some extent pulled down and demolished the chancel. The plt. charged that the church was not, nor was the chancel, or any part thereof, erected beyond the regular line of buildings in the street, within the meaning of the Act; and submitted that, even if that were so, a church or ecclesiastical edifice was not within its purview.

Dr. Courtenay memorialised the Metropolitan Board of Works, and thereupon a special meeting of the vestry was called by Mr. Pascall, who was a prominent member. At that meeting a deputation of the vestry to the board of works upon the subject of resisting the erection of the church, composed, as Dr. Courtenay alleged, almost entirely of directors, was appointed, and a memorial to the board was prepared. In the course of the same day the inhabitants of Penton-street were canvassed for signatures and eighteen were procured. The result was, that the Metropolitan Board of Works refused to give their consent to the erection of the church, on the ground that the same was opposed by the local authorities.

The bill alleged that the district surveyor had reported to the Metropolitan Board of Works that the chancel of the church was not erected beyond the regular line of buildings in the street; that the building had been approved by the proper ecclesiastical authorities; and that all requirements in regard thereto imposed by the Acts of Parliament under which the Ecclesiastical Commissioners were constituted had been complied with.

On the 4th Jan. 1861 the defts. caused a part of the tower and chancel, which they alleged to be in front of the line of buildings in the street, to be pulled down; whereupon the bill was filed.

On the 14th Feb. the plt. moved for an injunction against the defts. in the terms of the prayer of the bill above set forth, and after some discussion it was by consent of all parties turned into a motion for a decree.

From the affidavit in support of the motion, it appeared that a memorial in favour of the erection of the church had been signed by fifty inhabitants of Penton-street, eight of whom had, as alleged, signed the memorial to the Board of Works under misrepresentation or misapprehension. Two of the fifty signatures were

[CHAN.]

CARDINALL v. MOLYNEUX.

[CHAN.]

given by the occupiers of two houses adjoining the church.

By the 58 Geo. 3, c. 45, it was enacted that it should be lawful for the commissioners for building new churches to accept and take any building or buildings fit to be used for, or to be converted into, additional churches or chapels, and also any lands, tenements and hereditaments proper for sites of additional churches or chapels, not exceeding in quantity in any one place what might be sufficient for building a new church or chapel, providing a churchyard, and making a proper and sufficient access and approach thereto, from any persons willing to give the same; and every such site, when conveyed to the commissioners and the church erected thereupon, and notice thereof given to the bishop of the diocese, should become for ever thereafter devoted to ecclesiastical purposes only, in order that the same might be consecrated by the bishop to public worship according to the rites of the United Church of England and Ireland as by law established; and also that it should be lawful for the commissioners to build, or cause to be built, churches or chapels, under the provisions of the Act, upon such plans as they should deem most expedient for the affording fit and proper accommodation for the largest number of persons at the least expense.

By subsequent Acts of Parliament power was given to the commissioners to advance and lend such sum of money as to them might appear to be required and expedient for or in aid of building additional churches and chapels, and also to make grants for the like purposes.

By the 19 & 20 Vict. c. 53, all the powers and authorities then vested in the commissioners for building new churches were transferred to, and the same are now vested in, the plts., the Ecclesiastical Commissioners for England, who were, by an Act passed in the 6 & 7 Will. 4, duly constituted a body corporate with perpetual succession.

The V. C. having granted a perpetual injunction in the terms of the prayer of the bill, with the additional words, "and from in any manner interfering to prevent the erection of the chancel or any part of the church" (*vide ante*, p. 83), the deft. now brought the present appeal.

*Malins*, Q.C., *Woodroffs* and *Lindley* appeared in support of the decree of the V.C.

*Bacon*, Q.C. and *Hardy* for the apprs.

*Woodroffs* in reply.

Authorities cited: 14 Geo. 3, c. 17, sect. 49; 58 Geo. 3, c. 45, sects. 33 and 62; 59 Geo. 3, c. 134, sects. 5 and 7; 7 & 8 Vict. c. 56; 7 & 8 Vict. c. 84; 8 & 9 Vict. c. 70, sect. 25; 18 & 19 Vict. c. 120; 19 & 20 Vict. c. 53; 19 & 20 Vict. c. 112, sect. 3; *Carter v. Crossley*, 28 L. T. Rep. 347; *Tear v. Freebody*, 4 L. B. N. S., 529; and *Tinkler v. The Board of Works for the Wandsworth District*, 3 Jur. N. S. 1292; 1 C. on appeal, 2 De G. & J. 261.

The LORD CHANCELLOR.—It is with great reluctance and with great pain that I feel myself compelled to say I think that the decree appealed against must be reversed. It seems to me, as far as my observation goes, that no harm would have followed to the public or to any individual if this chancel had been allowed to be erected and remain; but I think that it is erected contrary to law, and the law must prevail. If it had been, as was suggested, that the commissioners had a power before the passing of the Metropolitan Local Management Act to erect a building with such a projection, I should have thought that they still retained it, but I find that it is now clearly shown that they had no such power. Under the 14th section of the Act of Geo. 3, it was forbidden, and under the Act of Parliament that passed the same day as the Metropolitan Management Act, it is forbidden. It is expressly forbidden, and therefore it is unlawful.

Now, can it be said that the sections relied upon by Mr. Malins gave a power to dispense with the law? It is impossible; it could only preserve the power which the commissioners before had. But they had no such power, and it would be monstrous to say that these sections that are referred to were meant to confer a power upon them of dispensing with the general law when they thought it convenient. That being so, it was unlawful, and by the express enactment of the 143rd section, if the building be erected beyond the general line of the buildings of the street in which the same is situate, then without the consent in writing of the Metropolitan Board of Works, it may be dealt with as the subsequent part of that section provides. Therefore I cannot say that this court has any power to grant an injunction against that being done which the law permits. I regret it exceedingly, but in the discharge of my duty I am bound to say that I think the V. C. took an erroneous view on this subject and that his decree must be reversed. The bill I think must be reversed, but under the circumstances without costs; and I would still throw out a hope that there may be some amicable arrangement, and that the meritorious and laudable hopes of those who wish this church to be completed may not be disappointed.

Solicitors:—*Hilliard, Dale and Stretton* for the apprs.; *Boallon and Sons* for the resps.

Decree reversed.

Thursday, July 4.

(Before the LORD CHANCELLOR (Westbury).)

CARDINALL v. MOLYNEUX.

*Injunction to restrain the incumbent of a church from altering the interior arrangements of a church—Scheme for restoration of church approved by chief clerk—Order directing the incumbent to restore the same—Jurisdiction.*

*The Court of Ch. has no jurisdiction to order the incumbent of a church, who had made certain alterations in the building by removing the pews, &c., and substituting chairs, to take the necessary proceedings to obtain a faculty from the bishop of the diocese for the restoration of the church.*

*An injunction was granted to restrain the alteration of the walls or brickwork of the church without the authority of the archdeacon or bishop, on the plt.'s undertaking to apply to the proper ecclesiastical court for authority to restore the church to its original state.*

This was an appeal from two orders made by Stuart, V.C. The bill was filed by George Cardinall, one of the churchwardens of the parish of St. Gregory, Sudbury, on behalf of himself and all other the parishioners of the parish, against the Rev. John William Henry Molyneux, the incumbent of the parish, and William Rowland Rolfe and George Grimwood.

About nine months before the filing of the bill, Mr. Molyneux caused the church to be closed for the purpose of effecting certain repairs to the roof. This proceeding, it was alleged, was taken without the consent of the plt. or of the parishioners, and without the immediate authority of the bishop. The bishop's surveyor afterwards reported the repairs, and it was then considered that Mr. Molyneux was no longer acting without the bishop's authority. On the 30th March 1859 Mr. Molyneux caused the pews of the church, and also a large gallery at the west end, to be cut down, severed and removed. For this purpose he employed the deft. George Grimwood, who was a builder; and on the same day the deft. Rolfe, who was an auctioneer, published a placard in Sudbury, advertising for sale on the following day a quantity of building materials, consisting of doors, door-frames, sashes, casements, two staircases, panneling, &c. arising from the repairs of the church of St. Gregory. The plt. thereupon, on the morning of the 31st March, served Mr. Grimwood with a notice,



addressed to all three defts., not to remove, sell, or dispose of the pews and sittings, or the materials thereof, and that it was his intention to apply for an injunction. The bill was filed on the same day. It prayed that the defts. Molyneux and Grimwood, and their respective agents, &c., might be restrained by injunction from further destroying, cutting down, covering, or removing the pews and sittings, or in the said church, or any of them, or the gallery of the said church, or any of the other internal fixtures and fittings of the said church, or any of the materials or pannelled work forming the said pews, sittings, gallery fixtures and fittings respectively, or of which the same respectively are or were composed; and that the said defts. might be restrained from selling or disposing of, or putting up or exposing or offering for sale, or holding any sale by auction, of the building materials and pannelled work mentioned in the said published notice or advertisement or particulars of sale before mentioned, or any of them, or the said pews, gallery fixtures and fittings respectively or any of them, or any of the materials or pannelled work of which the same respectively were composed. An injunction restraining the sale was granted by Stuart, V.C. on the same day, the 31st March. In the afternoon of that day a telegraphic dispatch, containing notice of the order, was served upon Mr. Rolfe whilst in the act of selling one of the lots on the Market-hill, at Sudbury. The plt.'s evidence went to show that the deft. Rolfe disregarded the notice, and went on with the sale for about half an hour afterwards; also that the deft. Grimwood was standing by; that he knew of the contents of the dispatch, but nevertheless assisted to continue the sale. Notice of motion on the 4th April ensuing, to commit the defts. Grimwood and Rolfe for contempt, was served on them the same evening. On or about the 4th April 1859 the plt. filed a supplemental bill on behalf of himself and all the parishioners of St. George's, Sudbury, against the Rev. Mr. Molyneux and George Grimwood. It stated that, notwithstanding the order of the 31st March, Mr. Molyneux had removed the pews and sittings, was then taking and pulling up the floor of the church, and placing brickwork there, with the intention of raising portions of the floor and substituting chairs and benches for pews; and was, in fact, so altering the floor of the church, and materials of which it was formed, as to render the same unsuitable for pews. Mr. Molyneux was also about to remove the west window of the church, and to place a new window in lieu thereof. He was also causing a hole to be cut in the brickwork of the outer wall on the south side of the church, for the purpose of effecting some alteration, the nature of which was unknown to the plt. The deft. Grimwood was the person employed in carrying out these alterations, which were being made without the consent of the plt. as one of the churchwardens, without the consent of the bishop or of the parishioners, and without any licence or faculty in that behalf. The supplemental bill prayed that the defts., their agents, &c., might be restrained from taking up or altering, or causing to be taken up or altered, the floor of the said church, or altering, or causing to be altered, any of the walls or brickwork of or in the said church, or executing or causing to be executed any works or alterations affecting the floor, walls, or brickwork of the said church, or affecting the internal arrangement or structure of the said church, or any of the pannelled work, fixtures, or fittings pertaining thereto (and further, by amendment on the 26th May 1860), "until a faculty for the purpose had been duly obtained." The supplemental bill also prayed that the defts., or one of them, might be decreed to account for and pay to the parishioners of the said parish, or the churchwardens of the said parish, for and on account of the parishioners, the value (to be ascertained in such manner as the court should think fit) of the said pews, sittings, gallery fixtures and

fittings, so destroyed or removed as aforesaid, and of all and every other the materials and effects belonging or pertaining to the said church, which had been destroyed, removed, or taken away, by or under the directions of the defts. or either of them, and should replace or restore, or pay the costs and charges of replacing and restoring the said pews, sittings, gallery fixtures, fittings, materials and effects.

On the 20th April an interim order for an injunction against the two defts. Mr. Molyneux and Grimwood, in the terms of the first paragraph of the prayer of the supplemental bill, i.e. restraining them from altering the floor of the church, &c., was granted until the following day, and on the 21st April the injunction was enlarged till the 5th May, and the motion on behalf of the plt. to attach the defts. Grimwood and Rolfe for contempt of the injunction of the 31st March was also ordered to stand over till the same date. From the evidence it appeared that on the same day, 21st April, Mr. Molyneux, and Mr. Hassell, his churchwarden, issued handbills to the effect that, notwithstanding the incomplete state of the repairs of the church, in order to carry out the original intention, and to prevent disappointment to the parishioners, it was determined to use the church in the afternoon in its present rough and disordered state. On the same day a large number of chairs, about 200, were placed in the church, and divine service was held in the church in the afternoon of Easter Sunday, the 24th April following. The two motions again stood over from the 5th to the 12th May. On the latter day the V.C., after hearing the evidence, granted an injunction restraining the defts. Messrs. Molyneux and Grimwood, their agents, &c., "from taking up or altering, or causing to be taken up or altered, the floor of the parish church of St. Gregory, in Sudbury, in the county of Suffolk, in the plt.'s supplemental bill mentioned, or altering or causing to be altered any of the walls or brickwork of and in the said church, or executing or causing to be executed any works or alterations affecting the floor, walls, or brickwork of the said church, or affecting the internal arrangements or structure of the said church, or any of the pannelled work, fixtures, or fittings pertaining thereto, until the hearing of the cause." And it was further ordered "that the plt. and defts. and any of the churchwardens of the parish of St. Gregory, Sudbury, in the county of Suffolk, should be at liberty to lay before the judge to whose court the said cause was attached proposals for fitting up the interior of the parish church of St. Gregory aforesaid, and providing proper accommodations therein for the minister and parishioners of the said parish for the performance of divine service, but such proposals were to be subject to the approbation of the bishop and archdeacon of the diocese of Ely." And with regard to the motion for the commitment of the defts. Greenwood and Rolfe, it was ordered that each of them should pay to the plt. "the sum of 15*l.* towards his costs of such motion," and on their expressing their contrition, that no further order should be made on the motion. In compliance with this order the plt. and the defts. each sent in proposals. The main point of difference was as to the pews. The plt. proposed that the pews which had been removed should be replaced; the defts. proposed to find benches for seating the congregation, as far as the present seating by chairs and benches was insufficient. As to the gallery also at the west end of the church the plt. proposed that it should be replaced on a plan to be approved by the bishop, and the organ restored therein; the defts. proposed to erect the organ at the east end of the north aisle, and to open and glaze the west window, which was partially bricked up. These proposals were laid before the bishop, who made several observations thereon. As to the pews he had the strongest ob-

[CHAM.]

CARDINALL v. MOLYNEUX.

[CHAM.]

jection to chairs. He was not averse to a gallery with as organ therein, but not having a plan of the church before him he could form no opinion whether it should be on the old site. He repeatedly and strongly urged that nothing should be carried into effect without a faculty. Further replies were sent by the plt. and observations returned by the bishop, and the whole of the documents were laid before the chief clerk. The matter stood over for a time to enable Mr. Molyneux to apply for a faculty. In May 1860 the deft. Mr. Molyneux, and James Hassell, his churchwarden, presented a petition to the chancellor of the diocese of Ely, praying for a faculty to perform the works set forth in the petition, and a citation was issued under the seal of the chancellor of the diocese. It recited the petition, alleging that the following further works were required to complete the restoration of the church: the floor of the church to be completed, the pulpit to be re-erected in its former position, and the sounding-board to be removed; a new reading-desk to be erected; the font to be placed at the north-west end of the nave; the organ to be placed at the east end of the north aisle. In addition to the present accommodation, to complete the seating of the church with benches similar to the best of those now in the church; the bricks which at present block up part of the west window to be removed, and glass substituted, and the windows of the church generally repaired and, where necessary, reglazed, and the walls repaired. The petitioner alleged further, that a meeting of the incumbent, churchwardens, parishioners and inhabitants of the parish was held in vestry on the 10th May 1860, at which the said proposed works were approved, and that the cost, estimated at 270*l.*, was intended to be raised, and was for the most part already raised, by voluntary subscription, without a church-rate. The citation then recited the prayer for a faculty, and cited the parishioners to appear and show cause against the faculty before the surrogate at St. Mary's Church, Cambridge, on the 26th May. The present accommodation, referred to in the petition, was the providing of loose chairs instead of benches or pews.

The court was adjourned till the 9th June. On the 7th June Mr. Gooday, the plt.'s solicitor, as he deposed, called with the plt. George Cardinall upon Mr. Molyneux, for the purpose of endeavouring to come to some terms or arrangement respecting the fitting up of the church, but Mr. Molyneux declined any such arrangement. On Saturday the 9th June Mr. Gooday attended the hearing of the application for the faculty, on behalf of the plt. and other inhabitants. He stated in his affidavit that he opposed the granting of such faculty, except in strict accordance with the decision and approval of the bishop. Mr. Molyneux also attended and refused to modify or alter his application. Thereupon, after hearing both sides, the court refused to decree the faculty, on the ground, as Mr. Gooday alleged, that the deft. did not propose to carry the re-fitting of the said church in accordance with the bishop's suggestions and approvals. The chief clerk made his certificate, dated 3rd Dec. 1860, whereby he certified that, in pursuance of the order of the 12th May 1859, the plt. and the deft. Mr. Molyneux had each laid before the judges proposals for fitting up the interior of the church and providing better accommodation, &c.; and that it would be fit and proper that such interior should be fitted up, and such accommodation provided according to the plan thereto annexed, which plan had been approved by the bishop and archdeacon of the diocese of Ely, as was admitted by the plt. and the defts. The plan was as follows:—

"1. The church to be properly floored and fitted up with single pews, according to the plan of the pews in modern churches, or with open benches. The question of the general style and character of the pews or

benches to be settled in the proceedings requisite for obtaining a faculty.

"2. The font to be placed at the west end of the church.

"3. The pulpit to be lowered, and a new reading-desk erected, as shown on plan, and the sounding-board to be removed. The pulpit and reading-desk to be in character with the general fittings of the church.

"4. The organ to be placed as shown on the plan (i.e. between the north aisle and the chancel).

"5. The west window of the church to be opened and properly glazed."

The V. C. approved the certificate on the 10th Dec.

The cause then came on upon the motion for a decree, before Stuart, V. C. (*vide ante*, p. 136), when his Honour, by his order made in both suits, dated the 13th March, ordered a perpetual injunction, and ordered that the defts. should concur in and take such proceedings as should be necessary for obtaining a faculty from the bishop of the diocese for repairing and restoring the said church according to the scheme set out in the chief clerk's certificate therein referred to; and further ordered that the scheme set out in the chief clerk's certificate, dated 3rd Dec. 1860, for repairing and restoring the said church, should be carried into effect; and that the defts. should pay to the plt. his costs of suit, excepting the costs of the affidavits used on the application for committal of the said defts. The defts. then brought the present appeal, seeking to reverse the two orders, dated respectively the 12th May 1859 and 13th March 1861.

Bacon, Q.C. and E. K. Karlake appeared for the plt., and as to the constitution of the suit referred to *Spencer v. The London and Birmingham Railway Company*, 8 Sim. 199; 15 & 16 Vict. c. 86, s. 42, rule 5; *Blenkinsop v. Blenkinsop*, 1 De G. M. & G. 495.

Malins, Q.C. and Surridge, for the defts., the appa., contended that the court had no power to grant the injunction; it was granted to restrain acts that had already been done. There was no allegation in the bill that the plt. had any property or interest in the church beyond what the other parishioners had, and therefore the suit should have been commenced by information at the suit of the Attorney-General. The Ecclesiastical Court was the proper tribunal to have dealt with the matter. They referred to the case of *Desodney v. Good and Ford*, 7 Jur. N. S. 637.

The LORD CHANCELLOR, after expressing his regret that the parish church should have been closed by these proceedings for so long a period, said that the court had no power to compel a restoration of the church, nor indeed to grant the injunction; but his Lordship thought that the defts. had shown acquiescence in respect of the injunction, and therefore that part of the order of the V. C. would not be disturbed. The order of the 12th May 1859 was clearly wrong in directing that proposals should be laid before the judge in chambers for the fitting up of the interior of the church, and must be reversed, as well as those portions of the order of the 13th March 1861 which directed that the defts. should concur in and take such proceedings as should be necessary for obtaining a faculty; and that the scheme set out in the chief clerk's certificate, dated the 3rd Dec. 1860, should be carried into effect. The plt. must undertake to apply to the proper ecclesiastical court for authority to complete the restoration of the interior of the church, on his doing which the order for the injunction might continue. The words "without the authority of the bishop or archdeacon" should be added at the end of the latter part of the order for the injunction. The bill must be dismissed against the defts. Grimwood and Rolfe, but without costs. The deft. Molyneux to pay the costs of the suit, but not such costs as were consequent upon those parts of the orders of the V. C. authorising proposals to be laid before him in chambers. There would

abundantly clear that this conviction cannot be sustained. The indictment is framed upon the 4th section of the 20 & 21 Vict. c. 54, which applies to bailees; and it is only necessary to say that the word bailment must be interpreted according to its ordinary legal acceptance. Understood in that sense, a bailment relates to something in the hands of the bailee which is to be returned in specie, and does not apply to the case of money in the hands of a party who is not under an obligation to return it in precisely the identical coins which he originally received. The present case, therefore, is not within the statute.

The rest of the Court concurring,

*Conviction quashed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLEY, Esqrs., Barristers-at-Law.

Wednesday, June 12.

EDMUND SMITH AND THE DISTRICT OF TODMORDEN, re LOCAL GOVERNMENT ACT 1858.

*Local Government Act 1858—Place within known boundary—Petition—Order—Extending limits—Order on appeal—Time for moving for certiorari.*

*One-tenth of the inhabitants of a place having no known or defined boundary, presented a petition to the Secretary of State under the provision of the Local Government Act 1858, defining the boundary which they desired to form into a district. The Secretary of State made an order omitting certain property, and including certain other property not mentioned in the petition, and afterwards, on the 16th Feb., the Act was adopted. Appeals were made under the 18th section of the Act, and on the 29th April the Secretary made his order, declaring that the Act should come into operation in the district defined by him at the expiration of one month from that date. The 20th section of the Act provides, that whenever any resolution has been passed in any place, the Act shall, at the expiration of two months from the date of the passing of such resolution, or in the event of an appeal, at such time as may be mentioned in the order made on such appeal, have the force of law within such place. On the 3rd June the applicant, owner of property not included in the petition, but included in the extended boundaries, obtained a rule for a certiorari to bring up the order of the Secretary of State, that the same might be quashed, on the ground that there was no jurisdiction to make such order:*

*Held, per Wightman and Blackburn, JJ., that the month having expired since the date of the Secretary of State's order of the 29th April, the application was too late.*

*Cockburn, C. J. dissents.*

This was a rule calling upon the Secretary of State for the Home Department to show cause why a writ of certiorari should not issue to bring up an order of the said secretary, bearing date the 15th Jan. 1861, purporting to settle the boundaries of the district of Todmorden, in the counties of Lancaster and York, for the purposes of the Local Government Act 1858, with a view that such order should be quashed, on the ground that the said Secretary of State had no power to extend the boundaries beyond the limits mentioned and defined in the petition and plan, signed by one-tenth of the ratepayers resident within such boundaries, as required by the 16th section of the Local Government Act 1858 (21 & 22 Vict. c. 98).

It appeared that Todmorden is a village extending into parts of four townships, and has no known or defined boundary. Certain inhabitants wishing to put the village under the operation of the Local Govern-

ment Act 1858, got up a petition, defining accurately by words and by a plan the extent and limits of the boundaries which they prayed to be formed into a district. The petition was signed by one-tenth of the ratepayers within that district, as required by the 16th section of the Act.

The Secretary of State, after having sent down Mr. Ranger, the inspector appointed for that purpose, made an order omitting certain properties prayed by the petition, but included and brought in to the district certain other properties, viz., a corn-mill at Inchfield worth 150*l.* per annum, belonging to Mr. Smith, who had obtained this rule; a cotton-mill at Square; another cotton-mill at Barewise, and a whole village of thirty-nine cottages at Square—altogether rated at more than 600*l.* per annum, none of which properties were included in the petition, nor asked to form any part of the district, and from the district of which properties neither one-tenth nor any part of the ratepayers were petitioners, and it did not appear that when these properties had been brought into the boundary the persons who signed the petition would reach one-tenth in number of the rate-payers within the boundary, including the properties in question. On the 16th Feb., at a meeting convened for that purpose, the Act was adopted. An appeal was then made by Mr. Smith to the Home Secretary, under the 18th section; but the Secretary finding he could not legally set aside his own order, however irregular, the appeal on that ground was withdrawn, and ultimately the appeals were dismissed on the 29th April last, when the Secretary of State ordered that the Act should come into operation in the said district one month after that date. Under these circumstances, Mr. Smith had obtained the present rule.

*Manisty, Q.C. (Welesby with him) now showed cause.*—When the steps are adopted laid down by the Act, as necessary to put the Secretary of State in motion, it is for him to define the boundaries, and then it is for the inhabitants to adopt them. The affidavits in answer show that the petition was signed by one-fifth of the ratepayers residing within the boundaries of the Todmorden district as settled by the Home Secretary. The 17th section of the Act gives a power of appeal by petition against the resolution to adopt the Act, but no such appeal has here been had. [COCKBURN, C.J.]—I cannot help thinking that you do not satisfy the requirements of the Act, which says the assent of one-tenth within the boundary shall be necessary, by taking the assent of some persons beyond that boundary; the Secretary may limit, that is to say, give something less, but can he give more without interfering with that provision? WIGHTMAN, J.—Besides, as in the present case, a man beyond the boundary finds himself within it without having been consulted.] The 8th section of the Act makes the order of the Secretary of State binding. The order of the Secretary of State on the appeal, dated 29th April 1861, says that the Local Government Act 1858 shall, within one month from the date thereof, have the force of law within such district. And the 20th section says, that in the event of an appeal the Act shall, at such time as may be mentioned in the order made on such appeal, have the force of a law within such place. The applicant must stand or fall by his appeal.

*Wheeler, Serjt. (Aspinall with him) was called on in support.*—The order is wholly and radically bad; it is made without jurisdiction. [COCKBURN, C.J.]—Your application for the rule had reference to the 18th and 19th sections; but then we come to the 20th, how do you get over that? The order has been made, and the time mentioned in it has expired.] The conditions precedent have not been properly complied with, therefore the later proceedings are ineffectual and void. Jurisdiction cannot be acquired or exceeded; it must be shown on the face of the proceedings, and if

Q. B.]

PUERNELL v. THE WOLVERHAMPTON WATERWORKS COMPANY.

[C. B.]

the facts be wrongly set forth they may be rectified by affidavit. The Secretary of State had power to fix a boundary co-extensive with, or of less extent than that named in the petition, but he had no power to go beyond. The 16th section must be read with reference to the other parts of the Act, and the preliminary order being defective, the subsequent order is of no avail.

WIGHTMAN, J.—I am of opinion that this rule ought to be discharged. It may be that the Secretary of State has been somewhat irregular in settling the boundary of this district, although the Act gives him power either to dismiss the petition or make an order as to the boundaries of the place, and it is a question whether he might not, under that authority, do what he has here done. But the vote adopting the Act was either good or bad. Then the 20th section says, whenever any resolution adopting this Act has been passed in any place, this Act shall, at the expiration of two months from the date of the passing of such resolution, or at such time as may be mentioned in the order made on appeal, have the force of law within such place; therefore, when the vote adopting the Act is unappealed against, it becomes law after two months. But here the motion was not made for more than a month after the dismissal of the appeal; the order of the Secretary was made on the 29th April, in which he declared that the Act should come into operation in the district at the expiration of one month from that date, and the motion for this rule was made on the 3rd June. Looking at that section, it seems to me that the time has passed, and that now it is too late to question this order.

BLACKBURN, J.—I am of the same opinion. The 16th section says that any place not having a known or defined boundary, may petition one of her Majesty's Secretaries of State to settle its boundary; that the petition shall state the proposed boundaries of the place, and shall be signed by one-tenth of the ratepayers resident within such boundaries. Now that seems to imply that the petitioners are to point out the boundaries, but then it is for the Secretary of State to settle them. Then in the fifth paragraph of the section, the Secretary of State may "make orders as to the boundaries;" that would seem that he might alter them. Here the objection is, that he has increased the limit of the boundary; on that I give no judgment either way. I am not convinced that he has or has not such power; but the present application is out of time. Whilst the order stood which mentioned this place with a defined boundary, the ratepayers might proceed to adopt the Act, and it seems that on the 16th Feb. a meeting was duly convened for that purpose, at which a resolution was carried to that effect; then an appeal was entered, and on the 29th April the Secretary of State made his final order, directing the Act to operate at the expiration of one month from that date. The 20th section says that after two months from the date of the resolution, or in the event of an appeal then at such time as may be mentioned in the order made on that appeal, the Act shall have the force of law in such place. Now the motion for this rule was made on the 3rd June, and therefore I think that, as the appeal was dismissed on the 29th April, and an order then made directing the Act to come into operation at the expiration of one month from that date, the time had passed, and the Act had the force of law in the district. It is therefore now too late to come for a *certiorari*, and on that ground alone I decide.

COCKBURN, C.J.—I entertain very serious doubts whether it is competent for a Secretary of State to extend the area of a proposed district beyond the boundaries mentioned in the petition; but although it is unnecessary to decide that, I am desirous that that question should be kept quite open for our considera-

tion if the question should arise again, and the matter is brought before us in time. On the other question I can only say that my mind is not satisfied that the provisions referred to meet the present case. I think there is considerable doubt whether they apply, and whether the whole proceedings do not fail in consequence of the illegality in fixing the boundaries. I however merely desire to express my doubts, and will not delay the decision of the case; neither do I desire that any doubt I may entertain should prevent this rule being discharged.

Croker, attorney for Mr. Smith.

Rule discharged.

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MATY, Esqrs., Barristers-at-Law.

Monday, May 27.

PUERNELL v. THE WOLVERHAMPTON WATERWORKS COMPANY.

*Wolverhampton Waterworks—Express enactment in private Act not repealed by public Act.*

In 1845 an Act of Parliament (8 & 9 Vict. c. 135) was passed for supplying the town of Wolverhampton with water, no mention being made in the Act as to the water being laid on at high pressure. In 1855 a new Act (18 & 19 Vict. c. 151) was passed for the same purpose, which by its first section enacted that the Waterworks Clauses Act 1847, should be incorporated in it, sect. 42 of which Act enacted that all the pipes to which fire-plugs should be fixed should be kept at high pressure, the company being liable to a penalty of 10*l.* for non-performance. By sect. 50, however, of the new Act, it was provided that the water to be supplied from any pipe of the company need not be laid on at high pressure.

In 1856 the two companies became amalgamated, by an Act entitled the Wolverhampton Waterworks Transfer Act, in which the Waterworks Clauses Act was incorporated.

A fire having taken place, and there not being a sufficient supply of water, the complainant, on behalf of the corporation, obtained a summons against the company, and, upon the hearing, the magistrate decided that the company were not bound to keep the water on at high pressure, as the General Act was expressly varied and repealed by sect. 40 of the Wolverhampton New Waterworks Act, and the Court

Held, upon an appeal from that decision, that the magistrate was right.

Case stated by the stipendiary magistrate of the borough of Wolverhampton.

The complainant alleged that after the making and passing of the Waterworks Clauses Consolidation Act 1847, and the Wolverhampton New Waterworks Act 1855, the defendants, and at the time of committing the offence thereafter mentioned, had certain main and other pipes belonging to them in the town and parish of Wolverhampton, in the said county of Stafford, within the limits of the last-mentioned Act, for the supply of water according to the provisions of the said Acts, and had certain fire-plugs fixed thereto for the supply of water for extinguishing fire, according to the provisions of the said Acts; yet that the defendants, on the 10th Oct. 1860, did not keep charged with water the said pipes so belonging unto them, and to which fire-plugs were so fixed, in the town and parish aforesaid, within the limits aforesaid, but then and there wholly neglected so to do, though not prevented from so doing by frost, unusual drought, or unavoidable cause or accident, or during necessary repairs.

A penalty of 10*l.* attaches to the offence.

The complainant relied upon the provisions of the

considerable amount below 10 per cent. per annum existed in the dividends already paid, and which, if that second Act had not passed, and the company had become sufficiently prosperous, the shareholders would have been entitled to receive. The question is, whether the second Act of Parliament has deprived the original shareholders of that right? The second Act was passed for the purpose of altering, amending and enlarging the former Act. It repeals no one of its clauses; it is simply additional to it; and it raises the nominal capital of the company to 850,000*l.*, by making it to consist of 5000 shares of 50*l.* each. It, in fact, changes the 25*l.* shares created by the former Act into 50*l.* shares under that Act; and it creates 2000 additional shares of 50*l.* each. It limits the dividends on each share to 5*l.* per cent.; thereby enabling the original shareholders of 25*l.* shares each to receive their original maximum of dividend in the shape of 5 per cent. on the 50*l.* shares. The parts of the new Act which alone seem to me to have any bearing on this subject are in the following places: in the preamble, and the 3rd, the 4th and the 5th sections. [His Honour read the preamble and those sections as above stated, and continued.] Upon the 4th section I am of opinion that no distinction is made between one class of shares and the other, or between one dividend and the other. The words of the Act are "any previous dividend." I do not consider myself at liberty to cut down that, the most general expression, "to any previous dividend declared under the authority of this Act, or subsequently to the passing of this Act." I am at a loss to understand why the recitals which I have read were introduced, unless it was intended to deal with those dividends which are therein expressed to be the right of the then existing shareholders. I think that clause deals with this part of the subject, by putting all the dividends on the same footing. But I also think that if there was any doubt on that point it would be removed by the 5th section. For what are the rights there spoken of which are preserved to the shareholders under the first Act? They are the rights acquired under that Act. The preamble recites that under that Act the shareholders were entitled to a dividend of 10 per cent. on the nominal amount of their shares. That, therefore, was one of the rights acquired under that Act; and that therefore was one of the rights vested in the old shareholders on taking new shares under the later Act. Indeed, except the clause refers to such dividends, it is difficult to see what are the rights to be vested in them, or why such right to be paid the deficiency of former dividends should be excluded. Well, then, are these provisions inconsistent with the provisions of the later Act? Certainly not. It seems to me that they are not only consistent with them, but that any other construction would be inconsistent with the provisions of both Acts, which must, for this purpose, be read together. That this is so is, to my mind, made clear by the contention on behalf of the consumers, and the clauses on which they rely for their rights. The contention of the consumers is, that the deficiency of dividends under the former Act is gone; that only deficiencies on dividends declared since the passing of the second Act can now be made good out of the profits of the company; and that the excess of profits after that should be applied in reducing the price of water to the consumers. But under the second Act, taken alone, there is no power of reducing the price of water to the consumers; it is solely under the first Act, which is incorporated with the second, and enlarged and amended by it, that that power can be exercised. But the only clause in the former Act under which that reduction of price to the consumers can be effected is the 32nd section. [His Honour again referred to that section, as above stated, and continued:] So that the reduction of price to the consumer is not to take place

until the accumulated fund, if created, shall have amounted to 7500*l.*, and after dividends to the amount of 10 per cent. shall have been paid on the original shares; that is, the court of quarter sessions, which alone has authority to do it, has no power or jurisdiction to reduce the price of water until 10 per cent. dividends have been paid on the original shares. The nominal value of the shares is doubled by the second Act, and the dividend of 5 per cent. is substituted for 10 per cent. on the former half amount. But that is virtually the same thing, and then power is given by the 4th section of the second Act to pay the deficiency of any previous dividend. I consider it, therefore, clear, that not only are the directors authorised to pay the deficiency of previous dividends from the beginning in 1845, but also that the court of quarter sessions has no power to reduce the price to the consumers, until every previous deficiency in the dividends is paid. I will therefore make a declaration to that effect; but I will vary the expression of it, if it shall appear to counsel to be inadequate in that form to explain the construction I have put on the clauses of these two Acts of Parliament. The decree will therefore be this:—Declares that the surplus of the past income of the said Nottingham Waterworks Company, not yet expended, and the future income of the said company, as the same shall be received, after payment of the working expenses of the undertaking, and the interest on the amount of the money borrowed by the company under the authority of the aforesaid Acts of Parliament, and after providing such an amount for the contingent fund as the directors under the authority of the same Acts may consider necessary to set apart for that purpose, is applicable to the payment of arrears of dividends to the shareholders in the said company, in the following manner—that is to say: in or towards payment of what is necessary to make up the deficiency of any previous dividend declared subsequently to the passing of the Nottingham Waterworks Act 1845; and if such surplus shall be insufficient to pay such deficiency in full, then that the same is to be applied *pro rata* in payment of so much of such deficiency as the said surplus will extend to satisfy, to each of the shareholders of the company, and so on in each and every year, so long as any such surplus shall exist, until the whole of the deficiency of any previous dividend shall have been made good, and paid to the shareholders of the company." That decree will probably be all that is required for the purpose of this suit, and it will be unnecessary to take any of the accounts as prayed by this bill. The costs of the plt. and of the defts. the directors, must be paid out of the funds of the company.

#### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-law.

June 9, 1860 and July 6, 1861.

THE ATTORNEY-GENERAL v. FLOYER, SNEYMER AND DIGBY, vs BANKES.

Succession Duty Act 1853—(16 & 17 Vict. c. 51)—Who the "predecessor"—Rate of duty payable.

*Henry Bankes being seized in fee, devised certain lands to his son Henry for life, remainder to his first and other sons in tail male. Henry the son being tenant for life, and William John, his eldest living son, tenant in tail male in remainder, and of full age, suffered a recovery in 1810 to such uses as they should jointly appoint; in default of appointment to the use of Henry for life, then to such uses as William John should appoint if he survived his father by deed or will, and in default of such appointment to the same uses as in the original will. Afterwards in 1821, there was a deed of appointment by Henry*

and his son William John to such uses as they should jointly appoint, then to Henry for life, then to William John for life, remainder to his first and other sons in tail male, then to the use of George, the next son of the second Henry, for life, remainder to his first and other sons in tail male. The joint power of appointment in the deed of 1821 was never executed. The second Henry died in 1834. William John died in 1855 without issue, and thereupon George succeeded to the estate as tenant for life:

*Held, that the estate and interest of George was derived from Henry and William John as the predecessors, and that the rate of succession duty payable by the representatives of George should be 3 per cent. on one moiety in respect of the interest derived from the brother William John, and 1 per cent. on the other moiety in respect of the interest derived from Henry, the father of George.*

This was an information filed by the Attorney-General, and the object of it was to obtain from defts., who are the executors of the will of the Right Honourable George Bankes, late of Kingston-hall, in the county of Dorset, deceased—Floyer and Seymer being trustees of a settlement of 1855, made by his eldest son Edmund George Bankes—payment of the duty owing to her Majesty in respect of the succession of the said George Bankes, deceased, in certain real property to which he became beneficially entitled in possession on the death of his brother William John Bankes, and also of the duty in respect of the succession in the same property of his eldest son the said Edmund Geo. Bankes, who became beneficially entitled thereto in possession upon his said father's death; and also of the duty owing in respect of the successions of several younger children of the said George Bankes, deceased, in the same property under the appointments made by his will and codicils respectively in pursuance of certain powers enabling him in that behalf. The question for the decision of the court was as to the rate of duty payable in respect of such successions respectively.

Henry Bankes, formerly of Kingston-hall, Esq. (since deceased), was owner of certain real property in the counties of Dorset and Cumberland. On the 18th Aug. 1774 he duly made his last will, and thereby devised his said real property unto his brothers-in-law, John Wynne and William Wynne (both deceased), to hold the same (subject as to part thereof to a yearly rentcharge of 600*l.*, payable to his wife Margaret, now deceased, for her life) unto them, their heirs and assigns, to the uses therein and hereinafter in part stated in effect as follows:—To the use of the testator's son Henry Bankes for life, without impeachment of waste, with a limitation to the use of the said John Wynne and William Wynne and their heirs, during the life of the said Henry Bankes (the son), in trust, to preserve contingent remainders, with remainder to the use of the first son of the body of the said Henry Bankes (the son) lawfully begotten, and of the heirs male of the body of such first son lawfully to be begotten, severally, successively and in remainder one after the other, as they respectively should be in seniority of age and priority of birth, and of the several heirs male of the body and bodies of such respective sons lawfully issuing, with divers remainders over.

The said testator Henry Bankes died in Sept. 1776, and the said will, with a codicil thereto, dated 20th of the same month of August, confirming the said will, was shortly after testator's death proved in the Prerogative Court of the Archbishop of Canterbury by the said Margaret Bankes, his widow, who was appointed the executrix during the minority of the said Henry Bankes, the son.

Henry Bankes the younger, who was the first and eldest son of the said Henry Bankes (the son), died in 1806, unmarried and without issue, and William John

Bankes, who was the second son of the said Henry Bankes (the son), thereupon became and was at the time of the date and execution of the indenture of bargain and sale next hereinafter stated, the first tenant in tail in remainder expectant on his father's death of the real property devised by the said will, and he attained his age of twenty-one years in the year 1809.

By an indenture of bargain and sale, dated 28th June 1810, made between the said Henry Bankes of the first part, the said William John Bankes of the second part, Jonathan Holmes (since deceased) of the third part, and Jos. Lowden of the fourth part, duly executed, and afterwards enrolled in the Court of G. P., after reciting as or to the effect stated, and that the said Henry Bankes (the son) and William John Bankes were desirous and had determined to suffer a common recovery of the manors, castles, advowsons, messuages, lands, tenements and hereditaments devised by the will of the said Henry Bankes, and of settling the same to the uses, &c., in the said indenture declared, it is witnessed that for docking, barring and destroying the estate tail of the said William Bankes of and in the same manors, &c., by the said indenture bargained and sold, or otherwise assured, and all reversions and remainders expectant or depending on the same estate tail, and all dormant entails (if any) in the said Henry Bankes (the son), and all conditions and collateral limitations annexed to the said estates tail respectively, and for settling and assuring the same manors, &c., to the use by the said indenture limited and declared, and for the nominal considerations therein mentioned, the said Henry Bankes (the son) did bargain and sell, and the said William John Bankes did grant, bargain, sell, ratify and confirm unto the said J. Holmes and his assigns, the manors, &c., therein particularly described, being the real property devised by the said testator's will, as before stated, to hold the same (subject to the said yearly rentcharge of 600*l.*) unto the said J. Holmes and his assigns during the joint natural lives of the said J. Holmes, H. Bankes (the son) and W. J. Bankes, to the intent that Holmes might become tenant of the freehold of the manors, &c., by the said indenture bargained and sold, to the end that one or more common recovery or recoveries might be suffered in manner therein mentioned, with a declaration that the same and other the assurances therein mentioned should enure to the uses by the same expressed, as to certain part thereof, to the use of the said Henry Bankes (the son), his heirs and assigns, for ever; and as to the other part thereof (being that portion of the said real property to which the question in this suit relates), to the use of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rentcharge, or otherwise, and in such parts, shares, and proportions, and upon such trusts and for such ends, intents and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers, provisions, conditions, restrictions, limitations, declarations and agreements, as the said Henry Bankes (the son) and William John Bankes jointly, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by them in the presence of two or more credible witnesses, and attested by the same witnesses, should direct, limit, or appoint; and in default of such direction, limitation, or appointment, and in the meantime subject thereto, to the use of the said H. Bankes (the son) during his life, without impeachment of waste, and with the same or the like powers of leasing, and other powers and privileges as were given to them by the will of the said Henry Bankes, the testator, in confirmation of the same estate for life, and the powers and privileges annexed thereto, with remainder to the use of such person or persons for such

[Ex.]

THE ATTORNEY-GENERAL v. FLOYER, SEYMER AND DIGBY, vs BANKES.

[Ex.]

estate and interest, &c. as the said Wm. Jno. Bankes at any time, and from time to time from and after the decease of the said Henry Bankes (the son), and in the event of his the said Wm. John Bankes surviving the same Henry Bankes, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of two or more credible witnesses, or by his last will and testament in writing, &c., should direct, limit, or appoint, and in default thereof then to the same or the like uses, &c. as the same manors and other hereditaments respectively were limited by the will of the said Henry Bankes the testator, after and expectant on the several estates limited for the life of the said Henry Bankes (the son), or as near thereto as might be, &c.

A common recovery was afterwards duly suffered in or as of Trinity Term 1810, in pursuance of the agreement contained in the said indenture of bargain and sale.

By an indenture of settlement, dated 2nd June 1821, [a lease for a year precedent thereto], made between the said H. Bankes (the son) of the first part, the said W. Jno. Bankes of the second part, Henry Seymer, W. Bond, the Rev. G. Pickard and the Rev. Henry Masterman of the fourth part, duly executed and attested, after reciting as before stated, and that the said H. Bankes (the son) was seised to him and his heirs in fee-simple of divers hereditaments in Dorsetshire in addition to those limited to the use of the said Henry Bankes (the son), in fee, and also possessed of certain leasehold hereditaments in the said county; and also that the freehold and leasehold hereditaments of the said H. Bankes (the son) were convenient to be held together with the manors and other hereditaments so subjected to the joint power of appointment of the said H. Bankes (the son) and William John Bankes, and thereafter settled by them; and also reciting that the said H. Bankes (the son) and William John Bankes, and by way of family arrangement, and on mature consideration, agreed to join in settling and assuring the several manors, &c., as thereafter declared, and for that purpose the said H. Bankes (the son) and William John Bankes had determined to execute their joint power of appointment and to make and execute the several conveyances, releases and assignment after contained; the said Henry Bankes (the son) and William John Bankes jointly in that behalf, did by that their deed, sealed and delivered by them jointly, in the presence of two credible witnesses, &c., jointly direct, limit and appoint that all those the manors, &c., first thereafter released should thenceforth remain and be, and that the said recovery and all other assurances should thenceforth be and remain (subject to the said annuity) to the uses after limited. And it is thereby also witnessed that, in pursuance and further performance of the said agreement, and for the considerations therein mentioned, Henry Bankes (the son) and Wm. John Bankes did grant, bargain, sell and release unto the said Seymer and Bond, their heirs and assigns for ever, firstly, the several manors (being all the same premises as are described in and conveyed by the before-stated indenture of bargain and sale, and the recovery suffered in pursuance thereof); and, secondly, the manor, &c. therein described (being hereditaments whereof the said Henry Bankes was seised for an estate of inheritance in fee-simple, or for some other estate of inheritance), to hold to Seymer and Bond, their heirs and assigns, upon the trusts therein declared; as to such part as was by the said indenture of bargain and sale limited to the use of the said Henry Bankes (the son) in fee-simple, to the use of the said Henry Bankes (the son) his heirs and assigns for ever; and as to the other parts thereof, "the said settled estates," including that portion of the real property devised by the said testator's will (to which the question in this suit relates), to

such uses, &c. &c., as the said Henry Bankes (the son) and Wm. J. Bankes should jointly appoint; and, subject thereto, to the use that Frances, the wife of Henry Bankes, the son (who died in her husband's lifetime), should, if she survived her said husband, receive for her life 700l. a year, with a term of 500 years to Pickard and Masterman, for securing due payment thereof, and providing for the maintenance of any tenant in tail during minority, to Henry for life; then to William John for life, with remainder to his first and other sons in tail male; then to the use of George Bankes (the person in question), the next son of the second Henry, for life, remainder to his first and other sons in tail male. The joint power of appointment in the deed of 1821 was never executed. The second Henry died in 1834, and William John in 1855 without issue, whereupon George succeeded to the estate as tenant for life. Under the Succession Duty Act 1853 there became payable in respect of the succession of George Bankes in the said settled estates, according to the value to be ascertained as in the Act mentioned, eight half-yearly instalments, the first whereof ought to have been paid at the expiration of twelve months next after George Bankes became entitled to the beneficial enjoyment.

George Bankes was tenant for life in possession of the settled estates in the settlement of 1821, at the time the disentailing deed next mentioned was made, and Edmund George Bankes was his first son, and as such was tenant in tail male in remainder, expectant on his father's death, and by a disentailing deed of the 2nd July 1855, made between the said George Bankes of the first part, the said Edmund George Bankes of the second part, and J. S. Gregory of the third part, and duly enrolled pursuant to the Statute for the Abolition of Fines and Recoveries, Edmund George Bankes, with the consent of the said George Bankes, his father, as protector of the settlement of 1821, disentailed the settled estates comprised therein, and the said George Bankes conveyed the same to such uses, &c., as the said George Bankes and Edmund George Bankes should by deed jointly appoint; and in default thereof the same were to be to the uses of the said settlement.

By an indenture of settlement dated 3rd July 1855, between said Geo. Bankes of the first part, said Edmd. Geo. Bankes of the second part, said Floyer and Seymer of the third part, the said Floyer of the fourth part, and the said J. S. Gregory of the fifth part; after reciting the settlement of June 1821, that Frances Bankes died in 1823, that said Henry Bankes did not marry afterwards; that Henry and William John Bankes did not exercise their power of joint appointment, and that said Henry Bankes did not, except to secure a jointure for the wife of George Bankes and the mother of said William George Bankes; that said Henry Bankes died on 17th Dec. 1834, and William John Bankes on 15th April 1855, unmarried and without issue; that Edmund George Bankes was born on 24th April 1836, and was the first son of said George Bankes—the last-mentioned disentailing deed of the day previous; that Edmund George Bankes intermarried on 24th Jan. 1848 with Rosa Louisa Bastard, spinster, and had two sons by her, to wit, Henry John P. Bankes, born on 12th Feb. 1850, and Walter Ralph Bankes, born on Aug. 1853: it is witnessed that said George and Edmund George Bankes, by virtue of the power given to them jointly by the indenture of 2nd July 1855, and of every other power, &c., did appoint that all and singular the said settled estates should remain to the uses therein stated; and it was further witnessed that said George and Edmund Geo. Bankes, by way of further assurance and in aid of the appointment thereby made, did grant unto the said Floyer and Seymer, their heirs and assigns, all the said settled estates (except the leasehold parts), to hold to them, their heirs and assigns for ever,

[Ex.] THE ATTORNEY-GENERAL v. FLOYER, SEYMER AND DIGBY, re BANKES.

[Ex.]

nevertheless to the uses and upon the trusts therein mentioned, and as George and Edmund George Bankes should jointly appoint, and, in default, to Floyer and Seymer, their executors, administrators and assigns, for 500 years; remainder to Gregory, his executors, administrators and assigns, for the term of one day, to prevent merger, and subject thereto to the use of George Bankes for life; remainder to Floyer and Seymer for 1000 years, upon certain trusts; remainder to Gregory for one day, and subject thereto to the use of Floyer and Seymer for the life of Edmund George Bankes, and after his decease to the use of Henry John P. Bankes, the first son of Edmund George Bankes, for life, and after his death to the use of the first and every other son of the said Henry John P. Bankes severally and successively, according to priority of birth, and the heirs male of the bodies of the same sons respectively, every elder of the same sons, and the heirs male of his body to take before every younger, &c.; and on failure of such issue, to the use of the said Walter Ralph Bankes, the second son of said Edmund George Bankes, for life, and afterwards over to his sons in a similar manner; and on failure of such issue, to the use of Henry Hyde Nugent Bankes, the second son of said George Bankes, for life, and afterwards over to his sons in a similar manner; and on failure of such issue, to the use of William George Hawtreys Bankes, the third son of George Bankes, for life, and afterwards over to his sons in a similar manner; and on failure of such issue, to the use of Wynne Albert Bankes, the fourth son of said George Bankes, for life, and afterwards over to his sons in a similar manner; and on failure of such issue, to the use of the fifth and every other younger son of said George Bankes, severally and successively, according to priority of birth, and the heirs male of the bodies of the same sons; and on failure of such issue, to the use of Edward Bankes for life; afterwards to the use of John Scott Bankes, the eldest son of said Edward Bankes, for life, and afterwards over to his sons in a similar manner; and on failure of such issue, to the use of the Rev. Eldon Surtees Bankes, the second son of said Edward Bankes, for life, and afterwards over to his sons in a similar manner; and on failure of such issue, to the use of the said George Bankes, his heirs and assigns for ever.

The said George Bankes by his will, dated 28th July 1855, recited that by the said settlement of 2nd June 1821 a power was limited to him to charge all or any part of the hereditaments, &c., thereby settled, except certain parts expressly excepted, with portions for his daughters and younger sons. And by the settlement of 3rd July 1855, being a resettlement of the estates settled by the settlement of 1821, a power was limited to him to charge all or any part of the hereditaments, &c. thereby settled, except certain parts thereof expressly excepted from the operation of the same power, but which were not altogether the same parts thereof as were excepted from the operation of the said power created by the settlement of 1821. "Now, therefore, by virtue and in exercise of every power and authority whatsoever me in this behalf in any way enabling, I do hereby charge all those the manors, &c., settled by the settlement of 1821, resettled by the settlement of 1855, except such parts thereof as by the settlement of 1821 were excepted from the operation of the said power thereby created, and except also such parts as by the settlement of 1855 were excepted from the operation of the said power thereby created, with the following sums as portions for my three younger sons and my four daughters respectively—that is to say, 10,000*l.* for my second son H. H. N. Bankes, 5000*l.* for my third son William George H., 5000*l.* for my fourth son Wynne Albert, 5000*l.* for my daughter Georgiana Charlotte Frances, wife of said John Floyer, and in satisfaction of a covenant con-

tained in her marriage settlement, and the sum of 5000*l.* each to Adelaide, Augusta Anne and Octavia Elizabeth."

By a codicil to his said will, dated 25th Feb. 1856, after taking notice of the death of his said daughter Octavia Elizabeth, he made a further apportionment of 3000*l.* to his daughter Mrs. Floyer, 3000*l.* to his daughter Adelaide, and 3000*l.* to his daughter Augusta Anne, and charged the same hereditaments with the payment thereof.

By a second codicil to his said will, dated the 16th June 1856, after reciting the appointment made by his will and codicil in favour of his said daughter Adelaide, he revoked the same, and declared that certain provisions which he had then lately made, in contemplation of her marriage with the deft. Digby, should be deemed in lieu of a bequest of 3000*l.* to her contained in his will, and made payable out of his general personal estate, and also of 5000*l.* and 3000*l.* by his will and codicil charged upon the said settled estates.

George Bankes died on the 6th July 1856, and his said will and codicils were duly proved by defts. (and William G. H. Bankes, since deceased), his executors, on the 15th Aug. then next.

Upon the death of George Bankes, his eldest son, the said Edmund George Bankes, or defts. Floyer and Seymer, on his behalf, became entitled in possession to the succession conferred on the said E. G. Bankes by the settlement of 1855, and duty became payable in respect thereof; and the said five younger children of the said George Bankes then also became respectively entitled in possession to the portions so apportioned to them; and defts. Floyer and Seymer, as the trustees, are personally accountable in respect of the duty on all the successions; and application has been made to defts. for payment after the rate of 3 per cent. on the value of that portion of the succession conferred on George Bankes by the settlement of 1821, derived under the will of Henry Bankes, the subsequent bargain and sale of Jan. 1810, and the recovery suffered in pursuance thereof; and the Attorney-General insists that this is the proper rate of duty, inasmuch as this portion of the succession of George Bankes was derived by him from his brother the said William John as predecessor.

The same as to Edmund George Bankes, inasmuch as the settlement of 1855, under which the said E. G. Bankes takes his succession, was a disposition made by himself at the date whereof he was entitled to the property comprised therein expectantly on the death of his father, the said G. Bankes, and he is therefore chargeable with duty at the same rate as he would have been chargeable with if no such disposition had been made; and the proper rate of duty with which the said Edmund George would have been chargeable if the settlement of 1855 had not been made is 3 per cent., inasmuch as in that case he would have derived his succession from his father's brother, the said William John Bankes, as predecessor.

The same in respect of the several portions appointed by the said will and codicils of George Bankes to his five younger children, inasmuch as such younger children derive their interests under one or other, or both, of the instruments by which the several powers of appointment which George Bankes assumed to exercise in their favour as before stated were respectively created; that is to say, the settlement of 1821, which was a disposition made by their father's brother William John, and the settlement of 1855, which was a disposition made by their own brother Edmund George, so that their interests were derived either from their uncle or from their brother as predecessor, within the meaning of the 4th section of the Succession Duty Act 1853.

The Attorney-General (Sir R. Bethell), Solicitor-General (Sir W. Atherton), Sir F. Kelly and Hanson for the Crown.



*Roll, Q.C., M. Smith, Q.C. and C. Hall* for the depts.

*The Attorney-General v. Sibthorp*, 3 H. & N. 424; *Attorney-General v. Braybrooke*, 2 L. T. Rep. N. S. 383; *Lord Salloun's case*, in the H. of L. (decided yesterday, the 8th June 1860), were cited.

*Cur. adv. vult.*

July 6, 1861.—BRAMWELL, B. delivered judgment. —The first question in this case is, what is the rate of succession duty on so much of the succession of George Bankes in property comprised in an indenture of June 2, 1821, as was derived under the will of Henry Bankes, and an indenture of June 28, 1810, and a recovery suffered thereon? To determine that we must determine who is or are the predecessor or predecessors under the 2nd section of the Succession Duty Act (the 16 & 17 Vict. c. 51)—that is to say, who is or are the person or persons from whom the interest of George Bankes is derived. Now his interest was derived thus: Henry Bankes, being seised in fee, devised the lands in question to his son Henry for life, remainder to his first and other sons in tail male, and died; Henry, the son, being tenant for life, and William John, his eldest living son, tenant in tail male in remainder, and of full age, suffered the recovery in question to such uses as they should jointly appoint; in default of appointment to the use of Henry for life, in confirmation of the same estate for life as was given by the will of the tenant before mentioned; then to such uses as William John should appoint, if he survived his father, by deed or will, and, in default of such appointment, to the same uses as in the original will before mentioned. There was afterwards, in 1821, a deed of appointment by Henry and his son William John, to such uses as they should jointly appoint, then to Henry for life, then to William John for life, remainder to his first and other sons in tail male; then to the use of George, the person in question, the next son of the second Henry, for life, remainder to his first and other sons in tail male. The joint power of appointment in this deed of 1821 was never executed. The second Henry died in 1834; William John died in 1855, without issue, and thereupon George succeeded to the estate as tenant for life. Now, if George's predecessor is exclusively his grandfather or his father, the rate of duty is 1 per cent.; but if his brother William John is his predecessor, in whole or in part, then in respect of the interest derived from him 3 per cent. ought to be paid. The first question then is, is any of the interest of George Bankes derived from his brother William John, within the meaning of the second section of the Duty Act? It seems impossible to say there is none. The result of the two dispositions of 1810 and 1821 is that Henry being tenant for life, William John tenant in tail male in remainder, with remainder over to George in tail male, Henry and William John suffering a recovery acquire a joint power of disposing of the fee, bar all subsequent remainders, and ultimately execute that power of disposing of the fee by giving an estate for life to Henry, remainder for life to William John, remainder to his first and other sons in tail male, remainder to George for life. If we look at the disposition of 1810, it amounts to this, that Henry gets back what is called the same estate for life, and William John converts his estate tail into a fee-simple, out of which is, by his act, in part at least, derived the subsequent estates, created by the disposition of 1821. If we look at that transaction, it is the joint act of William John and his father which conferred the estate on George; it is from the estate tail of William John, and, at least in part, by the act of William John, that George's life-estate is derived. If William John had survived his father, suffered a recovery to such uses as he should appoint, and then had appointed to the uses of the deed of 1821, subsequent to the life-estate of the father, it could not be doubted that he would be

the predecessor from whom George's interest was derived; so if the recovery had been suffered without the intermediate power of appointment directly to such uses. Then does the circumstance of the father being a party to the dispositions prevent any of the interest being derived from William John? Let it be tried thus: suppose the recovery had been to the use of the father Henry for life, remainder to William John in fee, or to such uses as he should appoint, and then he had appointed to the uses of the deed of 1821 subsequent to the life-estate of the father, would not the interest be derived from him? Clearly. So also if the intermediate power of appointment had been left out. This shows that neither the fact of the father Henry being a party to the disposition, nor the fact of the life-estate of George not being directly created by the deed to lead the uses of the recovery, nor consequently those two facts combined, prevent the interest being, in part at least, derived from William John. The next question is, is the interest wholly derived from William John the brother, or in part from Henry, the father of George? We think the latter is the case. Henry and William John have a joint power of appointment, and the act of each is necessary to give the estate for life to George. George might, indeed, have had such an estate, or rather an estate tail, had the joint power of appointment not been executed; but still the estate which he gets under that power, Henry and William John might have given the same estate to an entire stranger. This is not inconsistent with the decision of the *Attorney-General v. Sibthorp*, 3 H. & N. 424. It is true that it was there held that the deft. derived no interest, or no appreciable interest, from his father; that his father took back his life-estate, and the deft.'s interest there was derived from his own estate tail; he got no more, any less, than he would have had had the power of appointment not been executed. So we should say here, had the question been what duty William John should pay, as he would get back only what was his own before. But here George gets, not by his own act—not anything of his own estate, but by the joint act of his father and brother operating on a fee, created indeed out of the brother's estate, but which he alone could not operate on. See the judgment of the L. C. in *Lord Braybrooke's case*, folio 6. We were much pressed by the decision of the *Attorney-General v. Lord Braybrooke*, but in truth that case is not inconsistent with our present decision, as was shown by the *Attorney-General*. It is a convenient expression to speak of the continuation of a family settlement; but the expression is obviously too vague for the enunciation of a proposition of law. Its use is justified by the case of *Lord Salloun v. The Lord Advocate*, which is an authority for our present decision. That case decided that the statute is to have a proper construction. Can it be doubted, popularly speaking, that it was from Henry and William John jointly that George's interest was derived? Nor is there any hardship in this. If there is any reason why a succession derived from a brother should pay more than one derived from a father, that reason exists as much in such a case as the present as in any other. In the result then, whether we consider half to come from Henry and half from William John, or that the interest derived from each cannot be distinguished, and that sect. 13 applies, the rate of duty is 3 per cent. on one moiety, and 1 per cent. on the other. The same considerations determine the next question, the rate of duty in respect of the succession of Edmund George Bankes. With respect to the last question it seems clear that 1 per cent. is the rate of duty. The settlor, the person from whom the interest of the children is derived, is their father. The decree should be accordingly. This judgment was prepared before the decision of *Lord Braybrooke's case* in the

[Ex.]

TAYLOR v. VERGETTE.

[Ex.]

H. of L. Though, as we are glad to think, that case sanctions the views we have taken here, it is not so in point as to dispense with our giving our reasons for our decision in this case. In this judgment we are unanimous.

*Decree accordingly. 3 per cent. on one moiety, and 1 per cent. on the other.*  
Solicitors, *Inland Revenue*.

Wednesday, June 12.

TAYLOR v. VERGETTE.

*Bribery—Action for penalties under 17 & 18 Vict. c. 102—Staying proceedings for wilful delay.*

*The plt. in an action for penalties for bribery on the 17 & 18 Vict. c. 102, is bound by the 14th section to proceed without wilful delay. The bribery was alleged to be in May 1859, no action was commenced until 15th March 1860; writ served 27th April 1860 (plt. and deft. lived in the same town); appearance entered 4th May; declaration delivered 17th April 1860; plea 25th April 1861; issue joined 7th May 1861; application for rule to stay proceedings 1st June 1861:*

*Held, as there was no sufficient reason assigned for the plt's delay, the delay was wilful, and proceedings ordered to be stayed.*

This was an action brought to recover penalties for bribery under the 17 & 18 Vict. c. 102 ("An Act to consolidate and amend the laws relating to bribery, treating and undue influence at elections of members of Parliament"), upon a letter of which the following is a copy:—

"Peterborough, April 27th, 1859.

"Mr. Turner, Mr. Peach's Yard.

"If you will be so good as let Mr. Richard Kelly know that this election will take place on Saturday, and that, as he has promised to vote for Mr. Whalley, I hereby promise on behalf of the committee of Mr. W. to pay his expenses if he will fulfil such arrangement.

"Yours obediently, W. VERGETTE."

The plt. is an attorney and solicitor, carrying on business in partnership with L. J. Deacon, at the city of Peterborough, and the deft. is a grocer, residing and carrying on his business in the same city, which he has done for twenty years last past.

The declaration stated that the deft., after the passing of an Act of Parliament, passed in a session of Parliament held in the 17 & 18 years of the reign of Queen Victoria, intitled "An Act to consolidate and amend the laws relating to bribery, treating, and undue influence at election of members of Parliament," and before this suit, promised money to or for one Richard Kelly, who was a voter within the true meaning and intent of the said statute for and at an election for members of Parliament for the borough of Peterborough, in the county of Northampton, in order to induce the said Richard Kelly to vote at the said election contrary to the form of the statute, whereby the said deft. became liable to forfeit for his said offence the sum of 100*l*. 2. And also for that the deft., after the passing of the said Act, and before this suit, gave money to or for the said R. Kelly, so being such voter as in the said first count mentioned, in order to induce the said R. Kelly to vote at the said election, contrary to the form of the statute, whereby the said deft. became liable to forfeit for such his offence the sum of 100*l*. 3. And also for that the deft., after the passing of the said statute, and before this suit, gave money to or for the said R. Kelly, so being such voter as aforesaid, on account of his having voted at the said election in the first count mentioned, contrary to the statute, whereby the deft. became liable to forfeit for such his offence the sum of 100*l*.; and the plt. claims 300*l*.

*Plea, not guilty by statute 21 Jac. 1, c. 4, s. 4.*

*The writ was issued on the 15th March 1860, served*

*27th April 1860; appearance entered 4th May 1860; declaration on 17th April 1861; plea 25th April 1861; issue joined 7th May 1861.*

The deft., upon an affidavit of the above facts, and also alleging that there had been no good cause for the delay in proceeding with the action, that he believed the delay had been wilful and had taken place from a desire on the part of the plt. and of those by whom he was instigated to annoy and prejudice deft., and to keep the charge of bribery hanging over his head, and undisposed of as long as possible; that he had a good defence to the action on the merits, and was advised by counsel to move for a rule to show cause why deft. should not be at liberty to add to the plea already pleaded the following pleas, viz.: 1. That the writ was not served within one year after offence committed. 2. To further maintenance of action, same plea. 3. To whole, action not proceeded with without wilful delay. 4. To further maintenance, same plea: or why all proceedings in this case should not be stayed on the grounds alleged in the said pleas.

*Field* having on the 1st June 1861 obtained such rule,

*Macaulay, Q. C. (Tompson Chitty with him)* showed cause.—Plt's affidavit states that the time he has taken in prosecuting the action has been such as the rules and practice of this court allow, and which time he has used in such a manner as appeared to him most convenient under the circumstances of the case; that he had not nor ever had any desire to annoy or prejudice deft., nor was he instigated by any one to do so, but was actuated by a desire to visit the penalties attached to bribery upon the deft., with a view by this action (appearing to him more reliable than criminal proceedings) to prevent a repetition of bribery at future elections at Peterborough; that the witnesses in this and another similar action were persons who he believed were actively engaged in the mob at the railway-station, and on account of the feeling then and since existing he had been unable until lately to obtain the information and evidence upon which he had been advised to make specific charges, and to set out specific offences in the declarations in the said action; that the same writs were required in both actions, and he was anxious to try both at the same time, and that he could not bring them to trial at an earlier period with a fair prospect of success than at the ensuing summer assizes. The above dates of the various proceedings were called to the attention of the court, and the 17 & 18 Vict. c. 102, s. 14, which enacts, that "no person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action, or suit, for the offence committed shall be commenced against such person within the space of one year next after such offence against this Act shall be committed, and unless such person shall be summoned or otherwise served with writ or process within the same space of time, so as such summons or service of writ or process shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the court out of which such writ or other process shall have issued, and in case of any such prosecution, suit, or process as aforesaid, the same shall be proceeded with and carried on without any wilful delay. *Wilkinson v. Allot*, Cowp. 366; *Sulton v. Bishop*, 4 Burr. 2287; *Petrie v. White*, 3 T. R. 5, were cited.

*Field*, contra, in support of the rule, was not called upon.

*POLLOCK, C.B.*—We think in this case there has been such a wilful delay as was intended to be prohibited by the Act of Parliament, and although not so great as in *Petrie v. White*, 3 T. R. 5, where the delay appears to have been six years, yet here the bribery is alleged to have taken place in the year 1859, no action was brought until very close upon the expiration of a

year afterwards, and the declaration was not delivered until April 1861; and really the excuse attempted to be set up for it is no excuse at all. The plt. should have been prepared to show in what way he is about to prove his case how the delay arose, and to have given some sort of answer to the def't.'s affidavit and application. He is not to keep these sort of proceedings hanging over the def't.'s head in this way without any reasonable excuse. The plt. and def't. it appears both live in the same town. I think this is a case for the interference of the court, the same as in *Petrie v. White*. The plt. may, if he desires, have the matter inquired into by indictment; but, as he has already allowed two assizes to go over without proceeding to trial, I think the rule should be made absolute to stay the proceedings.

MARTIN, B.—I am of the same opinion. If we are to give any effect to the Act of the Legislature, this is a case certainly in which I think we ought to interfere. Now what are the facts? The alleged bribery is supposed to have taken place in April or May 1859; no action is commenced until the middle of March 1860, more than a month is then allowed to elapse after the writ is issued before it is served upon the def't., although it is sworn the plt. and def't. both reside in the same town; the def't. enters an appearance to the writ, and it is not for more than eleven months after that the plt. delivers his declaration. If ever there was evidence of wilful delay in proceeding with a suit it is here. What is the answer set up by the plt. for this delay? It is that he has taken such time as the rules and practice of this court allow, which time he has used, he says, in such a manner as appeared to him most convenient under the circumstances of the case, and that the persons required as witnesses were persons who he was informed were actively engaged in a mob at the railway-station, and on account of the feeling existing he has been unable until lately to obtain information to set out specific offences. That is no excuse for the continued delay in the proceedings; persons who bring actions for penalties should see that they are right before they take proceedings, and when they have commenced their actions they ought to be prompt and regular in continuing them, so as not to keep suits of that sort hanging over the heads of parties an unnecessary length of time. The question here is, whether there has not been wilful delay? The statute does not mean perverse delay, but every delay which the plt. cannot account for to the satisfaction of the court in which the action was commenced. If the court see that the action might have been prosecuted in a more speedy manner, and no reason is assigned for it, such a plt. is undoubtedly guilty of wilful delay; that has been so here, and I think it is a clear case for staying the proceedings. Properly the def't. should have applied to the court for the purpose of this application immediately after the declaration, and on that account there will be no costs to either party.

*Rules absolute to stay the proceedings without costs.*

Plt.'s attorneys, Messrs. Roscoe and Hincks, 14, King-street, Finsbury-square.

Def't.'s attorney, Mr. Perceval, Peterborough.

### V. C. KINDERSLEY'S COURT.

Reported by JOSHUA METCALFE, Esq., Barrister-at-Law.

April 26 and 29.

MINTON v. MINTON.

*Construction of will—Joint tenancy—"Surviving children."*

*B. bequeathed to his five daughters, naming them, 12,500*l.*, chargeable on his real and personal estate, the interest to be paid to them in equal shares during*

*their lives, the principal to be invested in trust for them or the survivors or survivor of them for their maintenance, to be free from the debts and control of their husbands, "the principal, after their deaths, in equal parts to their surviving children, as they arrive at the age of twenty-one;" and he gave to his trustees the residue of his property. Two of the daughters died, one leaving two children:*

*Held, that the principal of the fund was to remain in its integrity until the death of the survivor of the five daughters, and on the death of such survivor the fund to be divided amongst the persons described as "surviving children," but that the time had not arrived to decide who were meant by those words.*

This was a petition presented by the daughters of Thos. Minton, deceased, raising the question of the construction of his will.

Thomas Minton made his will dated the 7th April 1832, and thereby appointed his widow Sarah Minton, and his sons Thomas Webb Minton and Herbert Minton, and his son-in-law John Campbell, his executrix and executors and trustees of all his real and personal property, and among others the testator made the following bequest:—"I give and bequeath to my daughters Mary (now Mary Campbell), Sarah, Elizabeth, Julia (now Julia Cave) and Catherine, 12,500*l.*, chargeable on my real estate at Shelton, alias Snape Marsh, and on my personalty, *videlicet* money in the funds or the stock of England or elsewhere, the interest of the above sum to be paid them in equal parts or shares during their lives, and the principal to be placed in the funds or Bank of England in trust for them or the survivors or survivor of them, and nothing but their receipts shall be a release or discharge to my trustees; nor shall any bankruptcy of themselves or their husbands have any power over them or their trustees, but solely for their maintenance, the principal after their deaths in equal parts to their children as they arrive at the age of twenty-one." After various other intervening devices and bequests, he concluded the gifts in his will by the following:—"I give and bequeath to my trustees all the remainder and residue of my property to buy real estate for my heir-at-law for his or her use for ever."

The testator made certain codicils to his will which did not affect the above bequests, and died on the 29th May 1836.

The above-mentioned sum of 12,500*l.* was, on the 28th May 1838, invested in the purchase in the names of the said Sarah Minton, Thomas Webb Minton, Herbert Minton and John Campbell, as such trustees as aforesaid, of a sum of 13,262*l.* 12*s.* Bank Three per Cent. Annuities.

The testator left surviving him his five daughters named in his will, all of whom had attained their respective ages of twenty-one years before the date of the will. The testator's heir-at-law was his eldest son Thomas Webb Minton, and the testator left three more sons, Herbert Minton, Charles Lee Minton and Arthur Minton, all of whom had respectively attained the age of twenty-one years before the date of the will.

A suit was instituted for the administration of the testator's estate, and on the 8th Aug. 1838 a decree was made by the late V. C. of England (*Minton v. Cave*, 10 Jur. 86) declaring, amongst other things, that the testator's daughters, Mary Campbell, Sarah Minton, Elizabeth Minton, Julia Cave and Catherine Minton, were entitled to life-interests for their separate use in the sum of 12,500*l.* bequeathed by the testator, and the Court ordered that one equal fifth part of the dividend of the said sum of 13,262*l.* 12*s.* Bank Three per Cent. Annuities, in which the 12,500*l.* had been invested, should be paid to each of the five daughters for their separate use, with liberty to apply on the death of any of the daughters.

The said Elizabeth Minton died unmarried on the 16th Sept. 1845, having by her will, dated the 5th

[V.C. K.]

MINTON v. MINTON.

[V.C. K.]

Aug. 1839, appointed the said John Campbell and Charles L. Minton her executors.

Mary Campbell had four children, all of whom attained their respective ages of twenty-one years. Sarah Minton was still unmarried; and Julia Cave had four children, all of whom attained their respective ages of twenty-one, and she had not had any other child since the death of the testator, except a son, who died on the 17th Jan. 1841 an infant. The deft. W. A. C. B. Cave took out letters of administration to him.

On the 5th Aug. 1853 Louisa, one of the daughters of Julia Cave, married the deft. Colin Minton Campbell, when a marriage-settlement, dated the 2nd Aug. 1853, was made and executed, whereby, after reciting that a marriage was then intended shortly to be solemnised between the said Colin Minton Campbell and Louisa W. C. B. Cave, and reciting, amongst other things, that the said Louisa Cave would be entitled, upon her attaining the age of twenty-one years, to a share of a legacy of 2500*l.* equally with her brothers and sisters, of whom she had three then living, under and by virtue of the will of Thomas Minton, subject to her mother's life-interest therein; he the said Colin Minton Campbell contracted with the said Herbert Campbell and Charles Lee Campbell, that the said legacy to which the said Louisa Cave would be entitled under the said will as aforesaid, and all the estate, property and effects whatsoever, both real and personal, which the said Colin Minton Campbell and the said Louisa Cave, or either of them in her right, was or were then, or should at any time during the said intended coverture become possessed of or entitled to, either at law or in equity, under any gift, devise, or bequest, in her favour, or by descent, qualification, or any other means whatsoever, of the value or to the amount of 100*l.* or upwards at any one time, should be assured and settled upon certain trusts therein declared, for the benefit of the said Louisa Cave and Colin Minton Campbell, during their respective lives, and afterwards for the children and issue of the said intended marriage in manner therein mentioned.

On the 29th March 1854, Julia Mead Cave Brown Cave, another of Mrs. Cave's daughters, intermarried with the Rev. Howard England Tunncliffe Gough, previously to which a marriage-settlement was made and executed, whereby, after reciting that a marriage was intended to be solemnised between the said Rev. H. Gough and Julia Cave, and that under and by virtue of the will of Thomas Minton, the said Julia Cave would become entitled, upon attaining the age of twenty-one years, to a share of a legacy or sum of 12,500*l.*, or to some interest therein, subject nevertheless to the several life-interests particularly mentioned and created by the same will, or such of them as should be then subsisting and undetermined, the said H. Gough covenanted with the trustees, that in case the marriage should take effect, he and the said Julia Cave and all other necessary parties should, as soon as conveniently might be after the said Julia Cave should have attained the age of twenty-one years, settle and assure all the share or interest of the said Julia Cave in the said legacy, and also all the estate, property and effects whatsoever, real or personal, which the said H. Gough and Julia Cave, or either of them in her right, should at any time during the said coverture become possessed of or entitled to, either in law or in equity, under any gift, devise, or bequest in her favour, or by descent, succession, or any other means whatsoever, of the value of 100*l.* and upwards, should be settled and assured upon certain trusts therein mentioned, for the benefit of the said Julia Cave and H. Gough during their respective lives, and then for the issue of their marriage in manner therein mentioned.

Catherine Minton intermarried with Robert Taylor, and had three children, one of whom died on the 29th

Nov. 1843, an infant, her father obtaining letters of administration to her.

On the 25th Nov. 1845, a supplemental suit was instituted for the purpose of bringing before the court the defts. F. Cave, R. M. Taylor and H. M. Taylor, who had been born since the date of the decree, and also the defts. William Cave and Robert Taylor, in their respective characters of legal personal representatives of their deceased children.

On the 23rd Jan. 1846 an order of that date was made, in consequence of the death of Elizabeth Minton, whereby it was declared that the dividends of a share of the 13,362*l.* 12*s.* Bank Three per Cent. Annuities, to which the said Elizabeth Minton, deceased, had been entitled, became divisible on her death between the other daughters of Thomas Minton, the testator, viz., the said Mary Campbell, Sarah Minton, Julia Cave and Catherine Minton, during their lives, as tenants in common, and liberty was thereby given to any party to apply to the court on the death of any other of the daughters; and it was declared that the dividends which accrued due on the 5th Jan. next after the death of the said Elizabeth Minton were divisible between the legal personal representatives and the surviving daughters in proportion to the time she lived of the half year; the dividends to accrue due, after payment of the costs, to be paid to the said Mary Campbell, Sarah Minton, Julia Cave and Catherine Minton, in equal shares during their lives.

The costs of the suit having been paid by a sale of a portion of the stock, there remained the sum of 13,126*l.* 1*s.* 4*d.* Bank Annuities standing in the names of the trustees, two of whom (Sarah Minton, the widow and Herbert Minton) died, after the date of the above order, leaving Thos. Webb Minton and John Campbell the only surviving trustees.

On the 25th Jan. 1861 Catherine Taylor died leaving Robert Taylor, her husband, and two children, Robert Minton Taylor, and Herbert Minton Taylor, her surviving.

The petitioners claimed to be entitled as tenants in common, during their lives, to the whole of the dividends of the said sum of 13,126*l.* 1*s.* 4*d.* Bank Three per Cent. Annuities from the death of Catherine Taylor, excepting only a proportionate part of the then accruing dividend on the original and accrued shares respectively of Catherine Taylor up to the time of her death. And they prayed that it might be declared that in the events which had happened the dividends on the original or accrued shares of the said Catherine Taylor, in the sum of 13,126*l.* 1*s.* 4*d.* Bank Three per Cent. Annuities, excepting only a proportional part, up to the time of her death, of the then accruing half-yearly dividend thereon, became divisible, on the death of Catherine Taylor, among the petitioners, the other daughters of Thomas Minton, during their lives, as tenants in common, and for their separate use; that the rights and interests of all parties to and in the capital and income of the original and accrued shares might be ascertained and declared; that the costs, charges and expenses of all parties of and incident to the petition might be taxed as between solicitor and client, and might be paid by a sale of a competent part of the sum of 13,126*l.* 1*s.* 4*d.* Bank Three per Cent. Annuities; and that the dividends of the above sum previous to such sale, except such apportioned part as aforesaid, and all the dividends to accrue on the residue of the fund, after such sale of part thereof, might be ordered to be divided amongst and paid to them on their separate account during their lives.

Glasser, Q.C. and Kay appeared for the petitioners, and contended that they were entitled, as the survivors of the five daughters, to the interest of the whole fund for their lives.

Fischer, for the surviving children of Mrs. Taylor,

submitted that they were entitled immediately to their mother's share.

*C. M. Roupell*, for the residuary legatees and heir-at-law, submitted that the accrued share was not disposed of except by the residuary gift.

*Baily, Q.C.* and *Robinson* for the surviving daughters of the testator.

*Cecil Russell*, for Charles Lee Minton and Arthur Minton, two of the sons of the testator, submitted that the words "surviving children" meant the children of the testator, and included his sons.

*George Lake Russell*, for the representatives of the children of Mrs. Cave and Mrs. Taylor, who died under twenty-one, contended that they were entitled to participate.

*Longley* for the trustees.

*Glaspe, Q.C.* in reply.

Authorities referred to:—*Jarm. on Wills*, 212; *Rep. on Leg.* 1223; *Pain v. Benson*, 3 Atk. 78; *Barker v. Lea*, Turn. & Russ. 413.

THE VICE-CHANCELLOR.—The effect of the V. C. of England's decision, and of the language of the will, is, that the principal of this fund is to remain in its integrity, until the death of the survivor of the five daughters, and on the death of such survivor, for the first time the division of the fund is to take place amongst the persons described as "surviving children," but as to who are meant by these words I shall not now decide. Whether it means the sons or the children of the daughters this question does not now arise, although, of course, if the case could not be decided without putting an interpretation upon these words, I should have done so. The testator, beyond doubt, has first given the fund to his five daughters in terms which, if he had stopped there, would have created a joint tenancy in the fund; but he meant to deal with the interest "during their lives," using words importing a tenancy in common, "in equal parts or shares." *Prima facie*, subject to the effect of the context, the words "during their lives" meant during the lives of the five, and so far it is difficult to say, supposing one dies, that there is a gift beyond that period; but he goes on to direct that the principal shall be placed in the funds in trust for them or the survivor, &c., for their maintenance, and so far it is difficult to hold that there is a joint tenancy. But then comes the proviso as to what is to become of the principal "after their deaths." The V. C. of England held that "after their deaths" meant after the death of the survivor of the five. There was no gift over to any one except after their deaths, and I concur in the former decision that there is no gift of the principal until after the deaths of all. The intention was, that as long as any one was living the fund was to remain as a security for the benefit of them and the survivors, not the capital only, but the income that is *in integro*, and when Elizabeth died it was decided that the survivors were to have the whole income, not dividing the fund into shares; but there was a survivorship joint tenancy of it, and the survivors divided the income equally, so that they received nothing out of the fund itself, nor was there any gift which made the interest they took depend upon their deaths with or without children, but the survivors were to have the fund, irrespective of leaving children or not. Upon the whole, the construction already put is the sound one, and not until the death of the survivor of the five is a division to be made among some children or other. It is not impossible that he had contemplated the case of their leaving children; but, at all events, he gave the daughters the full benefit of the fund, which was then to go to a second set of objects, whoever they were.

Solicitors, Messrs. *Thomas White and Sons*, Bedford-row.

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SACKDEN, and C. J. H. HERTLEY, Esqrs., Barristers-at-Law.

May 23 and July 9.

COOK AND OTHERS v. WRIGHT.

Promissory note—Consideration—Compromise of claim.

*Deft. was agent for Mrs. Bennett, a non-resident owner of houses in a district subject to a local Act. Works had been done by the commissioners, the expenses of which were chargeable on the owners of the adjoining premises. Notice was given to the deft. to pay as owner the proportion chargeable on A.'s houses; he attended and objected that Mrs. Bennett was owner, when he was told that if he did not pay he would be served as another man had been, against whom proceedings had been taken. Ultimately the amount was reduced, and the deft. gave promissory notes for it:*

*Held, that the effect of the compromise made by the deft. was, that the commissioners were induced to refrain from taking proceedings against Mrs. Bennett, and that that amounted to a consideration for the deft.'s promise to pay.*

Action by the trustees under the Whitechapel Improvement Act 1853, against the deft., as ratepayer and occupier of property in the parish, to recover 21*l.* 10*s.*, the amount of two promissory notes.

The declaration alleged that deft., on the 7th Feb. 1856, by his promissory note, now overdue, promised to pay to the p<sup>l</sup>ts. 10*l.* 10*s.* twelve months after date, but did not pay the same. There was another count on another promissory note for 11*l.* twenty-four months after date, and on accounts stated between them.

P<sup>l</sup>ea:—1. That after the passing and coming into operation of the Whitechapel Improvement Act 1853, and after the passing and coming into operation of the Metropolitan Local Management Act 1855, he, the deft., made the several promissory notes at the request of the p<sup>l</sup>ts., and that at the time of making them the p<sup>l</sup>ts. asserted and represented to the deft., and the deft. believed such assertion and representation to be true, that there was then due and owing and payable from him, the deft., as the owner of certain lands and buildings in certain streets, called Finch-street, John-street and Dowson's-place, situate within the parish of St. Mary, Whitechapel, to the trustees of the parish of St. Mary, Whitechapel, under the provisions of the Whitechapel Improvement Act 1853, diverse large sums of money in respect of paving the streets fronting, adjoining and abutting on such lands and buildings; that at the time of making such promissory notes a sum of money whatever was due or owing or payable from the deft. as such owner to the said trustees, nor was the deft. such owner as aforesaid; that there never was any consideration or value for the deft. making the said promissory notes or either of them, or for his paying the same or any part thereof; and the p<sup>l</sup>ts. never were, nor was any person ever a holder of the said notes or either of them, for value or consideration; and deft. says that the said account stated was stated of and concerning the matters and things in this p<sup>l</sup>ea mentioned, and not of or concerning any other matter or thing whatever.

2. That deft. was induced to make, and did make the promissory notes mentioned, and each of them, by the fraud, covin and misrepresentations of the p<sup>l</sup>ts. and others in collusion with them.

The p<sup>l</sup>ts. are four of the trustees acting under the Whitechapel Improvement Act 1853 (16 & 17 Vict. c. cxxi.), and the deft. is a smith and ironfounder carrying on business at No. 8, Finch-street, Whitechapel, and renting two houses in John-street, of Mrs. Bennett, at a rack rent. The action was brought to recover the amounts of the two promissory notes men-

Q. B.]

COOK AND OTHERS v. WRIGHT.

[Q. B.]

tioned in the declaration, made by the deft. in favour of the plts. It appeared that in 1855 the trustees under the Whitechapel Improvement Act claimed of the deft. the sum in respect of which the notes in question were given alleging that he was liable to pay for having improvements made in front of certain houses in Finch-street, two houses in John-street, and two houses in Dowson's-place. Those houses are situate in and about public highways within the district of the Whitechapel Improvement Act, and the deft. attended a board meeting of the commissioners and contended that he was not liable to pay the claim made on him, and that he was not the owner of the said property within the meaning of the Whitechapel Improvement Act, but was merely agent for Mrs. Bennett; that he was told that if he did not pay he would be treated as one Goble had been, who, having refused to pay, had been proceeded against, and had ultimately submitted and paid the costs; and he was further told by Mr. Mitchell, the clerk to the improvement trustees, and by the trustees, that, as he paid rates and taxes, he was the owner, and he was requested to give notes for the amount at long dates; that many other persons were doing so; and that an action was pending in one of the Superior Courts in which the question of the liability of the inhabitants would be determined at the instance of the trustees, and that, if the decision was against the trustees, neither the deft. nor any of the other parties would have to pay the notes so given. Deft. asked for a reduction in the amount of the claim, which was agreed to by the board. In consequence of the above representations he gave the said notes. No decision as to the liability of persons to pay for paving improvements in front of houses abutting on highways within the Whitechapel district had been obtained: and on deft. complaining that no decision had been obtained, Mitchell said, "You have signed the notes, and must pay them, and if you do not you will be served as Goble was, which was by levying an execution on him." There was no other consideration for the notes. Deft. was not the owner of the houses, he collected the rents for the leaseholder, and paid her over the amount, deducting a percentage for his trouble; and except as collector he had no interest in the houses.

At the trial before Wightman, J., in London, at the sittings in Easter Term, the learned judge left the following questions to the jury: First, did the deft. tell Mitchell or the board, before he gave the notes, that he was not the owner? The jury found he did. Secondly, did deft. mention, before he gave the notes, that Mrs. Bennett was the owner? The jury found he did. Thirdly, did Mitchell say that, unless deft. gave the notes, he would be served as Goble had been served? The jury found that Mitchell did not say so, but that some member of the board did: whereupon a verdict was entered for the deft., leave being reserved to the plts. to move to enter a verdict for them, on the ground that the evidence did not prove the want of consideration for giving the notes, and that, upon the evidence, the plts. were entitled to a verdict. A rule having been obtained accordingly,

*Shee*, Serjt. (*Barnard* with him) showed cause.—There was no legal claim on the deft. at the time the notes were given. The jury have found that the deft. was not the owner, and that Mrs. Bennett was. In *Edwards v. Baugh*, 12 L. J. 426, Ex.; 11 M. & W. 641, it was held that the mere existence of disputes and controversies was not a sufficient consideration, that the existence of a debt must be proved. [*CROMPTON*, J.—It is enough if he gave a promissory note for another party. After the trustees had taken this note, could they have sued Mrs. Bennett? Yes; the deft. was not liable to pay the amount. [*BLACKBURN*, J.—Here there was a real controversy between the parties.] (*Forman v. Wright*, 20 L. J. 145, C. P.; *Ad-dison on Contracts*, 25.)

[MAG. CAS.]

*Hannen* in support of the rule.—The deft. was the occupier of two houses in John-street, as tenant from year to year. First, is this a good plea? Secondly, is the plea proved? It is not all proved. The deft. was not the owner, and did not believe himself so to be. [*WIGHTMAN*, J.—Owner under the provisions of the Act.] There was no such proof. [*COCKBURN*, C.J.—The officers of the board had made representations to the man that were not tenable.] A deduction was made in the accounts, and he agreed to pay the reduced sum: (*Baker v. Walker*, 14 M. & W. 465, 467.) [*COCKBURN*, C.J.—This was not given for the debt of a third person; he gave it to discharge his own liability. The effect of the evidence on my mind is that, in consequence of what he was told, the man believed himself to be liable.] He denies his liability, and asks for time. He must make out that there was no consideration, but he obtains time for the payment. [*COCKBURN*, C.J.—Yes, but for the payment of money he does not owe.] But he gets time for the third person, who does: (*Sowerby v. Butcher*, 2 Cro. & M. 368.) [*BLACKBURN*, J.—At present it is a question of fact, was there any evidence of an agreement for time to be allowed Mrs. Bennett?] The jury have found that a part of the plea was not proved. There was a sufficient consideration in asking for time, by granting which the plt. was prejudiced. [*WIGHTMAN*, J.—Suppose they cannot find the owner, is the occupier made liable?] Yes: (sects. 11–54.)

Cur. adv. vult.

July 9.—*BLACKBURN*, J.—In this case it appeared on the trial, the deft. was agent for Mrs. Bennett, who was the non-resident owner of houses in a district subject to a local Act. Works had been done in the adjoining street by the commissioners for executing the Act, the expenses of which, under the provisions of the Act, were charged upon the owners of the adjoining houses; notice had been given to the deft. as if he had himself been owner of the houses, calling on him for the proportion chargeable in respect of them; he attended a board meeting of the commissioners, and objected both to the want of notice and the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that if he did not pay, he would be treated as one Goble had been. It appeared that Goble had refused to pay the sum charged against him as owner of some houses; that the commissioners had taken legal proceedings against him, and he had submitted and paid it with costs. In the result it was agreed between the commissioners and the deft. that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments; the first of the promissory notes given was duly honoured, the others were not, and were the subject of the present action. At the trial it appeared that the deft. was not, in fact, owner of the houses; as the agent for the owner he was not personally liable under the Act: the commissioners were, therefore, not in point of fact entitled to claim the money from the deft., but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the deft. was personally liable, and really intended to take legal proceedings against him as they had done against Goble. The deft., according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances, the substantial question reserved, irrespective of the form of the plea, was, whether there was any consideration for the notes. We are of opinion that there was. There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration, if it appear that there was a mistake in fact as to the existence of the debt: (*Bell v. Gardiner*, 4 M. & G. 11.) And according to the case of *Southall v. Rigg*,

3 G

Q. B.]

THE ATTORNEY-GENERAL v. JESUS COLLEGE, OXFORD.

[ROLLS.]

11 C. B. 481, and *Forman v. Wright*, the law is the same if a bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the debt., either of law or fact. What he did was not only the making an erroneous account stated, but a promise to pay a debt for which he mistakenly believed himself liable. It appeared in the evidence that he believed himself not to be liable, but he knew that the plta. thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to a compromise, and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for the compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus comprised might have been successfully resisted. If the suit had been actually commenced the point would have been concluded by authority. In *Langridge v. Dorville*, 5 B. & AL 117, it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In *Atles v. Backhouse*, 3 M. & W. 650, where the plt.'s goods had been seized by the Excise, and he had entered into an agreement with the Commissioners of Excise that all proceedings should be terminated, and the goods delivered up to the plt., and a sum of money paid by him to the commissioners, Parke, B. rested his judgment on the ground that this agreement of a compromise honestly made was for consideration and binding. In *Cooper v. Parker*, 15 C. B. 822, the Court of Ex. Ch. held that the withdrawal of an untrue defence of infancy in a suit was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger. In these cases, however, litigation had been actually commenced, and it was argued before us, and was made an argument in point of law, that though where the plt. has actually issued a writ against the debt., a compromise honestly made is binding, yet the same compromise, if made, though litigation is pending, before the writ actually issues, is void. *Edwards v. Bury*, 11 M. & W. 641, was relied on as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment upon the assumption that the debt. did not, either expressly or impliedly, show that a reasonable debt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise and a real *bond fide* claim; but it does not appear to have been so construed by the court. We agree that, unless there was a reasonable claim on the one side which it was *bond fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterwards opened up, they cannot be replaced as they were before the compromise, and they may well be in a less favourable position for renewing litigation. He must be at additional trouble and expense in again getting up the case, and he may no longer be able to produce the evidence which would have proved it originally; besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case there can be no doubt that the practical effect of the compromise must have been to have induced the commissioners to refrain from taking legal proceedings against Mrs. Bennett, the real owner of the houses, whilst the notice given by

the debt., her agent, was running through; the compromise might have afforded no ground of defence had such proceedings been resorted to. It is this detriment to the party consenting to the compromise, arising from the necessary alteration in position, which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra cost of litigation. The real consideration, therefore, depends not on the actual commencement of the suit, but on the legality of the claim made, and the *bond fide* compromise. In the present case we think there was sufficient consideration for the notice and the compromise, made as it was, and the rule to enter the verdict for the plt. must be made absolute. *Rule absolute.*

*Brown and Godwin, debt.'s attorneys.*

## ROLLS COURT.

Reported by H. R. Young, Esq., Barrister-at-Law.

Jan. 21 and 22, and Feb. 13.

THE ATTORNEY-GENERAL v. JESUS COLLEGE, OXFORD.

*Charity—Decree—Surplus rents—Increase in the value of the charity property—College—School.*

A testator in 1712, by his will, gave all his estates to J. College absolutely. By a codicil he stated the amount of the rents of his estates, and pointed out that there was a balance of the surplus rents, which he directed should be applied in a particular manner for the benefit of B. School. A suit was instituted shortly after the testator's death for the administration of the charity estates; in which suit a decree was made, in 1714, establishing the will and codicil, and directing the trusts of them to be executed in the terms thereof. The value and income of the charity estates had considerably increased since the testator's death:

*Held, that B. School was now entitled to such proportion of the present surplus rents of the charity estates, when compared with the whole rental of them, as the balance pointed out by the codicil bore to the then existing rental.*

This was an information filed by her Majesty's Attorney-General, praying a declaration that by the true construction of the will and codicil of Edmund Meyricke, a school at Bala, founded by his said codicil, was entitled to the whole of the surplus rents and profits of the estates belonging to the testator in the county of Merioneth, after providing for the scholars and exhibitioners at Jesus College, Oxford; or at all events, that the said school was entitled to a much larger proportion of the said rents and profits than had hitherto been paid and applied for the use and benefit of the said school: that a new scheme might be settled for the application of the said charity estates and funds and the income thereof, and that in settling such scheme regard might be had to the rights and interests of the said school at Bala, and to the aforesaid ordinance of the said commissioners, and that trustees of the said school at Bala might be appointed: and for an account of the rents and profits of the charity estates and funds received by the debt., the principal, fellows and scholars of Jesus College, and of the application thereof.

The information stated that the Rev. Edmund Meyricke, by his will, dated the 25th March 1712, duly devised and bequeathed as follows:—"And as to my worldly estate, which God Almighty has blessed me with above my merits or expectations, I dispose thereof in manner following. Imprimis: Whereas I always intended to bestow a good part of what God should please to bless me withal for the encouragement of learning in Jesus College in Oxford, for the better maintenance of six of the junior scholars who are or

shall be scholars of the foundation of the college out of the six counties of North Wales, I do give, devise, and bequeath all my real and personal estate other than and besides what thereof is or shall be by this my will, or shall be by any codicil or codicils of this my will, or any instrument in writing under my hand and seal, whereby I may or shall give, devise, or bequeath any part of my real or personal estate, which instrument in writing shall be deemed and taken as a codicil to this my will, and such codicil or codicils, or instrument in writing, shall be annexed to this my will, and shall be as part and parcel thereof, given or to be given, demised, or bequeathed by such codicil or codicils, or instrument in writing, or any such instruments in writing, unto and for these several uses and purposes—that is to say, unto every one of the said six scholars, particularly and severally, the annual sum of 10*l.* of lawful money of Great Britain during his residence in the said college; and for the maintenance and settlement of six exhibitors in the said college, natives of the six counties of North Wales, or of any or either of the said six counties, and of my kindred, if such of that number of exhibitors, else such exhibitors to be others of the said six counties, to make up the said number of six. I do give to each and every of the said exhibitors the annual sum of 8*l.* of lawful money during his residence in the college, the said 10*l.* per annum to each and every of the said scholars, and the 8*l.* per annum to each and every of the said exhibitors, as aforesaid, to be paid unto them severally and respectively yearly and every year during their respective residence in the said college as aforesaid, out of the yearly rents, issues and profits of my said estate, and the remainder of the yearly rents, issues and profits of such part of my estate other than and beside what thereof is or shall be by this my will, or shall be by any codicil or codicils, or any instrument or instruments in writing under my hand and seal as aforesaid, given, devised, or bequeathed otherwise; and I do give, devise and bequeath to and for these further uses and purposes, that is to say, for the buying of advowsons, of rectories, impropriations, or vicarages, whereto the principal for the time being, and the fellows of the said college shall or may, as patrons thereof, present fit persons thereto out of the said number of the said six scholars; or if it happen that there be none of such scholars capable to be presented thereto, then any of the said exhibitors that shall be capable to be presented thereto, such scholars and such exhibitors to be so presented to such advowsons of such rectories, impropriations and vicarages as there shall be any vacancy or vacancies of such livings or benefices; or if it happen that there be none of such scholars or of such exhibitors capable to be presented thereto, then one of the North Wales fellows of the said college is to be presented, instead of such of the said scholars, or of such of the said exhibitors as shall not be capable to be presented as aforesaid to such vacancy as may be of such of the said rectories, impropriations, or vicarages. And my will and further meaning and intent is as to the said six exhibitors, that they and each and every of them shall be well and duly paid yearly the said sum of 8*l.* per annum, as aforesaid, until they do or shall take their several and respective degrees of M.A., or until they or any or either of them shall have received and enjoy a cure of souls really worth 40*l.* per annum. And I do hereby give, devise and bequeath such part of my estate so given, devised and bequeathed for and to the said six scholars, and the said six exhibitors, and for the buying of such advowsons of rectories, impropriations or vicarages as aforesaid, and for the use and purposes aforesaid, and the yearly rents, issues and profits thereof, yearly and every year for ever, for and to the same uses and purposes for ever, and to and for no

other use, intent, or purpose whatsoever; and that the same may be so well and truly done, from time to time, and at all times as aforesaid, I do hereby nominate, constitute, authorise, empower, appoint and desire my worthy good friends the Right Rev. Father in God Humphrey Lord Bishop of Hereford, and Dr. Jonathan Edwards, Principal of Jesus College, and Dr. Henry Smabridge, canon of Christ's College, in Oxford, and Dr. John Wynne, or any three or two of them, to be trustees to order and manage my estate, so given for the said uses and purposes relating to the said Jesus College as aforesaid, and to receive the yearly rents and profits of such part of my estate as appropriated for those uses and purposes, and to pay and dispose of the same yearly for the said uses and purposes as aforesaid, for and during the term or terms of their natural lives respectively; and after the decease of any two of them that shall happen to die before the other two, then thereupon the principal of the said college, in case the said Dr. Jonathan Edwards happen to be one of the two first, and one of the senior fellows of the college, to be such trustees in the stead or places of such two of the said trustees so deceased, or if the said Dr. Edwards be not one of the two first that shall so happen to die, then one of the said senior fellows of the said college to be one of the said trustees along with the said Dr. Edwards, and the said other surviving trustees for and during their lives respectively; and from and after the deceases of the said four trustees hereinbefore named, then for the future and for ever the trustees of my said estate so given, devised and bequeathed as aforesaid, to and for the said said six scholars, and the said six exhibitors, and for the buying of such advowsons as aforesaid for the uses and purposes as aforesaid, and all and every the matters and things relating to the same as aforesaid, shall be the principal of the said college for the time being for ever, and two of the senior fellows of the said college for the time being for ever, and they are by me hereby constituted, authorised, empowered and appointed to be such trustees for the said uses and purposes relating to the said college as aforesaid, and to act and do in and touching the same, and in and concerning such part of my said estate so given, devised and bequeathed for and towards the said six scholars and the said six exhibitors, and the buying of such advowsons as aforesaid for the uses and purposes aforesaid, and the management of such part of my said estate as appropriated to and for those uses and purposes as aforesaid from time to time and at all times as occasion shall be, as they shall think fit or judge necessary yearly and in every year for ever, that the same may be truly and duly done as aforesaid yearly and in every year for ever, according to my true intent and well meaning herein expressed for the said several uses and purposes aforesaid." And after giving the trustees thereby named and every other succeeding trustees, a guinea to buy him a mourning ring out of the yearly rents of such part of his said estate as should come to their hands for the uses and purposes aforesaid relating to the colleges as aforesaid, the said will proceeded as follows:—"Item: I give unto the minister of the parish of St. Peters, in the county borough of Carmarthen for the time being for ever, the sum of 10*s.* for preaching a sermon in the parish church of St. Peters as aforesaid, in the said county borough, on St. Barnaby's day, being the 11th June yearly, being the day wherein I was christened in the year of our Lord 1636; and the like sum of 10*s.* for preaching another sermon in the said parish church of St. Peter's on the 30th day of August yearly, being the day wherein I was ordained deacon and priest of the Church of England by the Right Rev. Father in God Robt. Skinner, then Lord Bishop of Oxford, in New College Chapel in Oxford, in the year of our Lord 1662; the said sermons to be so preached on the said days yearly and in every year



[ROLLS.]

THE ATTORNEY-GENERAL v. JESUS COLLEGE, OXFORD.

[ROLLS.]

for ever; and such minister for the time being yearly for ever to be paid such 10s. and 10s. yearly for ever out of the rent annually due and payable of and for a certain close of mine called Parkley Lone, in the said parish of St. Peter's, which I bought of Jn. Muggle Mercer. Item: I give to the poor people of the said county borough of Carmarthen the sum of 20s. yearly for ever (I mean such poor people as do not receive any poor-rates or pensions) to be distributed amongst them, the value thereof in bread, by the vicar or minister for the time being of the said parish of St. Peter's; that is to say, 10s. worth of bread on the said 11th day of June, and the other 10s. worth of bread on the 30th day of August yearly for ever; and such minister for the time being yearly for ever to be paid such 10s. and 10s. for preaching such sermons, and also such 10s. and 10s. for such bread out of the yearly rent of and for the said close called Parkley Lone; or in default of such payment, such minister to distrain on any corn, hay, or cattle in the said close, in order to recover the same, and his costs and charges touching the same; such sermons yearly being so given by me for the benefit of those devout Christians as shall come to be auditors of the same." "And, lastly, I do hereby nominate, constitute, authorise, empower, ordain, make and appoint the said Rt. Rev. Father in God Humphrey Lord Bishop of Hereford, the said Dr. Jonathan Edwards, the said Dr. Henry Snabridge, and the said Dr. John Wynne to be my executors of this my last will and testament, and only so to be to and for the several and respective ends, intents, uses and purposes aforesaid, and as aforesaid, and as I shall give, devise, bequeath, order, will, or appoint, in and by any codicil or codicils, or such instrument in writing as hereinbefore mentioned and expressed."

The testator duly made a codicil, dated the 14th May 1712, and thereby, amongst other devises and bequests therein contained, devised as follows:—"Item: I give, devise and bequeath all that my messuage and tenement, with the appurtenances thereto belonging, called Tytan-y-Donnen, situate, lying and being in the town of Bala, in the said county of Merioneth, together with my one acre of land in Park and Caeyr-rliechweidd, now or of late in the possession of Philip Morgan, at or under the yearly rent of 3*l.* 12*s.*, to and for the use and benefit of a school and schoolmaster, in which school there shall be thirty poor boys of North Wales settled and taught grammar learning, until they shall be thought fit to be removed to other schools or employment, or to be put apprentices, at the discretion of the visitors and trustees of and for such school hereinafter named and appointed, and such school to be kept in convenient room or rooms in the said house or messuage, and the rest of the said house and the appurtenances thereunto belonging, and the said acre of land, for the dwelling-house and benefit of such schoolmaster. And I do further give, devise, and bequeath the sum of 15*l.* yearly to the said thirty scholars (that is to say), 10*s.* to be paid yearly for and towards the clothing of each of them yearly and every year for ever, and the sum of 15*l.* of lawful money of Great Britain to the schoolmaster of the said school, for the time being for ever, to be paid unto him by half-yearly equal payments, that is to say, on the first day of May and the 1st day of Nov. yearly for ever, or within fifteen days next after the said days yearly, for the benefit, maintenance and livelihood of such schoolmaster, besides the use and benefit of the said house, messuage and appurtenances, and the said acre of land given as aforesaid. And I do further give, devise and bequeath so much money to be laid out yearly, and as often as the visitors and trustees of such school shall think fit, or judge necessary for the repairs of the said messuage and premises and the keeping of the same in sufficient repair from time to time, and at all times

for ever, there being the sum of 4*l.* 17*s.* of the present rents of my estate in Merionethshire above the sum of 108*l.* per annum, by me given by my last will to six scholars and six exhibitors in Jesus College, in Oxford, as in and by my said will, and over and above the said 15*l.* towards clothing the said thirty scholars, and the said 15*l.* per annum for such schoolmaster as aforesaid, but the said house or messuage and acre of land, given as aforesaid for the use and benefit of such school and schoolmaster, being of the yearly rent of 3*l.* 12*s.* as aforesaid, being so much of the said 4*l.* 17*s.*, the remainder thereof is 1*l.* 5*s.* per annum, for the repairs of the said house and messuage and premises, and keeping the same in repair yearly and at all times for ever as aforesaid. And I do desire, constitute, authorise, ordain and appoint the Right Rev. Father in God the Lord Bishop of St. Asaph and Bangor for the time being, and my nephew Robert Meyricks, and Kinsman John Adams, of Kyftu, during their respective lives, and after their respective deceases the heir of Ucheldre for the time being, when he shall be of the age of twenty-one years, to be visitors and trustees of and for the said school and schoolmaster and the said scholars, and for the ordering and management of the same according to my will and true intent and meaning herein, and concerning the same as aforesaid from time to time and as often as there shall be occasion for ever, only I do hereby will, order and appoint Mr. Evan Griffiths, the present master of my charity school at Carmarthen, to be the first schoolmaster of the said school at Bala, and to have, hold and enjoy the said house and messuage and acre of land for the use and benefit of the said schoolmaster of such school as aforesaid, and also to be paid the said 15*l.* per annum, given to and for such schoolmaster as aforesaid, for and during his the said Evan Griffiths' natural life.

The testator died soon after he had made the said will and codicil, and they were duly proved by the Principal of Jesus College alone, on the 6th May 1813.

In 1714 a suit having been instituted for the administration of the charity estates, a decree was made, whereby the will and codicil were established, the trusts thereof declared to be performed, and the several payments directed by the will and codicil ordered to be made and provided for in the terms and according to the express intention of those instruments.

Various other suits have from time to time been since instituted with reference to the charity estates; and several decrees and orders for investment, and other purposes, have been made in such suits.

The income of the property has, from the death of the testator to the present time, increased considerably in amount, and the estates and funds now applicable to the charitable objects of the testator's will and codicil were stated by the information to be the following:—

Real estate, producing <i>communibus annis</i> , after payment of expenses	£ s. d.
16,398 <i>l.</i> 11 <i>s.</i> 9 <i>d.</i> Three per Cent.	750 0 0
Reduced Annuities, in court, producing per annum about .....	486 0 0
11,276 <i>l.</i> 16 <i>s.</i> 4 <i>d.</i> Three per Cent. Consolidated Bank Annuities, also in court, producing per annum about ...	338 0 0
	1574 0 0
Deduct for annual payments directed to be made in before-mentioned suits...	1224 0 0
Surplus annual income .....	350 0 0

There was also a sum of 783*l.* 0*s.* 10*d.* cash in court, and a further considerable sum of cash in the hands of

[ROLLS.]

THE ATTORNEY-GENERAL v. JESUS COLLEGE, OXFORD.

[ROLLS.]

the college, arising from surplus rents and profits of real estate.

In pursuance of the provisions of the 17 & 18 Vict. c. 81, the commissioners appointed for the purposes of that Act framed an ordinance dated the 3rd April 1857 in relation to Jesus College, Oxford.

The information set out several clauses of the ordinance (to which, however, it is not necessary here more particularly to refer), and stated that the possible effect of the said ordinance would be that shortly there might not be a single scholar or exhibitioner from North Wales on the foundation of the said college, but that they all both scholars and exhibitioners might be natives of South Wales or England; and that even if there should be North Wales scholars and exhibitioners, they would be superannuated at five years from the date of their matriculation, and that therefore none of them would be in holy orders, except under very unusual circumstances.

The informant therefore submitted that, by the true construction of the will and codicil of the said Edmund Meyrick, the whole surplus rents and profits of the testator's estate in Merionethshire, after providing the annual sums by the testator directed to be paid for scholars and exhibitioners in Jesus College in Oxford, were applicable for the use and benefit of the school at Bala, founded by the codicil to the testator's will, or, at all events, that the said school was now entitled to a much large proportion of the increased rents and profits of the testator's estate than it had yet received by virtue of the aforesaid orders of this court. The informant showed that it appeared by the codicil, and was the fact, that the real estate of the testator in Merionethshire was of the annual value at the date of the said codicil of 142*l.* 17*s.*, and that the whole then surplus consisting of 1*l.* 5*s.* per annum was given to him for the maintenance and repair of the said school. And the informant further submitted, that it was the intention of the testator that there should for all time be trustees and visitors of the said school apart from and wholly independent of the principal and fellows of Jesus College, Oxford, to whom the management and supervision of the said school and the protection of the interests thereof should be intrusted. The information then stated that neither to the original suit, in which the decree of 1714 was pronounced, nor to any of the subsequent proceedings hereinbefore referred to, was any person as trustee or otherwise exclusively representing the interests of the said school made a party, except that the Bishops of St. Asaph and Bangor were named as relators; and prayed to the effect hereinbefore particularly mentioned.

*Palmer, Q.C.* and *J. H. Terrell* appeared for the Attorney-General.

*Lloyd, Q.C.* and *Grenside* for the defts., the principal and fellows of Jesus College; and

*Hobhouse* for the visitors.

The following authorities were cited in the argument:—*Attorney-General v. The Dean and Canons of Windsor*, 24 Beav. 679; *The Thelford School* case, 8 pt. Rep. p. 401.

THE MASTER OF THE ROLLS said:—The question on this information turns upon the proper construction to be put upon the will of the Rev. Edmund Meyrick. The testator left considerable estates to Jesus College, and the object of the information is to have the whole of the surplus rents of his estates in Merionethshire, or a large portion of them, applied to the use of the school at Bala. The information prays as follows: [His Honour read the prayer as above stated and continued.] The will, which bears date the 25th March 1712, is to this effect. It begins with a recital in these terms: "Whereas I always intended to bestow a good part of what God should bless me withal for the encouragement of learning in Jesus College, in Oxford, and for the better maintenance of six of the junior scholars

who are or shall be scholars of the foundation of the said college, out of the six counties of North Wales, I do give, devise and bequeath all my real and personal estate, other than," &c. That recital is very important. Although the recital cannot control the plain meaning of the words of disposition, yet if the words of the devise are ambiguous, the recital may be referred to to explain and ascertain what was the real meaning of the testator. After giving certain directions with respect to the maintenance of six scholars and six exhibitioners, and the payment to each of the six scholars of the annual sum of 10*l.*, and to each of the six exhibitioners the annual sum of 8*l.*, he proceeded thus: [His Honour then read the devise in the will, as above stated, and continued.] It is important to observe that complete control is given to the trustees, who in effect are members of the college and persons concerned in the government of the college. The will then gives certain pecuniary legacies, and concludes by the testator appointing the said trustees his executors: "And only so to be and for the several and respective ends, intents, uses and purposes aforesaid and as aforesaid, and as I shall give, devise, bequeath, order, will, or appoint in and by any codicil or codicils, as hereinbefore mentioned and expressed." I am quite clear as to the general effect of the will. In the first place, the whole of the property, subject to the legacies and limited interests which are carved out of it, is given to Jesus College, for the full benefit of the college, in the manner pointed out by the will. Those gifts are subject to the gifts contained in the codicil, and the question is how far the codicil takes away the gifts in the will? The rule applicable to all these cases is that there must be distinct words in the codicil to have that effect. I have no doubt that the effect of the will is to give to the college an absolute and beneficial interest. The testator made a codicil to his will, dated the 14th May 1712, which was in these terms: [His Honour then read the codicil as above stated, and continued.] The testator then appointed certain persons to be visitors and trustees of the said school. The result of my consideration of the codicil is, that it does not alter the final destination of the estates which are devised for the benefit of the college, and that the testator did not intend, and has not expressed his intention, that the whole estate, or that the whole of the surplus rents, should be applied for the benefit of the Bala school, subject to the payments thereout in favour of the scholars and exhibitioners. It is not possible for me to assent to that view of the information which seeks a declaration accordingly. I think that, according to the true construction of the codicil, the Bala school is entitled to an apportionment of the surplus rents in the manner I shall state. I regard the payments of 15*l.* and 30*s.* as fixed payments; and I am of opinion that in such proportion as 4*l.* 17*s.* originally stood to the whole of the rents, the Bala school is now entitled to the surplus of the present rents, to be applied, after payment of the rent of the schoolhouse, for the purposes of the school. It is unnecessary to refer to the numerous cases which were cited, commencing with the *Thelford School* case. The principle of all those cases is well established; the application of it depends upon the meaning to be given to the language of the testator. By his will the testator in this instance gives the whole estate for the benefit of Jesus College; but when in the codicil he points out that there is a balance of 4*l.* 17*s.*, which is to be applied for the benefit of the Bala school, I cannot say that the amount of the gift is merely limited to that sum in addition to the 15*l.* and 30*s.*, but I think that they are entitled to such proportion of the surplus rents at the present time as 4*l.* 17*s.* bore to the rents at that time, and that this proportion is to be applied for the benefit of the school, and a scheme must be directed accordingly. I will make a declaration to that effect, but I

cannot go further. I think the information was a proper one, and that the costs of the information must be paid out of the rents of the estate.

The solicitor for the informant was Mr. J. P. Fearon.

April 30, May 1 and 23.

PARK v. CLEGG.

*Friendly society—Certificate—Creditor's suit—Trustee and cestui que trust—Parties.*

*The certificate of a friendly society, duly made under the Friendly Societies Acts, was in a creditor's suit held to be conclusive as to the character of the society.*

*The plt. lent money to a friendly society; but on the occasion of the loan all the due formalities required by the rules of the society were not observed. It was clear, however, that the society had had the benefit of the loan:*

*Held, that they could not object to the plt.'s claim on the ground of informality.*

*The plt. was a member of the society, and under the circumstances of the case the relationship of trustee and cestui que trust was held to have been established.*

*There were classes, of upwards of 400 persons, interested in the society, which was, in fact, extinct.*

*The plt. in the creditor's suit made one of each class parties to represent such persons:*

*Held, that all parties interested were sufficiently before the court.*

This was a creditor's suit, instituted against the defts., as trustees of a certain society, called "The Rational Society." The society had under that name been certified by Mr. Tidd Pratt in 1842 to be a friendly society, and the nature and objects of it, and the character of the plt.'s claim, may be shortly stated as follows:—and first, as to the nature of the society: that will best appear by an extract from the rules of it.

Rule 17. Non-responsibility. — It is therefore evident that man has not been created to be a responsible being in the ordinary acceptation of the term, but that he is left to experience the necessary effects of his conduct, which teach all in the best possible manner, through the sensations of pain and pleasure, the means of increasing happiness; and through this knowledge a dull man in society may effect the greatest improvement in the character and condition of the infatigable and of the human race."

Rule 20. For further exposition of the objects and principles of this society, reference is made to the "Outlines of the Rational System of Society, by Robt Owen."

The outline, as referred to, contained the following paragraphs:—Creed and duties of this system, and the religion of the new moral world. Articles: 1. That all facts yet known to man indicate that there is an external or internal cause of all existences by the fact of their existence, and this all-pervading cause of motion and change in the universe is the power which the nations of the world have called God, Jehovah, Lord, &c. &c.; but that the facts are yet unknown to man which define what that power is. 2. That all ceremonial worship by man of this cause whose qualities are yet so little known, proceeds from ignorance of his own nature, that it can be of no real utility in practice, and that it is impossible to train men to become natural in their feelings, thoughts, or actions, until all such forms shall cease. On the responsibility of man: 5. No one shall be responsible for his physical, intellectual, or moral organisation. 6. No one shall be responsible for the sensations made on his organisation by external circumstances. 7. No one shall be responsible for the feelings and convictions within him, and which are to him the

truth while they continue. On the general arrangement for the population: 15. Under the rational system of society, after the children shall have been trained to acquire new habits and new feelings derived from the laws of human nature, there shall be no useless private property.

Secondly, as to the objects of the society:—They were stated to be to raise by subscriptions amongst its members, or by voluntary contributions, donations, or loans, funds for the mutual assistance, maintenance and education of their wives, and husbands and children or nominees, in sickness, infancy, or advanced age, or other natural state or contingency, during which the funds were to be applied in the purchase or rental of land whereon to erect buildings wherein the members should by united labour support each other under every vicissitude, and thus by lawful means to arrange the powers of production, distribution, consumption and education in order to produce among the members feelings of pure charity and social affection for each other, and practically plant on earth the standard of peace and goodwill towards men.

The community fund was to be raised by subscription from such members as might be able and willing to contribute thereto. The directors of such society were by the original rules empowered to borrow by way of security or otherwise any such sums of money as might be required for the purposes of the society, provided a resolution to that effect was agreed to unanimously by the directors at a meeting held after fourteen days' special notice. And it was also provided that every sum of money so borrowed should be taken in the names of the trustees of the society for the time being, and be charged upon the stocks, funds, lands, buildings and premises of the society, and remain as a security for the full payment and satisfaction of the whole of such money; principal, interest and costs. Those rules were, however, subsequently modified, and the power to borrow was given to the central board upon an unanimous resolution to that effect being agreed to at a special meeting, and it was provided that for every sum of money borrowed by the society on the security of the community fund, a certificate in a certain form should be granted to the lender which should pledge community property of the society for repayment of the sum borrowed. The modified rules also provided for the payment of interest on all loans of money at 5 per cent., and that in the event of a dissolution of the society, or of any of its establishments, all moneys contributed by the society should be first repaid, and that the balance should be divided among the members in the ratio of the sums originally contributed by each.

Thirdly, the character of the plt.'s claim appeared to be the following:—In the year 1839 certain leasehold property was demised to the defts. W. Clegg and C. F. Green and J. Finch (the father of E. Finch, one of the defts.) for a term of ninety-nine years from Michaelmas 1839, at the yearly rent of 376*l*. The society took possession of the property so purchased, and erected and kept up at considerable expense an establishment thereon, called "Harmony" or "Harmony-hall." Part of the money so expended was lent to the society by the plt., who was a member of it, and partly by certain persons on behalf of the "Home Colonisation Society." The sum lent by the plt. was one of 500*l*., which he raised by the sale of certain railway shares. The 500*l*. was paid to the society in the month of May or June 1842, through their general secretary, who was the proper authority to act in the borrowing of the money by the central board. The terms upon which the plt. made such loan were, that the same with the expenses and interest should be repaid at the end of a month. In the case of the plt.'s loan, however, the formalities prescribed by the rules were not observed, and he did not take a certificate in the form mentioned

[ROLLS.]

PARE v. CLEGG.

[ROLLS.]

in the rules for the money lent by him. Before the expiration of the month from the time of the loan, the plt. consented, at the request of the secretary, to postpone the payment till the 30th Sept. following; but the amount of such loan and interest was not paid, and still remained due to the plt. In the month of June 1843 a minute was entered in the minute-book of the central board as follows:—"A sum of 500*l.* having been raised by Mr. Pare in June 1842 as a loan to the society for one month, which loan is not yet repaid, and an expense of 9*l.* 16*s.* 9*d.* having been incurred in raising the same, Resolved that this debt and expenses be paid by the society, and that interest at the rate of 5 per cent. per annum be allowed for the principal sum, until the same be paid." In the month of Feb. 1845 the plt. applied by letter to the central board pressing for an immediate settlement of his claim in respect of the loan made to the society. In reply to that application Mr. J. Buxton, the then president of the society, wrote to the plt. a letter dated the 18th day of the same month of February, in which, after stating that his claim rested upon merits peculiar to itself, and objecting to the memorandum which had been made by the central board as improper, considering the temporary character of the plt.'s loan, he stated that he did not make such statement in order to invalidate the plt.'s claim, but only out of a desire to discharge a public duty, and he expressed his willingness, should the plt. not be present at the then ensuing congress, to lay before the delegates any application the plt. might think proper with a view of arriving at an amicable settlement. The congress alluded to in that letter was held on the 23rd May 1845, and several resolutions were passed as to the unsatisfactory state of the affairs of the society. Among those resolutions was the following one, made after a full statement of the plt.'s claim, "that the minute of the central board dated the 17th June 1843 in relation to the claim of Mr. Pare, be and is hereby confirmed by this congress." At a further special congress held on the 10th July following, it was resolved that all the property of the society should be assigned to Messrs. Buxton, Bracher and Bate in trust for the benefit of the creditors. In May 1846, in consequence of the difficulties and liabilities of the society, Mr. J. Finch, on behalf of his co-lessees and himself, took possession of the leasehold property in question in this suit. At a special meeting of the officers and members of the society (including the plt.) held on the 29th June 1846, the following resolutions were passed:—"First, that in the opinion of this meeting the appointment of Messrs. Buxton, Bracher and Bate, or other person or persons by the Rational Society as assignees, was not legally carried out, and was and is therefore of no avail, and this meeting is further of opinion that the lessees have alone legal possession of the property of the society, and they aving stated that their object is to see justice done to all parties, and that as speedily as possible, this meeting has full reliance on the honour of the said lessees, and hereby requests that they will proceed to dispose of the property, and make such distribution of the proceeds as to them shall appear, under all circumstances, just and equitable. Secondly, that this meeting is of opinion that Mr. Buxton should immediately place in the hands of the lessees any and all the documents, papers, &c. which he may hold, and which are connected with the society's affairs, and necessary to the proper winding-up of the same, together with any information which may tend to the same object; and further, that having done so, he should forthwith withdraw from the society, that the lessees having entire and undisputed possession, may be enabled to make the most of the property for the benefit of the creditors. Thirdly, at the resolutions of the meeting be signed by the chairman on its behalf, and that Messrs. J. Ardill, J. Jackson and W. Pare (the plt.) be and are hereby

appointed to lay the same before Mr. Finch, the acting lessee, and request his acquiescence, at the same time assuring him that this meeting is prepared to give him any aid which in them lies in carrying the said resolutions into effect." Those resolutions were adopted and approved at a special congress of the society, held on the following day, the 30th June. In 1847 the lessees underlet the leasehold premises to Mr. Edmondson for the purpose of a schoolhouse, and the tenancy still subsisted, and they also sold to Mr. Edmondson the stock and other moveable property thereon for a considerable sum of money, and they applied such money in the payment of certain debts of the society. Mr. J. Finch, one of the lessees, died in 1857, having previously assigned all his interest in the property to the deft. Edward Finch for the residue of the term granted by the lease. No further step had been taken to wind-up the society. Under these circumstances the plt. instituted the present suit, alleging that the leasehold property was community property of the society, and had become and remained subject to a charge in the first place for the repayment of all moneys advanced, or contributed under the above-stated rules, relating to loans to the society; and as to the balance, if any, according to the directions laid down in that behalf in the said rules.

The plt. filed the bill on behalf of himself and all lenders or contributors of moneys, for the purposes of the society under the rules aforesaid (except the creditors of the society who were defts.), against W. Clegg, Chas. F. Green and Edwd. Finch, as such trustees as aforesaid; and the bill prayed that such defts. might be declared to be trustees of the leasehold estate for the plt. and all other persons interested therein; and that the rights of the plt. and all other persons might be declared; for an account, for sale of the trust estate, and for payment out of the proceeds of the debts due to the plt. and the other persons entitled thereto. The society had long since ceased to exist, and was not made a deft., there being no board of directors, or other official person in existence, to represent it. The plt. had, however, made Mr. and Mrs. James Wm. Barton defts. to the suit, as representing the certificated loan-holders of the society, and Mr. Geo. Holyoake, as representing the ordinary members. All the persons interested in the trust-estates were more than 400 in number; but they were represented by the actual parties to the suit.

Follett, Q.C., *Baggallay* and *Westlake* appeared for the plt., and contended, first, that this society had been duly certified by Mr. Tidd Pratt to be a friendly society, within the rules of the Society Acts; secondly, that although the society had in fact ceased to exist, yet, as all classes of persons interested in it were before the court either as plt.s or defts., it was virtually, and therefore sufficiently, represented; thirdly, although the formalities required by the rules had not on the occasion of the plt.'s loan been all observed, his money had been clearly applied for the benefit of the society, and was therefore made a debt due from the society to the plt.; the formalities were required for the protection of the society, and not for the creditor, and the society could waive them if they chose, and in this case they had done so; further, the plt.'s claim was recognised and confirmed by the members of the central board, and the vote of the general board; fourthly, the transactions between the lessees of the property in question and the society and its creditors, established the relation of trustee and *certain que trust* between them: The debts became, therefore, a charge upon the society, and the Statute of Limitations had no operation: (10 Geo. 4, c. 56; 4 & 5 Will. 4, c. 40; *Hodges v. Wale*, 22 L. T. Rep. 144; *Yeates v. Roberts*, 3 Drew, 170; 18 & 19 Vict. c. 63, ss. 17, 18; 15 & 16 Vict. c. 86, s. 42, r. 9.)

[ROLLS.]

PARE v. CLEGG.

[ROLLS.]

*Morris* appeared for the defts. Mr. and Mrs. Barton, and Mr. G. Holyoake.

*Lloyd, Q.C. and Batten* appeared for the trustees, and contended, first, that the society in question was, having regard to the above-stated nature of it, clearly founded for an immoral and illegal purpose, and therefore the money advanced by the plt. for its benefit was not the proper subject for a suit in equity; secondly, that the society, in its character of a society, was not represented on the record; and thirdly, that as on the occasion of the loan being made by the plt., the proper formalities prescribed by the rules of the society were not observed, and as the debt, being one of simple contract, even if it originally bound the society, was barred by the Statute of Limitations; the plt. could not succeed in this suit. They cited *Southey v. Sherwood*, 2 Mer. 435; *Lawrence v. Smith*, Jacob, 471; *De Begnis v. Armistead*, 10 Bing. 107; *Ewing v. Osbaldeston*, 2 Myl. & Cr. 53. [THE MASTER of the ROLLS referred to *Sharp v. Taylor*, 2 Ph. 801.]

*Schoyn, Q.C. and Leonard Field*, for Mr. E. Finch, in the same interest, cited *Richardson v. Larpent*, 2 Y. & C. C. 507; *Clough v. Ratcliffe*, 1 De G. & Sm. 164.

*Roundell Palmer, Q.C. and De Gex*, for the deft. Mr. Clegg.

*Follett, Q.C.* in reply.

THE MASTER of the ROLLS said:—This is a suit by a person claiming to be a creditor of a society called the Rational Society, and seeking to have some property belonging to that society, in the hands of the three first defts. upon the record, applied in the payment of the debts due by the society to the plt. and to other creditors circumstanced similarly to himself. That the property belongs to the society is not disputed. The first question is, whether the plt. ever was a creditor of the society, and whether he is so still? The following facts appear to me to be clear: First, that the plt., in May 1842, advanced 500*l.* for the purpose of its being applied for the benefit of the Rational Society, and that it was, together with other sums of money, contributed by members of the Home Colonisation Society, applied for the benefit of the Rational Society. Secondly, that at the meeting of the directors of the Rational Society, which took place on the 3rd June 1843, the following resolutions were passed [his Honour read the minute above stated, and continued:—] Thirdly, that on the 8th Feb. 1845, the plt. wrote to the central board of the society requiring payment; in answer to which application Mr. Buxton, the chairman, disputed the claim; but the annual congress of the society, held on the 23rd May 1845, duly confirmed the entry which I have read, relating to Mr. Pare's debt. After those transactions I think it impossible to say that Mr. Pare was not a creditor of the society at that time for the sum of 509*l.* 16*s.* 9*d.* It does not, however, rest there; for he seems afterwards to have been treated as a creditor by all parties concerned. In June 1846 Mr. Buxton summoned a meeting of all parties interested in the society for the 29th of that month, for the purpose of making a full disclosure of the affairs of the society; and, by the same advertisement, issued under the rules of the society, he summoned a special congress of the delegates of the society for the following day, viz. the 30th June, to take into consideration the affairs of the society. The meeting of the 29th June 1846 took place accordingly, at which the following resolution was come to. [The M.R. read the resolution above stated, and continued:—] At the special congress, which was held the following day, viz. the 30th June 1846, those resolutions were adopted and confirmed. I am of opinion that after those transactions it is impossible for any one to contend that Mr. Pare was not for the time a creditor of the society, or that he is not so now, for the sum of

509*l.* 16*s.* 9*d.* An argument against the plt.'s claim was founded on those sections of the rules of the society which gave the central board a power of borrowing, which specified in what manner that should be done, and which also provided that a certificate should be given to the members—none of which formalities were followed on the occasion of the plt.'s loan. But, although the absence of those formalities might raise a question of priorities, I am of opinion that the society might have incurred debts independent on this rule; for, unless it could have done so, it could not have gone on; and it, or those who represent it, and have had the benefit of the plt.'s money, cannot now repudiate the debt. And I am of that opinion, although the society did not adopt the right method of giving to the creditor the proper certificate. The first and most material objection to the claim of the plt. was, that, admitting the entry and resolution of the congress to bind the society, still this was only a simple contract debt; and that, as no steps have been taken to enforce payment until the filing of the bill in this suit in 1860, the debt is now barred by the Statute of Limitations. I think, however, that the argument of the plt.'s counsel as to that objection is a conclusive answer to it, viz., that the resolutions passed in June 1846, and sanctioned by the special congress (which resolutions I have read), constituted a trust of the leasehold property in question for the benefit of the creditors generally. That being so, the relationship of trustee and *cestuis que trust* was constituted, and that being established no question as to the statute arises. That the defts. are the trustees of the property for the benefit of the creditors is not only established in the manner I have mentioned, but in truth it is not disputed by any of them; and the only real question raised by two of them (for the third consents to act as the court shall direct) is, whether the plt. is or is not one of such *cestuis que trust*? There were, however, two other objections which were very strenuously urged against the right of the plt. to sustain this suit. The former, and more important of them, was this—that the society was founded for an immoral and illegal purpose; which it was contended appeared from the rules of it. The immorality with which the society was charged, is of this kind; that it was founded, first, for the purpose of propagating natural religion to the injury of revealed religion; secondly, in order to put an end to all moral restraint on the actions of mankind; and thirdly, with a view to destroy the institution of private property generally. I have perused the rules of the society for the purpose of considering the force of that objection; and although I am of opinion that the society is based upon irrational principles, and seeks to realise a visionary and unattainable object, it ought not to be considered as founded for the purpose of propagating irreligious and immoral doctrines, in the ordinary and correct acceptation of those words. It is not such a society as to disable a person dealing with it from acquiring the right to enforce a contract into which the society may have entered with him. I consider that the certificate of Mr. Tidd Pratt must, in the present case, be held to be conclusive as to the character of the society, and that it is to be treated by me as any other ordinary friendly society. That objection therefore cannot, in my opinion, be sustained as a bar to the suit. The only remaining question argued against the constitution of the suit was, that the society, in its character of a society, is not represented on this record. In consequence of the failure and the insolvency of the society there is not now an officer or board in existence who can be made parties as defts. to this suit for the purpose of representing it. The plt., therefore, has adopted this course: he has selected a member of the society from each of the classes of members composing

NISI PRIUS.]

PINCKNEY v. EWENS—REG. v. INHABITANTS OF BRIGHTON.

[Q. B.]

it, and which classes are not represented by the plt., to represent the class to which the plt. does not belong; and accordingly Mr. and Mrs. Barton are made defts., to represent the creditors who have certificates under the rules to which I have already referred. Mr. Holyoake represents the ordinary class of the members of the society as distinct from the creditors. Having done that, the plt. has, in my opinion, done all that can be required of him; and the circumstance that the defts. so selected, think fit to support the case of the plt., and desire to have an ordinary decree for an account, does not lead me to the conclusion that they have not acted as is the best for the class to whom they respectively belong. Nor does even the selection of the plt.'s solicitor to conduct their case (if, as I am informed, such is the fact in the present instance) weaken or destroy that opinion on my part. That being so, I think that the plt. is entitled to a decree for an account against the first three defts. upon the record in respect of the lease assigned to them, and to an inquiry as to who the creditors of the society are, and what are their respective priorities; and I must reserve further consideration and costs.

The solicitors for the plt. and some of the defts. were Messrs. Ashurst, Son and Morris.

The solicitors for the other defts. were Messrs. Warry, Robins and Burgess, Messrs. Field and Roscoe, and Mr. Atkinson.

## NISI PRIUS.

## WESTERN CIRCUIT.

DEVON SUMMER ASSIZES 1861.

Exeter, July 30.

(Before CHANNELL, B. and a Special Jury.)

PINCKNEY v. EWENS.

*Action for nuisance—Lawful trade—Questions for the jury.*

*In an action for a nuisance, caused by a fellmonger's yard and business, the following questions were submitted to the jury:—*

1. *Was the plt.'s enjoyment of his property sensibly diminished by the nuisance, if any, caused by the defts.?*
2. *Is the trade of a fellmonger a proper trade?*
3. *Was it in this instance carried on in a proper manner?*
4. *Was it carried on in a proper place?*

This was an action for a nuisance.

M. Smith, Q.C., Karlake, Q.C. and Leigh for the plt.

Collier, Q.C. and E. W. Cox for the defts.

The nuisance complained of was caused by the erection of buildings for the purpose of carrying on the business of a fellmonger, in the town of Col-lumpton.

It was proved on the part of the plt. that when the wind blew in the direction of the vicarage in which he lived, a noisome smell proceeded from the hides and lime pits of the defts., and that the foul water from the pits had deprived him of the use of a stream, into which they were emptied, and which flowed through his garden and lawn. The ground had been but lately converted to its present purpose.

On the part of the defts., witnesses were called to prove that the business of a fellmonger is not necessarily noisome, nor is it at all noxious; that it is carried on in the centre of many populous towns; that this one was conducted by the defts. with even more than common care and cleanliness; and that no unpleasant smells were discovered to proceed from the yard by other neighbours living nearer to it than the plt.

Collier directed the attention of the judge to the case of *Hole v. Barlow*, 4 C. B. 334, in which Byles, J.

[MAG. CAS.]

had told the jury that a nuisance was subject to this exception, that an action for it could not be maintained by a private person by reason of disagreeable odours produced by a lawful and proper business, beneficial to the public, carried on in a proper manner and in a proper place; and he contended that the case of the present defts. was within the exception so stated by Byles, J., whose ruling was afterwards confirmed by the full court.

CHANNELL, B., in summing up, said that the case to which his attention had been called had certainly very materially modified the law of nuisances, as hitherto understood. The same question was now before the Court of Ex., and the judges there differed in opinion upon it. But inasmuch as it was a unanimous judgment of the C. P., the court in which the present action was brought, he should hold that decision to be the law until it was otherwise determined. He should therefore put four questions to the jury, on each of which he would take their opinion, so that, if necessary, the point may be further considered by a higher tribunal. He should ask them to say, in accordance with the old law, First, whether the plt. was sensibly hindered in the reasonable enjoyment of his property by reason of the smells alleged to proceed from the defts.'s premises, and he should tell them that it need not be a small injurious to health, nor was it necessary that it should annoy the dwelling-house; it was enough that it fouled the air in the grounds or the garden. Secondly, is the business carried on by the defts. a lawful and proper business? Thirdly, is it carried on in a proper manner? Fourthly, is it carried on in a proper place?

The jury returned—First, That the plt. was so hindered in the enjoyment of his property. Secondly, That it was a lawful and proper business. Thirdly, That it was conducted in a proper manner. Fourthly, But that it was not in a proper place.

*Verdict for plt., damages 40s.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HICKLETT, Esqrs., Barristers-at-Law.

Wednesday, June 26.

REG. v. THE INHABITANTS OF BRIGHTON.

*Poor-law—Husband's settlement—Illegitimacy of marriage.*

*A marriage between a man and the niece of his deceased wife is unlawful, notwithstanding that the niece's mother was an illegitimate child of the deceased wife's mother.*

Special case for the opinion of this court, stated by the Middlesex Court of Quarter Sessions, upon confirming an order of removal of a pauper from the parish of New Brontford, Middlesex, to the parish of Brighton, Sussex.

Elizabeth Morgan, the pauper, was alleged to be settled in Brighton by reason of her marriage with John Morgan, whose settlement in Brighton is admitted, and who was dead at the date of the order of removal.

The pauper's maiden name was Jones, and she was the legitimate daughter of Daniel Jones and Ann, his wife.

The pauper's mother Ann was the illegitimate child of Elizabeth Bartlett. After her birth the said Elizabeth Bartlett married one Thomas Haines, and had by him, amongst other legitimate children, a daughter named Mary. The said Mary was legally married, in 1835, to John Morgan, the pauper's alleged husband, and died on the 19th Nov. 1842. On the 19th Oct. 1843 John Morgan was married to the pauper at Chepstow, in Monmouthshire.

The question for the opinion of the court is, whether

3 H

Q. B.]

HAILES v. MARKS.

[Ex.]

the marriage celebrated between John Morgan and the pauper was valid.

The case was argued (June 5 and 8) by *Metcalf* (Poland with him) in support of the order of Sessions, and *Denman* and *H. Mathews* for the apps.

It is unnecessary to quote the authorities or report the argument, as the same authorities, with the addition of *Brook v. Brook*, 4 L. T. Rep. N.S. 93, and the same line of argument was resorted to as is to be found in the very full and able report of the case of *Reg. v. Chadwick*, 11 Q.B. 173.

At the close of the argument of the resps.

COCKBURN, C. J. said:—It would be a great public scandal if it went forth for a moment that where a marriage between persons of legitimate relations was prohibited as being within the prohibited degrees; he court had any doubt in holding that such a marriage was equally prohibited and unlawful when the parties were only related by the natural ties of consanguinity, and not by legitimate relationship. *Cur. ad. vult.*

COCKBURN, C. J.—This was a case argued before us during the term, in which, in consequence of my unavoidable absence at the close of the argument, my learned brothers did not deliver judgment, wishing to have my concurrence in the judgment as one of the entire court, and not on account of any doubt they entertained as to the judgment that ought to be pronounced. It was a case of settlement, and the question was, whether the marriage with the niece of a deceased wife was a legitimate and lawful marriage. I will now state as the united opinion of the court, that the marriage was not lawful, and consequently that the settlement fails. In that we are guided by the express decision of the court in the case of *Ellerton and Wife v. Gastrellin*, Comyn's Reports, p. 318, where all the authorities are collected, and in which it appears, that upon the review of many cases, all ending in the same result, the court were of opinion that such a marriage was within the prohibited degrees. Now we have the Act of the 5 & 6 Will. 4, c. 54, which makes marriages within the prohibited degrees not only voidable, but void, and we must consider that Act as having been passed, with reference to the known and ascertained state of the law, as administered by the Ecclesiastical Courts of this country, sanctioned and confirmed by the decision of this court, in this instance, in the particular case to which I have referred. That being so, we entertain no doubt, that upon that authority, and with the Act of Parliament, to which I have referred, this marriage was bad, and consequently that the settlement failed. There was another point in the case, which was, whether one of the parties, being illegitimate, the illegitimacy made any difference with reference to the validity or the invalidity of the marriage. We disposed of that on the argument, stopping the counsel on the other side, and I only advert to it now, because in a report which I happened to see in a newspaper of the case, it was stated that the court had taken time to consider that part of the case. Now that was clearly an error, and quite the contrary of what fell from the court, because I remember stating, somewhat emphatically perhaps, that I thought it would be a great public scandal if it could be supposed that this court entertained for a single moment the supposition that legal consanguinity was necessary, as well as natural consanguinity, to make a marriage void, which would otherwise be good. If, indeed, that had not been from the very first assumed as a thing too plain to admit of a moment's doubt, there was abundant authority for it in a case of *Haines v. Jeffreys*, in which the court, with equal determination, repudiated the doctrine that illegitimacy could at all affect the question of the validity of a marriage within the prohibited degrees. That is found in the same report: (Com. Rep. 2.) However, I should not have adverted to this part of the case, as it was disposed of

during the progress of the argument, had it not been for the mistake made in a public print, and which, the matter being one of great public importance, I could not pass over without an observation.

*Order of sessions quashed.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, June 10.

HAILES v. MARKS.

*False imprisonment—Reasonable and probable cause—Amendment of plea at trial—C. L. P. A.*

*In an action for false imprisonment, deft. pleaded a plea of justification, setting out many circumstances as showing reasonable and probable cause. At the trial, several of those circumstances were not proved at all; some were proved; and others not proved in the terms as alleged in the plea. An amendment of the plea was required, by striking out that part not proved, and altering that part not proved in the terms alleged; to make it accord with the facts as proved:*

*Held, that such an amendment could be made, and that the facts remaining in the plea as proved, afforded sufficient reasonable and probable cause; and was a question for the judge at the trial to determine.*

*Declaration.—Trespass and false imprisonment.*

*Plea.*—1. Not guilty. 2. That deft. was possessed of certain prints and engravings which had been stolen; that he had good reason to, and did suspect the plt. of stealing them, for these reasons: that the goods were stolen from deft.'s stock, in his business of a printseller, at divers times between Christmas 1860 and 6th Feb. 1861, when they were discovered, and plt. had been, during all that time, making frames for deft. Plt. often went to deft.'s place of business, where the goods were stolen from, and on many occasions sent deft.'s boy out for things, or on some errand or excuse, on which occasions he was down in the room in which the said goods were kept, and from which they were stolen, and had the opportunity of stealing same; and although during that time he was in pecuniary difficulties, and paying off a County Court judgment at the rate of 6s. a month, he was dealing very largely in prints of the same sort as those which had been stolen from the deft., and had frequently left large bundles of such prints at a public-house, and, according to the statement of one Brall, had sold to him during that time 300l. worth of prints; wherefore the deft. did suspect and believe, &c.

The case was tried before Channell, B., in London, when deft. failed to prove that plt. was in pecuniary difficulties, or was paying off a County Court debt, and the proof was that Brall said he had bought 300l. worth of prints of him altogether during their acquaintance, which extended over some years, and not that he had purchased them of plt. between Christmas and February. It was also proved that plt. had been paid for his work in prints. Application was made to amend the plea at the trial by altering so much as related to the statement of Brall, and striking out the averments not proved. The judge left the facts of the second plea to the jury, reserving leave to move the court as to the power of amendment, and leave to enter a nonsuit. The jury found a verdict for plt., damages 30l. A rule nisi was afterwards obtained to set aside the verdict as against the evidence, or to enter a verdict for the deft., on the ground that the facts as proved and found by the jury afforded reasonable and probable cause, which was for the judge to determine after the jury had found some of those facts proved, although not all proved, and that the learned baron should have amended the plea. *Joyce* and *B. Rigby* showed cause.—The plea should

[Ex.]

HARDWICK v. MOSS AND OTHERS.

[Ex.]

not be amended in the way the defts. seeks. He puts a number of false statements in his plea of justification which he cannot prove, and then, failing to prove them, wishes to strike them out; he puts the whole together forward as the ground of his reasonable and probable cause to suspect and imprison the plt. On failing to prove the whole of what he alleges as his ground of suspicion, his plea necessarily fails. The real question is, whether the several matters alleged and set out in the deft.'s plea of justification are those which operated on his mind at the time? In *Broad v. Ham*, 5 Bing. N.C. 725, Tindal, C. J. says: "In order to justify a deft. there must be a reasonable cause, such as would operate on the mind of a discreet man. There must also be a probable cause, such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge." [MARTIN, B.—The question of the amendment depends now entirely upon the C. L. P. Act.] The words of the Act are very comprehensive, but the jury negated the chief statements in the deft.'s plea. Indeed, there was no evidence to prove the principal part of it. Even Brall's statement was negated in substance. The plea ought to have been proved entirely, and the facts as alleged; if not, the grounds found by the jury did not amount to reasonable and probable cause. *Harris v. Dignum*, 1 Fos. & Fin. 688; and *Hogg v. Ward*, 3 H. & N. 417, were cited. Reasonable and probable cause is a mixed question of law and fact: (*Davis v. Russell*, 5 Bing. 354.)

*Robinson*, contra, in support of the rule, was stopped.

CHANNELL, B.—I think this rule should be made absolute. The facts of the case, as in evidence before me at the trial, were these. [The learned judge stated the facts.] The first question is, whether the deft.'s plea of justification can be properly amended. It was contended that, as this was a plea setting forth the deft.'s grounds of suspicion, and reasonable and probable cause to act as he did, every allegation in the plea specifically stating such cause must be proved. But I do not think a deft. is bound necessarily to prove everything he has alleged. If he can prove sufficient to justify his acts, it is enough. The question of reasonable and probable cause was for me to determine upon the facts proved and found to be proved by the jury. I also think the judge had the power to make the amendment asked. If he has power to amend by striking out, he has the power to make the alteration the deft. required.

POLLOCK, C.B.—I think our judgment should be for the deft.; it is more consistent than a nonsuit. The question we are now to decide is, whether a plea of this description may be amended; the other question, whether the plea furnishes an answer to the action, is a secondary consideration. In my opinion it is not compulsory for a deft. to prove all he states in his plea; but it is enough if the judge thinks what you do prove shows sufficient reasonable and probable cause. Here I think what was proposed to be added may be added—it is substituting what is true for what was untrue. It has long been settled that it is for the judge and not for the jury to decide what is reasonable and probable cause. It often happens that what would be enough on the criminal side to find a man guilty is not considered sufficient to furnish reasonable and probable cause on the civil side. I think the plea may properly be altered in the manner proposed, and when altered that the facts remaining show sufficient reasonable and probable cause.

BRAMWELL, B.—Since *Panton v. Williams*, 2 Q.B. 69, I have thought reasonable and probable cause was for the judge to determine, and the only question for the jury to determine was, whether the facts alleged were proved. A plea states a variety of matters which are supposed to show reasonable and probable cause,

the judge has to determine whether such as are proved constitute reasonable and probable cause. If he thinks they do the others are immaterial, and he may strike them out. Then comes the question whether he can add or qualify. I think he can. The question is not what cause the deft. acted upon, but whether he had reasonable and probable cause to act as alleged. I think the plea might be amended as required.

*Rule absolute.*

May 31, June 1 and 4.

HARDWICK v. MOSS AND OTHERS.

*Highway Act*, 5 & 6 Will. 4, c. 50, s. 109.—*Surveyor entitled to notice of action—When.*

*A surveyor of highways made an excavation in the highway for the purpose of erecting a weighing machine, and left the same by night not fenced off; an accident occurred in consequence, for which an action was brought against him without any notice of action being given as required by sect. 109 of the Highway Act:*

*Held, that the surveyor was entitled to notice of action, as he had reasonable ground for believing that he acted under the authority of the Highway Act in what he did.*

This was an action against the defts., who were surveyors of the highways leading from Bradford to Leeds, for causing certain earth, stones and rubbish to be placed in the highway. It was left there by night without being fenced off, or any light or other notice to protect travellers from running against it. The plt. was an articled clerk to an attorney at Leeds, and on the 17th Oct. last was returning home in a dog-cart about nine o'clock in the evening, when, not observing this heap of rubbish, &c., which had been placed upon the road by a man employed by the defts. to erect a weighing machine there, he drove upon it, caused the carriage to upset, and he was thereby seriously injured.

The declaration alleged that the defts. wrongfully and carelessly made a certain excavation in the highway leading from Bradford to Leeds for the purpose of erecting a certain weighing machine there, and wrongfully and carelessly placed certain large quantities of earth, stones and rubbish dug up from the said excavation in a heap in and upon the said highway, and permitted the same to remain there during the night without any light or means to prevent persons from driving against the same, whereby the plt., whilst he was lawfully driving along the said highway in the night time, drove his horse and carriage against the said earth, stones and rubbish, and upset the said carriage, and the plt., who was then riding in the said carriage, was thereby and by reason of the premises greatly injured, &c.

Plea, not guilty by statute.

The cause was tried at York, before Keating, J., when a verdict was found for the plt.—damages 70l. A rule nisi was subsequently obtained to set aside that verdict, and enter a nonsuit, on the ground that the defts. were entitled to notice of action, and also on the ground that, as the defts. at the time of the accident were acting as surveyors of the highways, the action under the circumstances would not lie against them.

*Overend, Q. C., Mellish, Q. C. and Quain* showed cause.—The defts. had no authority at all to make this excavation in the highway, get up stones and rubbish, and leave the same there wholly unprotected. It was said this was done under an order of the vestry; but in fact it was not done by order of the vestry, and the learned judge at the trial asked why the defts. endeavoured to obtain leave of the vestry, if they thought it within their duty to erect the machine. A surveyor of highways has no power to dig there, except for the purpose of making or repairing drains, or to repair the road. The Highway Act, 5 & 6 Will. 4, c. 50, does not authorise a surveyor to erect weighing machines on



[Ex.]

BISHOP OF DOWN v. REV. T. F. MILLER, D.D.

[IRELAND.]

the highway. It is different with reference to turnpike roads, where weighing machines are erected, as permission is expressly given by the Turnpike Acts, but not so in parish highways. [MARTIN, B.—Is it not the question here whether the surveyors believed they were acting in virtue of their authority?] It is not sufficient that the surveyors believe they are so acting unless there is some provision in the Act which authorises them to do so; and here there is none. For making culverts there are sections specially enabling them to do so. In *Smith v. Hopper*, 9 Q. B. 1015, the correct rule is laid down "that *bona fides* is not alone sufficient to bring a case within the privileges of such an Act of Parliament. . . . And some of the cases have said that it is not enough for the deft. to have thought generally that he possesses the power to do what was done, he must also think that it was done in execution of some particular provision of the statute which applies." This rule will not be departed from without strong cause for it. [CHANNELL, B.—It has been held to be a nuisance to carry an extraordinary weight over a highway. Does the Highway Act give no general powers to surveyors apart from their specific powers? It may be necessary, perhaps, sometimes to have machines on parish highways as well as on turnpike-roads.] There is no general or special provision for erecting such machines on parish roads. The following cases were referred to:—*Davis v. Curling*, 8 Q. B. 286; *Smith v. Shaw*, 10 B. & C. 277; *Lawson v. Dumlin*, 9 C. B. 61; *Hopkins v. Crowe*, 4 A. & E. 774; *Cann v. Clipperton*, 10 A. & E. 583; *The Proprietors of Wilham Navigation v. Padley*, 4 B. & Ad. 69; *Huggins v. Wadey*, 15 M. & W. 357; *Cook v. Leonard*, 6 B. & C. 351; *Kene v. Everashed*, 10 Q. B. 143; *Read v. Coker*, 13 C. B. 850; *Arnold v. Harnel*, 9 Ex. 404; and *Edge v. Parker*, 8 B. & C. 697.

*S. Temple*, Q.C. and *Manisty*, Q.C. in support of the rule.—The defts. were entitled to notice of action according to the 5 & 6 Will. 4, c. 50, s. 109, which enacts, "that no action or suit shall be commenced against any person for anything done in pursuance of or under the authority of this Act until twenty-one days' notice has been given thereof in writing to the justice, surveyor, or person against whom such action is intended to be brought, nor after sufficient satisfaction or tender of satisfaction has been made to the party aggrieved, nor after three calendar months next after the act committed, for which such action or suit shall be so brought;" "and the deft. in such action or suit may plead the general issue, and give this Act and every special matter in evidence at any trial which shall be had thereupon, and if the matter or thing shall appear to have been done under or by virtue of this Act, or if it shall appear that such action or suit was brought before twenty-one days' notice thereof given as aforesaid, then the jury shall find a verdict for the deft." The plt.'s attorney wrote on the 7th Jan. 1861 requiring compensation, and threatened legal proceedings. The action was commenced on the 12th Jan. 1861, and no notice of action was given as the Act requires. By sect. 6 of the Highway Act the surveyor is to repair and keep in repair the several highways in the parish for which he is appointed. Rates are to be made and materials are to be purchased for the repairs of the highways; the surveyors in the discharge of their duty are to see that proper materials, and in due measure, weight and quantity, are supplied. The means of ascertaining this is to be provided with a machine for the purpose of weighing, and they were here acting in the due discharge of their duty by causing one to be erected. If the persons who did the works left them not fenced off or guarded by light by night, defts. are not responsible. The 36th section imposes a penalty of 5*l.* on the surveyors allowing stones, &c., to remain on the highway by night to the danger of any person passing. *Smith*

*v. Hopper* is a decision in favour of the defts.; there it was held that those persons are within the protection of the 109th clause, who, although their act be not legally justifiable under the statute, act in a *bona fide* belief that they are executing some particular provision of the statute, provided such belief be not utterly unreasonable. Here there cannot be the least doubt but that they really believed they were acting in pursuance of their powers under the Act of Parliament.

JUNE 4.—FOLLOCK, C.B.—It appears to me that the rule that a deft., to entitle him to twenty-one days' notice of action, must be acting under the authority of some particular clause in an Act of Parliament, is too narrow. In my judgment, if the Act done is done by a public officer in the capacity of a public officer, with reasonable grounds for believing that he is authorised by virtue of his office, he is entitled to notice of action. In this case there is no doubt but that the parish is bound to repair the highways, and for that purpose the surveyors must buy stones and pay for them—usually, I believe, according to weight; they should, therefore, be provided with a weighing machine. Here it seems the parish gave directions to have a weighing machine erected, and the defts. were carrying out these directions. I am of opinion that the defts. acted in a public capacity, and had reasonable grounds for believing that they were acting under the authority of the Act of Parliament.

MARTIN, B. concurred.

BRAMWELL, B.—I was at first inclined to accede to the plt.'s argument, that the defts. had no authority for the erection of this machine, but the defts. met that by saying that they believed they had authority and that they had reasonable grounds for believing so. I think that is a good answer.

CHANNELL, B.—I think so too. It is clearly shown that the defts. had reasonable grounds for believing they had authority under the Act of Parliament, and that, in my judgment, is sufficient to entitle them to notice of action. The rule must be made absolute. Rule absolute.

## CONSISTORY AND METROPOLITAN COURT OF ARMAGH.

Friday, March 22.

(Heard in Dublin, before Dr. RADCLIFF, Q.C., V.G. of the Diocese.)

The Office of the Judge promoted by the LORD BISHOP OF DOWN AND CONNOR AND DROMORE v. THE REV. THOS. FITZWILLIAM MILLER, D.D.

THE SAME v. THE REV. SAMUEL G. POTTER

*Inhibition against a stranger preaching or officiating in a diocese—No previous citation—Bishop's jurisdiction—Licence in one diocese, what effect as regards another—Occasional preaching—Leave of incumbent.*

An inhibition signed by the Vicar-General of a diocese, and under the seal of the Consistorial Court, forbidding a clergyman preaching in the diocese, is in fact the inhibition of the bishop, and is not a judicial act requiring a previous citation. A bishop of one diocese has the power to inhibit, at his pleasure and without cause assigned, a beneficed and licensed clergyman of another diocese from officiating or preaching in his diocese without his licence, though the clergyman has the leave of the incumbent to preach in his church. A licence to officiate in one diocese determines by the institution into and licence in another. A usage of clergymen of different dioceses to occasionally assist one another, and preach, without the bishop's licence, is of no avail against his inhibition.

[IRELAND.]

BISHOP OF DOWN v. REV. T. F. MILLER, D.D.

[IRELAND.]

These cases, which had been sent to Armagh by letters of request from the Vicar-General of Down and Connor, had been, on the 5th and 7th Jan. last, argued on an exception to the admissibility of the articles tendered by the impugnants respectively, as defensive and responsive to the articles of the promoter. The facts of the cases will appear from the pleadings. The first article filed by the promoter in the first case pleaded, that by the laws, canons and constitutions ecclesiastical of the realm, no rector or curate, or other minister of any parish church, chapel, or other place of worship, is to permit any stranger to preach or perform any ecclesiastical duties or divine offices of the Church of England and Ireland, in their respective churches, &c., without the licence or other lawful authority or permission, express or implied, of the bishop of the diocese first had. The second article pleaded the 39th canon of 1634, "Strangers not admitted to preach without licence," viz., "Neither the minister, churchwardens, or other officers of any parochial or collegiate church shall suffer any stranger to preach unto the people in the churches except they know him to be sufficiently authorised thereto, as is aforesaid." The third alleged that Dr. Miller was the Vicar of Shankill, otherwise Belfast, in the diocese of Down, &c., and lawfully instituted and inducted thereto, and bound to obey and pay due reverence to the lawful and honest commands, &c., of the bishop. The fourth article pleaded a certified copy of the act of institution of Dr. Miller to said vicarage. The fifth pleaded the ordination vow taken by Dr. Miller, as in the ordination service in the Book of Common Prayer, viz., "That you would reverently obey your ordinary and other chief minister, unto whom is committed the charge and government over you, following with a glad mind and will their godly judgments." The sixth alleged the oath taken on the occasion of Dr. Miller's institution, viz., "I do swear that I will perform true and canonical obedience to the Lord Bishop of Down, &c., and his successors, in all things lawful and honest, so help me God." The seventh alleged that Mr. Potter was, at the time of preaching the sermon in question, viz. the 12th Aug. 1860, a beneficed clergyman in the diocese of Leighlin, and had no licence or authority then to preach or perform ecclesiastical duties in the diocese of Down, &c., and that Dr. Miller was aware of that. The eighth alleged an interview between the bishop and Dr. Miller at the Vicar-General's office, when the bishop expressly admonished and commanded Dr. Miller not to permit Mr. Potter to preach in Shankill Church on the 12th Aug. The ninth stated a letter written on the 8th Aug. by the bishop to Dr. Miller, at his request, in which the bishop, amongst other things, said, "As I understand that you have invited the Rev. Mr. Potter to preach in your church next Sunday, I regret to say that I feel it my duty to inhibit him from doing so upon account of the sermon preached by him in Down Cathedral on the 12th July, as I consider its tone and language, as reported in the *Downpatrick Recorder*, calculated to stir up, rather than allay religious animosities between us and our Roman Catholic brethren." The tenth article set out Dr. Miller's reply of the 10th Aug., in which he stated, amongst other things, that he was under the impression that the incumbent had the sole control over his pulpit, and that the bishop would exercise authority not sanctioned by law, did he try to limit the freedom of the incumbent in that respect, and that he felt constrained to allow Mr. Potter to preach as advertised. The eleventh article stated, that on the 10th Aug. the bishop ceased to issue his inhibition under the consistorial seal, and signed by the Vicar-General of the diocese, which was served on Dr. Miller on the 11th Aug., and is as follows:— "Robert, by Divine permission, Lord Bishop of Down and Connor and Dromore, to all sin-

gular clerks and literate persons within the diocese of Down and Connor, greeting— Whereas, the Rev. Samuel George Potter, incumbent of Stratford-on-Slaney, in the diocese of Leighlin, has taken on himself to preach in the parish church of Shankill, Belfast, in our diocese of Connor, without our licence or authority, contrary to the laws and canons of the Church of Ireland, we authorise and strictly enjoin you, jointly and severally, that you peremptorily inhibit, or cause to be inhibited, the said Rev. Samuel George Potter; and we do, by the tenor of these presents, inhibit that he presume not to preach in said church, or in any other church in our said diocese, or perform any clerical office in our said diocese, without our authority aforesaid had and obtained for that purpose according to the law and canons aforesaid, and also that you inhibit, or cause to be inhibited, the Rev. Thomas Fitzwilliam Miller, D.D., vicar of Shankill; and we do, by the tenor of these presents, inhibit him that he do not permit the said Samuel Potter to preach in said church, or any other church in the said parish of Shankill, without our licence or authority aforesaid to preach or officiate. To which we have caused our consistorial seal to be affixed this 10th day of Aug. 1860." The twelfth averred the fact of Mr. Potter having, at Dr. Miller's request and by his permission, preached at Shankill on the 12th Aug., without any licence, and contrary to and in defiance of the commands and inhibition of the Bishop of Down, &c., and in violation of the ordination vow and the oath of canonical obedience, and the articles prayed for suspension for one month, and a monition not to offend again in like manner, and pay costs, &c.

The articles in the second case filed against Mr. Potter were similar to the 1st, 2nd, 11th and 12th of the foregoing, and prayed for his due correction and payment of costs, &c.

By a consent of the 13th Oct. 1860, signed by the proctor for the impugnants, the foregoing facts were substantially admitted. The articles which were sought to be pleaded as responsive, alleged, on Mr. Potter's part, that Mr. Potter had been originally ordained a deacon of the Established Church in 1845, and on the 13th Dec. 1846 was admitted a priest by the then Bishop of Down and Connor in his diocese, and was for two years duly licensed as curate of Cusendrum in the same diocese. That in 1849 he was appointed to the inappropriate curacy of Stratford-on-Slaney, and was duly licensed on the 30th May 1849, by the Bishop of Leighlin and Ossory, and that though the Bishop of Down was not his ordinary, he had occasionally assisted in Divine service, and preached in the diocese of Down and Connor on the invitation of the respective incumbents of the churches, without any objection on the part of the bishop, and that it was the usage and custom of the Church of Ireland for clergymen to assist in service and preaching in churches to which they have no special appointment or licence, when requested by the incumbent and churchwardens, and that a book was kept in every parish church in Ireland in which the different clergymen who preached entered and signed their names for the information of the bishop, and that he (Mr. Potter) had the consent of the incumbent and churchwardens to preach on the occasion in question. That by his ordination and the matters aforesaid, he was fully authorised to preach in said diocese, and stated the request to preach a charity sermon on the 12th Aug. made to him for building a chapel of ease, and objected to the inhibition as a judicial act requiring a citation before issuing, and therefore void, and that it was not served until the 11th Aug., the day before the sermon was preached.

Dr. Miller, in his articles, relied on the same defences as Mr. Potter, and also that the letter of the bishop did not contain any inhibition, but called for explanation and reply, and that the inhibition itself was

void, being in the nature of a judgment or sentence, and that no citation had previously issued, and he relied generally on the sole authority of the incumbent of the church over his own pulpit.

Drs. Ball, Q.C. and Darley, Q.C. (with whom was Dr. Knox), for the bishop, contended that the articles tendered were irrelevant and unnecessary, as the real question in the case arose fully on the articles of the promoter. The question to be decided was, had the bishop the power to prohibit by name a particular individual, a stranger to his diocese (being a beneficed clergyman in another diocese) from officiating in his diocese. If the bishop had the power, nothing contained in the articles tendered would be an answer to it. The case is not the case of a clergyman doing duty for another, and then being sued for having done so without the licence of the bishop (which would not be perhaps a judicious proceeding on his part), but it is the case of a clergyman of one diocese, in disobedience of a direct command from the bishop of another diocese, intruding into and doing duty in the latter. In fact, the real question is, what are the true limits of episcopal authority in this respect. First, as to the general principles of the Church before the Reformation. Originally the bishop had the entire cure of souls in the district—the *cura animarum*. It was his *parochia*; there were then no subdivisions: (2 Hooker's Ecol. Polity, book 7, sect. 2, and book 8, sect. 9; Taylor's Episcopacy Asserted, sect 37, Plowd. 495; Clerk v. Meath, 1 Mod. 11; Portland v. Bingham, 1 Hagg. Consist. 161; Carr v. Marsh, 2 Ph. 206; Rose v. Lee, 3 Ph. 575; Provincial Canons of 1571; Smith v. Lovegrove, 2 Lee, 171; 1 Add. 103, N.; Colefall v. Newcomb, 2 Ld. Raym. 1205; Finch v. Harris, 12 Mod. 641; Linwood, 294; 1 Burns. Ecol. L. 193.) But afterwards, as the Church extended, clergymen were employed under the bishop, and they had distinct places marked out for them, but they held only by delegation from the bishop, and the presence of the latter in the place did, for the time being, suspend the powers of the clergymen. Preaching, originally, was no part of the minister's duty, only reading mass and administering the sacrament, and the bishop appointed the preachers: (Colefall v. Newcomb, 2 Ld. Raym. 1205; 3 Burns, 442.) So matters continued up to the Reformation, and in Edw. VI. and Elizabeth a royal licence was granted to preach: (3 Burns, 442.) Secondly, the canons of the Church, though not binding on the laity, bind the clergy; that is conceded by the counsel and judge in Marshall v. Bishop of Exeter, 6 C. B. 716; S.C. 6 Jur. N.S. 1301.) In England the canons now in force are dated 1603. In Ireland 1634. The earliest canons were Theodore's: (see 1 Johns. Can. 91 and 92, and 2 Ib. 499.) The 9th canon (Irish) requires every beneficed clergyman, allowed to be a preacher, and residing on his benefice, to preach one sermon every Sunday, and the 11th requires the parson, vicar, or curate, on every Sunday, to catechise the youth and ignorant persons of his parish in the Commandments, Belief and Lord's Prayer; these plainly point to a local duty, viz. the parish of the clergyman: and the 39th refers to the 38th, which contemplates permanent duty. The 26th, 27th and 28th require residence on the benefice, and preaching there. The 30th requires the candidate for orders to exhibit to the bishop a presentation of himself to a preferment in that diocese, or a certificate that he is provided with a curacy, &c., in that diocese: (see Martyn v. Hind, Cowp. 437.) The 36th, 45th, 46th, 47th, 49th, 50th, 51st and 52nd of the English canons were also cited to show that, though the Irish canons were confined to a licence from the diocesan, the English canons contemplated also a royal licence; and the 46th (9th Irish) showed that a clergyman could not get the right to preach by his merely getting

a benefice, as it says, "Every beneficed man, not allowed to be a preacher, shall procure sermons to be preached in his cure once every month at the least," &c.; but none of the canons give him the right to preach as against the will and command of the bishop; much less none of them countenance a stranger intruding from another diocese, nor the right of one bishop to license for another diocese. The Irish Act of Uniformity (17 & 18 Car. 2, c. 6, sect. 13) enacts that no person shall be a lecturer, or allowed to preach in any church or other place of public worship, unless he be licensed by the bishop of the diocese; and the ordination service of both deacons and priests showed that they were applicable to local services; the former, "Take thou authority to read the Gospel in the Church of God, and to preach the same, if thou be therunto licensed by the bishop himself." The latter, "Take thou authority to preach the Word of God, and to minister the holy sacraments in the congregation where thou shalt be lawfully appointed therunto." The 23rd article of the Church was also relied on. As to the inhibition, no citation was necessary. In *Rex v. Archbishop of Canterbury*, 15 East, 117, Lord Ellenborough held that, on the corresponding English Act of Uniformity, a bishop had a discretion in the granting of the licence, and was not bound to hold a judicial inquiry, but only "to exercise his conscience, duly informed on the subject:" (pp. 140, 146.) The following cases were also cited:—*Hodgson v. Dillon*, 2 Curt. 388; *Barnes v. Shore*, 4 Notes of Cases, 593; *Freeland v. Neall*, 6 Ib. 55; *Ellis v. Niszon*, 20 Ch. Remembrancer, 292; 3 Chr. Ex. 323, and Milw. 392; *Archbishop of Dublin v. Gregg* (not reported); *Hodgson v. Gladstone*, Times, 4th May, 3rd and 11th June 1852, which was a proceeding against the impugnant for preaching in an unlicensed place. Also *Barder v. Merton*, Times, 2nd Nov. 1853. In these cases no citation had issued, and in *Gregg's* case the inhibition was under the consistorial seal, as in this case. Also *Bartlett v. Kirkwood*, 2 Ell. & Bl. 776. The inhibition here is not a perpetual one, but only until the bishop grant his licence. It pronounces no judgment on Potter's status; the bishop could not do so, as he was not under his control. The licence originally granted to him to preach in the diocese of Down and Connor determined by his acceptance of a benefice in Ossory, and so he admits by his pleading in his fifth article, where he refers to the Bishop of Ossory as his diocesan. The mere ordination cannot give the right contended for, as in the case of a curate ordained on the nomination of a bishop of another diocese, and to a curacy in another diocese, he would have no authority to preach in the diocese in which he was so ordained: (Cripps on the Clergy, 635; Watson's Clergyman's Law, 3rd edit. 147; *Bishop of Exeter v. Tucker*, not reported.)

Dr. Battersby, Q.C. and Dr. Walsh, Q.C. (with whom was Dr. Lindsey), contra, contended that the articles tendered were strictly responsive and admissible. We do not dispute that, for which a great many authorities were relied on by the other side, viz. that a bishop may revoke at his pleasure a licence granted during his pleasure, and in his own diocese. The case cited from the diocese of Exeter (*Bishop of Exeter v. Tucker*) is not reported, and is merely noted by the registrar of that diocese in a schedule to a return ordered by the House of Commons as a case which had occurred, but the particulars are all omitted, save the important one, that the clergyman, by his own consent, was sentenced: therefore, it is no authority whatever. The other side adopt the Roman doctrine, that the will of the bishop is the sole law of the Church, but the Roman Catholics have some canons and rules to rely on for that; but the other side here rely on the ordination vow, and contend that by it the will of the bishop should prevail in things indifferent.

[IRELAND.]

BISHOP OF DOWN v. REV. T. F. MILLER, D.D.

[IRELAND.]

and not only in things strictly coming under and cognisable by the laws of the Church. The bishop puts his case on this: it is my right, no matter how groundless or absurd my reasons or motives, or what the circumstances or exigencies of the case—*Hoc volo, hoc jubeo*. The bishop must, therefore, go the length of arguing that under the 39th canon his licence is indispensable in every instance for a clergyman preaching in his diocese. If that is so, every clergyman probably in Ireland has violated that canon. We say that long and immemorial usage, uncontrolled by any law, is in our favour, and that it is the abstract right of one clergyman to get occasional aid from another without the bishop's licence, and notwithstanding the 39th canon. That usage uncontrolled by any law is part of the established common law of the Church. See 1 Bl. Com. 64, and the case of *The Office v. Nizon* is an express authority for us as to the right, and nothing in Burton, J.'s judgment is contrary to it. We admit that, for a permanent cure of souls, a licence from the diocesan is, under the 38th canon, necessary, and all the modern cases cited on the other side are within the 38th and not the 39th canon, as in them permanent service was persevered in against the will of the bishop and within his diocese, and in several of them in unconsecrated places. The ordination service of a priest is our licence, and we require no other—"Take thou authority to preach the Word of God, and to minister the holy sacraments in the congregation where thou shalt be lawfully appointed thereto." Those words do not, as argued by the other side, confine the authority of preaching to any local jurisdiction, but are used in the same sense as in the 23rd article of the Church, and that article plainly shows that a clergyman, when ordained, acquires the right thereby to preach generally, and such authority was only subject to such restrictions as to time and place as have been adopted by the Church of England for the convenience of the Church, either by canons or rules, but such as are against or in derogation of the rights of the priest must be construed strictly, and be founded on some authentic law. The 39th canon is the only one which the other side pretends supports the right claimed, and they say that the words "as is aforesaid" refer to the 38th canon, where permanent duty is contemplated; but we contend that those words refer to the prior canons which require examination before ordination, &c., and the heading of the canon, "strangers not admitted to preach without showing their licence," shows that a stranger, though not licensed in the diocese, has a right, and whether licensed or unlicensed, the canon gives the right of occasional service. "Stranger" is no new word; "a man is no stranger who has been ordained in a diocese." See Linwood, 47 and 238, n. u.: "Potest tamen excusa necessaria ad tempus modicum deservire curæ suæ per substitutum, dato ei pretio, ut puta protectione necessaria imminente vel ubi contingit ex justâ causâ cum abesse." *Gates v. Chambers*, 2 Add. 177, in which Sir J. Nicholl admitted an allegation, responsive to articles filed against a clergyman who, against the 48th canon, officiated out of his own diocese without licence of the bishop, is an express authority for us; the only difference is as to the inhibition—as none was there—but we say that the inhibition is not a judgment, decree, or valid order that could make wrong what was right within the laws of the Church. *Smith v. Lovegrove*, 2 Lec. 162, was the case only of a lecturer, and in p. 172 he is stated not to have ever had a licence to preach or perform divine service from any bishop whatever, or from either university. *Rosse v. Lee*, 3 Phill. 566, turned on whether the locus had been erected into a peculiar jurisdiction exempt from the ordinary, and as strong doubts existed on that point, the articles were rejected and the suit dismissed. *Rex v. Archbishop of Canterbury* was not a case of capricious refusal, as the

archbishop there swore that he had acted upon due consideration and inquiry, and entirely on account of the doctrines contained in a sermon on infant baptism. So *Rex v. Bishop of Ely*, 2 T. R. 336. As to the case of *Hodgson v. Dillon*, and that class of cases, they are all within the 21st and 22nd canons, referring to the administration of the communion in private houses, and performing service in private conventicles, but they show that the rector or vicar has the sole care of souls in the parish, and the right, in their own judgment, to an assistant-priest to help them, subject to this restriction, that they conduct themselves properly, and that if otherwise they are subject to the ordinary. But here Mr. Potter actually had the licence of the ordinary; he was originally ordained in that diocese, and was a licensed curate there, and there is no authority, nor is it averred, that such licence was revoked by the acceptance of the benefice in Ossory. Ayl. Par. "Licence," 353, shows that it must be recalled on just grounds and for good cause, not wantonly and wilfully. Ordination would alone give authority to preach; *a multo fortiori* if that ordination had been, as here, in the particular diocese: (*Marshall v. Bishop of Exeter*, 7 C. B. 716.) The 49th English canon requires that no person not examined and approved of by the bishop, or not licensed, shall preach in his own cure or elsewhere, &c. Here Mr. Potter has the licence of and was examined and approved of by the bishop of the diocese. As to the inhibition, the bishop had no power to issue it, but if otherwise the canon on which it is based (39) is obsolete; besides, according to the old law the inhibition rendered a party disobeying it liable to excommunication, and therefore there should be some reason shown for issuing it. There is no authority in a bishop to issue it without a cause pending, but on his own motion. The 58th and 59th canons require the signature of an advocate. In the case of appeals, it is issued properly as a suit is before the court. In *Gregg's* case no question was raised on the point, and this order being unlawful there was no disobedience of the oath of canonical obedience. *Bonacre v. Evans*, 16 Q. B. 162; *Capel v. Child*, 2 Cr. & J. 558; *Bartlett v. Kirwan*, 2 Ell. & Bl. 771; *Trebeck v. Keith*, 2 Atk. 498, were cited, to show that a party should be heard in his defence.

The Judge having refused to decide the main question in the case on the motion, an order was made whereby the defensive pleas were admitted, but all questions of law as well as costs of the exception and argument were reserved to the hearing. And on the 4th March, the promotor filed responsive articles, principally alleging that Mr. Potter's licence for Cushendun ceased and determined by his appointment to Stratford-on-Slaney, and if not, it was by the admission and collation on the 16th Nov. 1849 to another benefice in the diocese of Down, of the rector (in 1847) of Cushendun, on whose nomination Mr. Potter's licence was granted, and they set out the certified copy of such act of collation, and alleged that Mr. Potter's right to preach in Shankill, as claimed by him, depending on the permission of Dr. Miller, such right ceased with the right to which it was incident. The facts alleged in the impugnant's articles and in the responsive articles were admitted by consent, and by consent the archbishop's attendance was dispensed with, and the Vicar-General authorised to give judgment in Dublin without prejudice to the right of appeal.

March 23.—Dr. RADCLIFF, Q.C., after stating the several pleadings filed on both sides, and the several documents and consents in the two causes, proceeded to dispose of the preliminary objection taken to the inhibition. The objection that it issued under the consistorial seal, without a previous citation and purported to be a judicial act and penal, is answered by reading the document itself, which could not have been done

[IRELAND.]

BISHOP OF DOWN v. REV. T. F. MILLER, D.D.

[IRELAND.]

on the argument of the exception. It does not purport to be issued under a decree, nor to be more than the bishop's prohibition against Mr. Potter preaching in his diocese until licensed by him. It could not bind the impugnants as a judgment not appealed from, so as to prevent their questioning the right of the bishop to inhibit, as would be the case if it were a judicial act, nor could process issue thereon to enforce its execution or punish its violation, as if it were a judgment or sentence of the Consistorial Court. The seal of the court rendered it more formal, but it did not convert it into a judicial act; it has really little, if any, more effect than the inhibition contained in the bishop's letter of the 8th Aug., and though signed by the Vicar-General, it was plainly, if not admittedly, the act and the inhibition of the bishop. The bishop claims the right to have inhibited Mr. Potter from preaching in his diocese without assigning any reasons save that he had no permission from, and was forbidden by him to do so. He did in conversation with, and in his letter to, Dr. Miller assign reasons for prohibiting Mr. Potter, grounded on a sermon preached by Mr. Potter on the 12th July, and in a letter of his, afterwards published, but no reasons are given in the inhibition, nor are such reasons submitted to the court for its opinion or judgment. The sole question now is, whether the incumbent of a parish with or without the churchwardens may allow a clergyman not beneficed nor licensed in that diocese to officiate or preach in his church after that clergyman, though beneficed and licensed in another diocese, shall have been inhibited by the bishop of the diocese in which the church is, and though no reasons for such inhibition be given. It has been argued on behalf of the impugnants that every incumbent has the right to avail himself of occasional aid from other clergymen in priest's orders, particularly if beneficed and licensed in another diocese, and that the bishop of the diocese in which such occasional assistance is given has no authority to interfere, unless the clergyman so assisting should preach strange doctrine, or otherwise misconduct himself, in which case the bishop (as any one else) might proceed against him in his consistorial court; but that his summary inhibition issued without some charge made and substantiated after an opportunity being given for defence, would be a nullity. On the other hand, the bishop says that no clergyman can preach or officiate in his diocese when not beneficed or licensed therein without his licence or authority, express or implied, and that the issuing of an inhibition against his so acting, with or without cause assigned, concluded all question of implied authority, and rendered the person so acting, and the incumbent permitting him to act after service thereof, punishable for contempt of the bishop's authority. As there is no case reported in which the precise questions appear to have been decided, the arguments on each side were chiefly grounded on the ecclesiastical laws, canons and usages of the Church, the relative positions of bishop and incumbent and the rights flowing therefrom respectively. It will, therefore, be requisite to consider, as regards the questions in controversy, the diocesan and parochial system of church government and discipline adopted in the United Kingdom. Originally there was but one diocese called Parochia, and the bishop was himself the sole parson, and had the sole cure of souls in the entire diocese. In course of time the diocese was divided into several others, and ministers were ordained by the bishops to assist them, and sent out to serve the cures and preach in the several districts assigned to them, while the bishop and clergy resided together where the church or cathedral was. When churches were founded and endowed, the bishop sent out his clergy to reside and officiate in those churches and the districts annexed, which formed parishes, reserving, however, a certain number in his cathed-

ral to counsel and assist him, who are now called the deans, prebendaries and canons. But the cathedral continued, as it had been, the parish church of the whole diocese: (Stillington, *Ecc. C.* 88, 143; 1 Barn. E. L. 194, 283.) The bishop was the chief pastor (as termed by some) the universal incumbent of the diocese, having the cure of souls therein, and in every parish thereof, and so the right of institution and collation of clerks to parishes belonged as of right to him: (1 Van. Esp. 132, Hooker, book 7.) They received from him and as his assistants and curates the cure of souls, and they were for a long period called curators, and all the inferior clergy were bound to obey the bishop as their ordinary and superior, and to take the oath of canonical obedience from a very early period on being admitted into their cures. Preaching was deemed of great importance and to be peculiarly the duty of the bishop himself, and he was enjoined by the early constitutions and canons to be active in the discharge of that duty. Formerly the inferior prelates and clergy could not preach without special authority from the bishop, and which was revocable at his will. In progress of time, however, when the parochial clergy were better established, the right of preaching in their churches passed to incumbents, as belonging to their care of souls, by institution or collation to the benefices or cures, after which the bishop could not at his will and pleasure have deprived such incumbents of their right to preach, though no special licence or authority had been granted for the purpose, but in other respects this jurisdiction and right of control over all clergy within his diocese remained as before. The bishop had also the right and used to licence and send preachers, though not beneficed, through his diocese as assistants to himself, and a canon of the Council of Lateran, under Innocent III., directs bishops, especially those having dioceses of great extent, to take to their assistance able preachers, so that the people might be properly instructed. Certain firms were, however, by the papal authority entitled to preach wherever sent by their superiors, but such privileges were restricted, and were conceded by the Pope, as the supreme head; but the bishop could, at his mere will and pleasure, revoke any licence granted to any preacher sent by himself through his diocese, and also, in like manner, could revoke, limit, or modify, any licence or authority to preach granted to any secular or regular not having *beneficium curatum*, as contradicting those from those having cure of souls granted by institution: (1 Van. Esp. pt. 1; tit. 16, s. 14.) The bishop was also authorised to send preachers to the churches of those who, having cure of souls, were unable or unfit to discharge their own duty (Van. Esp., *supra*); and he might also have sent preachers to the churches of those having cure of souls in Advent or Lent: (Ibid. c. 7.) A new church or chapel could not, without the consent of the bishop, have been erected in any parish (3 Hag. 510); nor could any incumbent officiate without licence of the bishop in any unconsecrated, though he might have done so in any consecrated place in his parish, by virtue of his institution: (2 Hag. 46.) Each bishop had the exclusive right of ordaining the clergy for his diocese, and orders conferred by strange bishops without letters demissory were held irregular without a special dispensation. A bishop also could not exercise his episcopal office in another diocese without the licence expressly given of the bishop of that diocese; but having a general authority to preach everywhere, he might do so in any other diocese if permitted by the incumbent, unless expressly prohibited by the bishop of that diocese (1 Van. Esp., pt. 1, 16); nor could any secular clergy exercise functions in any diocese without the authority of the bishop, and the parish clergy were directly enjoined not to permit any one to preach in

[IRELAND.]

BISHOP OF DOWN v. REV. T. F. MILLER, D.D.

[IRELAND.]

their churches without being satisfied that they had been ordained, and had letters from their own bishop as to their faith, &c.: (see *Lynn*, 48-9, and 133, 389.) But the bishop was also placed under control. A canon of the Council of Lateran, A.D. 1179 (2 Johns. 87), decreed that, if any bishop should ordain any deacon or priest without a title, he should maintain him till he could make a clerical provision for him; and it appears from 2 Gibson Codex, app. forms 8, 9, 10, that these canons were not merely in *terrorem*. These general rules and constitutions having been adopted by councils and otherwise, and become part of the common law of the Church of England and Ireland, were specially enforced in both countries, and canons were made in both countries before the Reformation for such purpose. The earliest English canons appear to be those of Archbishop Theodore, A.D. 673; and these and others are collected in 1 Johns. 187, *et seq.* In 1400 was the first statute requiring preachers to be licensed (2 Hen. 4, c. 15), and was followed in 1408 by the constitutions of Arundel, which, though only provincial, show that they only purported to enforce the ancient laws of the Church, and forbid clergymen, unless authorised by the canon or special privilege, from preaching within or without a church unless examined and licensed by the diocesan for a certain parish, and the penalty added for violation of it is excommunication: (see also 2 Johns. 333, 465, 513; *Lynn*, 33, 48.) Incumbents also had remedy, by action of trespass, against any one who should preach or officiate in their churches, save the ordinary: (*Smith v. Reynolds*, 12 Mod. 420, 433; *Duke of Portland v. Bingham*, 1 Hagg. C. R. 161.) By a regulation at the synod of Cashel, after the arrival of Henry II. A.D. 1172, all Divine service in the Church of Ireland was ordered to be in the same manner as in the Church of England; and all the English Acts made against provisors were adopted here, first in 1434 by the 32 Hen. 6, c. 1, and the liturgies and services of Ed. VI. were adopted here by 2 Eliz. c. 2, and again by the 10 Hen. 7, c. 1; and see Steph. 45, 8ro ed., and 5 Art. Union, 39 & 40 Geo. 3, c. 67. The Irish canons are similar: see 1 Ware, 315, 317; 1 Wilk. Concilia, p. 2, 548, 551; Julian's Bull, 1503; followed by 5 R. 2, c. 5, and 2 Hen. 4, c. 15, against preaching without licence of diocesan, and imposes penalties; and Ireland was included in them. 2 Hen. 4 was repealed by 25 Hen. 8, c. 14, by which the earlier Acts against heresies were confirmed; but 25 Hen. 8 did not further interfere with the law of licensing preachers. This repeal was considered to include Ireland. See 3 & 4 P. & M. c. 9 (Ireland). The 2 Eliz. c. 1 (Ireland), repealed 3 & 4 P. & M., and revived 5 R. 2, and 2 Hen. 4, c. 15, and restored the common law, save as altered by the Reformation. And so it appeared that, according to the common law of the Church of England and Ireland, no person could have preached in any church without the authority of the bishop, express or implied, unless specially exempt by such privilege as would after the Reformation be valid or conferred by the Crown, and an implied authority resulting from usage could not be of greater force than an express licence, and must have been subject to a similar power of revocation. The incumbent's consent in either case would have been necessary—whether the bishop's permission were express or implied; nor could an unlicensed clergyman be in a better position than a bishop who had a general authority to preach everywhere, but should succumb to the prohibition of the bishop of another diocese. Such was the law at the time of the repeal of 2 Hen. 4, c. 15. It was continued by the Acts 25 Hen. 8, c. 19 (England), and 28 Hen. 8, c. 13 (Ireland), except as to the Pope's powers and privileges: (see also 3 & 4 Ed. 6.) Unless, therefore, this jurisdiction of the bishop in respect of persons who shall preach in his diocese has been taken away or modified by some subsequent canons,

[MAG. CAS.]

statutes, ordinances and usage, it must be taken to be in full force as it was at the repeal of the 2 Hen. 4, c. 15; but there was no disposition on the part of the Crown or those in authority in the remainder of the reign of Hen. VIII., or in Ed. VI., or of Elizabeth, to relax the laws imposing restraints on preachers; on the contrary, such rights were placed under very strict regulations by proclamations and injunctions from the Crown, and the prerogative of the Crown was stretched to the utmost. At one time, no one could preach unless licensed by the Crown or Archbishop of Canterbury, or bishop of the diocese, save the beneficed clergy; at another time, even the beneficed clergy should have such a licence for preaching. Even in Ed. VI. the bishops were directed not to give licences to preach—the proclamation reserving that right to the Crown and the Archbishop of Canterbury. His Honour then referred to the convocation in 1603, in the reign of James I., and the canons framed under it, and the patent of confirmation following the 25 Hen. 8. The canons from 31 to 35 inclusive related to the ordination of the clergy—adopting the rules already mentioned, adapting them to the Reformed Church: (see Nelson, 138.) The 36th requires subscription to the three articles of supremacy of the Crown—adherence to the Book of Common Prayer and adoption of the Thirty-nine Articles, and suspends for twelve months bishops' licensing without such subscription—thus depriving them of any discretion to dispense with the law. The 37th is only supplementary to the 36th—requiring a person licensed to preach by the archbishop or one of the universities, on coming into a diocese where he has got an appointment, again to subscribe the three articles before the bishop, and is in affirmation of the bishop's authority and of the ancient laws, but is not compulsory on the bishop. The 39th, 40th and 41st relate to institutions to benefices, &c., and 42nd, 43rd and 44th to residence and preaching of deans, &c., the episcopal authority being preserved. The 45th relates to preaching once every Sunday in the church, &c., "where the clergyman may do conveniently near adjoining (where no preacher is)," &c., but does not authorise him to do so in another diocese, if not permitted to do so: "where he may conveniently," &c., merely enforces and localises the performance of the duty. The 46th provides for a limited class of occasional preachers, the necessity of whom was to be determined by the ordinary. The 47th relates to non-residents supplying a licensed preacher; the 48th to the previous examination and licence of the ordinary of curates and ministers, &c.: (see *Gates v. Chambers*, 2 Add. 189.) The 50th, 51st, and 52nd more immediately relate to occasional preaching, read along with the 36th and 49th, requiring the bishop's examination and approval. "No person whatsoever not examined and approved by the bishop of the diocese, or not licensed, as is aforesaid, for a sufficient or convenient preacher, shall take on him to expound in his own cure or elsewhere, &c., but only read homilies." This seems to adopt so much of the constitution of Arundel as begins with, "but let parish priests and temporary vicars (not perpetual), who are not sent in form aforesaid, only preach those things contained in the constitution of," &c.: (2 Johns. 460, 282.) Probably, the 49th canon only referred to deacons who might, at that period, have been admitted to benefices: (13 Eliz. c. 12, s. 3.) The 50th canon is: "Neither the minister, churchwardens, nor any other officers of the Church, shall suffer any man to preach within their churches, &c., but such as, by showing their licence to preach, shall appear to them sufficiently authorised thereunto as aforesaid"—i. e. licensed by the archbishop of the province, bishop of the diocese, or one of the universities; for no others conferred authority to preach in a different diocese, and no licence to preach is mentioned in the 36th or any prior canon save those. The 51st precludes strangers from preaching.

3 I

in cathedral or collegiate churches, except allowed by the archbishop of the province, or bishop of the diocese, or one of the universities. The 52nd refers to a book to be kept for noting the names of the preachers; but, reading this with the 50th and 51st, it would preclude the view that the licence of any bishop is sufficient authority to a stranger to preach in another bishop's diocese, as they refer to the licence, in the 36th canon, and were framed to supply the bishop with information as to the sermons preached in his diocese as to those who should presume to preach without licence in violation of the 50th canon, and clear words would be necessary to deprive the bishop of his diocesan authority, but inferences and presumptions could not change the common law of the Church or divest rights, and the words in the canon "the name of the bishop of whom he had licence" may mean "the authority of whom he had licence," otherwise an entry of a licence from the archbishop or either university need not be made; and if their names were not intended to be entered, then it would seem that those licensed by strange bishops were meant as "presuming to preach without licence" of the bishop of the diocese, and guilty of contempt. It is said that the churchwardens themselves might enforce the authority given by the 50th canon—see *Cresswick v. Rokaby*, 2 Bulstr. 49; but as the canons were not ratified by statute and rested (as to the province of York, in which province *Cresswick v. Rokaby* arose) merely on the King's mandate—having been made by the provincial council of Canterbury alone—the convocation or the Crown, after 25 Hen. 8, c. 19, could scarcely have deprived the incumbent of the legal right (if he had it) to admit any priest in orders to preach in his church without the bishop's leave and to give the churchwardens and sidesmen the power to control him; but if he had not such right up to 1603, and if the bishop could have prevented strangers preaching in his diocese, then the churchwardens, as a kind of new machinery, might, as to this, have acted for the ordinary, as they do in respect of seating the parishioners, and the words "that the bishop may know," &c., enforce this view, as it was to support his authority they were to act. The 71st canon relates to service in unconsecrated places. These canons were not extended to Ireland by the Crown; but, by a national synod authorised by Charles II., the Irish canons of 1634 were prepared and ratified, and are, as to the matters in controversy here, similar to those of 1603, save that the only person competent to licence or authorise preachers is the bishop of the diocese, and none of them requires a book to be kept for preachers' names; but they merely embody the ancient common law and canons of the Church adapted to the Reformation. It is doubtful if they apply to occasional preachers; they certainly do not deprive the bishop of any of his authority. The impugnants' advocates strongly urged that the licence of any bishop to preach was sufficient, founded on a supposed opinion of Watson, 4th edit. 147, where he says the licence of any bishop is sufficient; but in the 3rd edit., p. 147, he says, "that a preacher by the canons must have licence from the bishop of the diocese in which the church is." This is omitted in the 4th edit., which runs, "but a licence of any bishop of any diocese is sufficient;" but this edition, and also the third, were published after Watson's death, so that even Watson's opinion cannot be relied on to controvert the general doctrine adverted to, though the passage in the 4th edit. should bear the interpretation put on it, which it would not seem in fairness to do. His Honour then went minutely through the English and Irish Acts of Uniformity, 13 & 14 Car. 2 (English), A.D. 1662; 19 & 20 and 17 & 18 Car. 2 (Irish), c. 6, and 1 Eliz. 12, the clauses of which are the same (see Watson, 4 ed., 338), who considers the clause in the 19th section (English) ex-

tends to all ministers preaching in any church, of which they have not the cure; and admitted the inconvenience of extending the canon and statute so as to require every clergyman preaching an occasional sermon in a strange diocese to have a licence under the seal of the bishop of that diocese. In *Gates v. Chambers*, 2 Add. 189, nothing was really decided; and Sir J. Nicholl expressed great doubts. The first charge against the impugnant there (who had preached by the incumbent's desire, and without any objection of the bishop, but in opposition to attempts to stop him made by a dismissed curate) was for violating the 48th canon for preaching without licence; and, so far as can be collected from the report, Sir J. Nicholl's opinion was against that. The second charge was for having obstructed a duly licensed curate in the discharge of his duties; but nothing was done on this; the pleading was admitted on other grounds, and the suit was abandoned. But here is a different question; for even if the 48th and 50th canons (English) and 38th and 39th (Irish) do not apply to occasional sermons, the impugnants further must show that the bishop has no power to prevent any such clergyman from so preaching or officiating. He had, up to 1603 in England, and 1634 in Ireland, such power; and if the canons do not refer to such a case, the power still remains, unless taken away by statute or usage. The Acts of Uniformity may not require a licence from the bishop to enable a stranger to preach occasional sermons absolutely essential, though they might be so construed, but they do not in any view deprive the bishop of any authority or jurisdiction; and I cannot find any case or *dictum* to the effect that a bishop could not at his will, without cause assigned, prevent any stranger from preaching or officiating in his diocese till licensed—and any abuse of such right is subject to correction by the metropolitan—and there are also powers in the Crown which might be brought into operation. (The oath was also referred to as taken by the bishop.) Greater abuses might follow if the unrestricted right were allowed incumbents as claimed without any adequate remedy, and no limit could be put to it, and some clear authority for it should be shown. The ordination service, as now in use, had been strongly relied on by the impugnants; and it was urged that, by reason of that service, licensing preachers had fallen into disuse, but no change in it had occurred since the 5 & 6 Edw. 6. There is nothing in it, or in the Thirty-nine Articles, to specify what authority, unless that of the ordinary, shall enable a clergyman to preach in a particular place; and the Thirty-nine Articles and the ordination service were in force when the injunctions of Eliz. and the canons of 1603 and 1634 were issued, and the two Acts of Uniformity enforce the use of such service which recognises the parochial and diocesan system. The discontinuance of the practice to grant the general licence to preach without restriction as to locality cannot be attributed to the ordination service, which has not varied, but more satisfactorily is accounted for by the superior education of the clergy having rendered such licence unnecessary. No authority but the Crown, the archbishops and the universities could grant such general licence. The bishop could only grant a licence in his own diocese, and when the former ceased to grant it, no authority remained but the bishop; but it is difficult to understand that, therefore, his authority was entirely superseded. The forms of institutions and collation for two centuries in use is, "We do commit to you the care and government of the souls of the parishioners," &c. There is no special mention of preaching, or of sacraments, or other duties—all being included in the cure of souls: but in the form to serve perpetual cures the words are, "to serve the cure of souls within, &c., to preach, &c., and administer the sacraments, &c., there," and so

[IRELAND.]

ATTENBOROUGH v. KEMP.

[Priv. Co.]

as to assistant curates; and when he was only to read prayers, "to read prayers as assistant." Dr. Miller's institution and Mr. Potter's licence are in accordance with those forms (see 2 Burns, 167); and, if institution alone could confer the power claimed, some trace of it would be found in the forms, but they never vary. Whenever a change of cure renders a licence necessary, it contains a licence to preach in the new cure, even in the same diocese. Usage has, in fact, been the other way, as in the cases of Mr. Taylor, whom, on suspicion of holding infidel opinions, and Mr. Nowlan and others, whom the Archbishop of Dublin inhibited; but if the argument here is valid, they might have preached here in defiance of the archbishop, who thus would be deprived of all episcopal power; but, in fact, usage without an adjudication would have little effect on the question. As to the colonies and foreign countries and Scotland, see 59 Geo. 3, c. 60, s. 3; 3 & 4 Vict. c. 33, ss. 1, 2, 3. The general rule that no clergyman can preach in any diocese without the diocesan's consent, express or implied, has been laid down by the temporal as well as ecclesiastical courts—*Finch v. Harris*, 12 Mod. 641, a prohibition case, the *dicta* in which, as to the necessity of licence and the effect of the orders, are important, and agree with Sir G. Lee, in *Smith v. Lovegrove*, 2 Lee, 163. In this case it was not necessary for Sir G. Lee to consider the law as to preachers, because Smith, as a permanent lecturer, came within the Act of Car. 2 and the canons; but, on performing divine service, he is clear that such is prohibited by the 36th and 37th canons: (*Trebec v. Keith*, 2 Atk. 498, 500.) Dr. Trebec was in holy orders, and Lord Hardwicke puts the very case of occasional officiating without licence as the contempt: (*Car v. Marsh*, 2 Phill. 206.) *Hodgson v. Dillon*, 2 Curt. 388, was a case of preaching after an inhibition; so also was *The Office v. Neal*, 6 N. C. 252; *Office v. Nixon*, Milw. 390, n.; same case heard on appeal 1838, before Dr. Miller, as surrogate in Armagh, in which he adopts Dr. Phillimore's opinion (Chr. Exr. May 1838, p. 325): "I apprehend that a bishop has no authority to prevent any incumbent within his diocese from admitting into the pulpit of his church any regularly ordained minister of the church, not resident within his diocese, from preaching an occasional sermon in any church within his diocese, provided he has the sanction of the incumbent of that church for so doing." But for that no authority is relied on except the past usage, and therefore it cannot be extended beyond that: (see also *Freeland v. Neal*, 1 Rob. 651; *Office v. Nixon*, 20 Ch. R.; *Office v. Gladstone*, Times, 4th May 1852; *Office v. Morton*, Times, 3d Nov. 1853.) These were as to unconsecrated places, but the sentences ran forbidding them to preach there or elsewhere in the diocese unless licensed; and the *dictum* of Lord Mansfield, in *Martyn v. Hinde*, Cowp. 445, was not relevant to the point under discussion here, as readers (the class in question there) need not have been priests or deacons, and the fuller report, in 1 Doug. 146, throws great doubt on the accuracy of the report. As to the inhibition being void, *Bonacre v. Evans*, 16 Q.B. 162, was cited; but this inhibition was not a judicial act. It was only a withdrawal of the bishop's permission, and this suit is the judicial proceeding for doing so. Now, on the whole, I am of opinion that the bishop had a legal right to prohibit Mr. Potter from preaching, and also Dr. Miller from permitting him to do so, without assigning cause, and the sentence must be in accordance with that view; but, under the circumstances of Dr. Phillimore's opinion, acted on by Dr. Miller, the surrogate in Armagh, and the other circumstances in the case, I give no costs. Let each party abide their own costs.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES PATTERSON, Esq., of the Middle Temple, Barrister-at-Law.

Saturday, June 15.

(Present—the Right Hon. Lord KINGSDOWN, KNIGHT BRUCE, L. J., Sir E. RYAN and TURNER, L. J.)

ATTENBOROUGH v. KEMP.

*Church-rate—Justice and fairness of—Founded on poors-rate—Difference between church-rate and poors-rate—Duty of churchwardens—Appeal as to costs.*

*Though a church-rate is often made according to the assessment for the poors-rate, it acquires no validity from that circumstance, and the poors-rates may be void and yet the church-rate good. A church-rate does not require to be upon the full rateable value, it merely requires to be just and equal. Yet the acquiescence of a parish in the poors-rate is presumptive evidence that a church-rate made upon the same basis is just and equal. The substantial inequality which will render a church-rate invalid may be either the omission of property that ought to be rated or the under-rating some and the over-rating others.*

*A church-rate differs from the poors-rate in three things: it need not be upon the net annual value; if just and equal, it cannot be compounded for; and the landlords of small tenements cannot be rated for part thereof in lieu of the occupiers.*

*The churchwardens in making a church-rate need not follow the poors-rate, and should not do so unless satisfied it is just and equal; and to make it a mere copy of the poors-rate, may make the rate bad.*

*The general rule that no appeal can be allowed on a mere matter of costs, applies only where the court below fairly exercised its discretion on the matter of costs.*

This was an appeal from the Archdeacon of Canterbury. A cause of subtraction of church-rate was originally commenced in the Consistorial Court of Rochester, by John Kemp and William Page the younger, the churchwardens of the parish of Southminster, in the county of Essex, diocese of Rochester, and province of Canterbury, against George Attenborough, a parishioner and inhabitant of the said parish. A libel was given and admitted on behalf of the churchwardens, and an allegation was then brought in on behalf of the said George Attenborough, setting forth his objections to the rate on the ground that the assessment thereof was unjust and unequal.

The judge of the Consistory Court of Rochester having ordered this allegation to be reformed, an appeal was entered to the Archdeacon, and the judge of that court admitted the allegation with some amendments, and retained the principal cause.

The learned judge (Dr. Lushington), in the course of his elaborate judgment, made the following observations bearing upon the points of law involved:—"The churchwardens for the parish of Southminster, in the county of Essex, are Mr. John Kemp and Mr. William Page. The first article of the libel pleads, that pursuant to notice duly given, a vestry was called on the 19th June, 1857, to make a church-rate—that an estimate was then exhibited; that sundry amendments were moved as to various items, which amendments were rejected, and a poll demanded; that a poll was had on the 20th June, and the result was, that a rate of 3d. in the pound was granted by a majority of 117 against 25. The third article pleads, that Mr. Attenborough was duly assessed for the house and land in his occupation at a yearly rateable value of 197l. 10s., the amount of the rate being 2l. 9s. 4½d. The allegation



Priv. Co.]

ATTENBOROUGH v. KEMP.

[Priv. Co.]

then alleges that the rate has been demanded and not paid, Mr. Attenborough having been previously summoned before the magistrates, and declared that he objected to the validity of the rate. It is further pleaded in this article, that Mr. Attenborough was rightly, duly, and legally assessed. I am of opinion that, with respect to the circumstances attending the granting of this rate (I mean the mere making and granting of the rate itself), the churchwardens have established to my satisfaction, that the rate was duly and legally made if the assessment be found to be just and equal. I now come, having briefly stated the contents of the original proceedings, to consider the defence. The first material statement is to be found in that which was originally the second article in the defensive allegation. It is alleged, and the fact is admitted, that this rate was made according to the assessment for the *poors-rate*. In the *St. Neot's* case I entered very much at large into the considerations which might arise from making a church-rate according to the *poors-rate*. I do not deem it necessary to repeat those observations at length. I shall content myself with stating the substance of them. First, a church-rate acquires no validity by being in conformity with the *poors-rate*. The statute which directs the mode in which a *poors-rate* should be made is silent as to church-rate. Secondly, a *poors-rate* being laid upon nearly the same properties as a church-rate, and almost always for a much larger amount, the acquiescence of a parish in such a *poors-rate* furnishes presumptive evidence that the rate has been justly and equitably made, and, consequently, that a church-rate made on the same basis is made upon a just and equal assessment. Thirdly, that a *poors-rate* may be illegal and void by the provisions of the statute, and yet a church-rate made on the same assessment may be valid. This position requires some explanation. The statute enacts that a *poors-rate* shall be made according to the full rateable value, and declares that if not so made such *poors-rate* shall be null and void. There is no statute to govern church-rates. If a church-rate be just and equal as upon a moiety of the rental throughout the parish, it would be valid, though a *poors-rate* so made would be by the statute invalid. Fourthly, I have said the acquiescence in a *poors-rate* furnishes a presumption in favour of a church-rate made on the same basis, and so it does, and also for another reason, because the presumption is that the law has been complied with, and the law requires an equal assessment. But this presumption may be rebutted by circumstances and by evidence. A statute is not always, as we well know, strictly obeyed, and in the case of *poors-rates* it is very often violated. Reverting to the allegation, the next averment is, that the assessment is unequal and unjust. Now, if the assessment be substantially unequal, it must be unjust and illegal. That, then, is the issue which the Court has to try. I use the expressions "substantially unequal," because perfect equality is utterly unattainable, and the law requires no such impossibility. I will here observe that, if there be a substantial inequality, it matters not what the cause of such inequality may be, whether the omission of property that ought to be rated, or the underrating some and the overrating others. The Court is bound to express its opinion upon the validity of the rate, and it cannot pronounce a rate to be valid, which from any cause is substantially unequal. The issue, therefore, which I have to try is, not whether Mr. Attenborough is correctly rated with regard to the annual value of the property he occupies, but whether also the other parishioners are adequately assessed. This is the only mode in which I can treat this or any other church-rate case, though if I were to try such a case by reference simply to the rating of one individual, the rate might be good as to one person and bad as to another, which cannot be. The whole rate is valid or invalid *in toto*. The

Court must pronounce the rate to be valid before it can enforce it against any one. It cannot take a partial view of a rate, and, as is well known, it cannot amend it. But before I approach the subject of the evidence of the unequal rating, I think it expedient to state the difference which exists in law between a rate for the poor and a church-rate. I shall do so as briefly as possible. As to the *poor-rate*, no rate not made according to the provisions of the statute of the 6 & 7 Will. 4, c. 96, can be valid: I leave out considerations of mere matter of form. Such *poors-rate* must be made upon the nett annual value of the rent for which the premises might reasonably be expected to let from year to year free of the charges enumerated in the statute. With respect to church-rates, the first essential difference is, that provided it be just and equal, it may be made upon any assessment or estimate whatever. Now it follows from this essential difference, as I have already said, that a *poors-rate* would be invalid, but a church-rate may be valid. I will see if this is so. Then, again, there is another distinction. The owners of certain tenements may compound for *poors-rates* as declared by the 2nd section of the statute. And lastly, reference with regard to *poors-rates* must be had to the 13 & 14 Vict., which does not apply to church-rates. That statute gives the power of rating the landlord for small tenements at three-fourths, and other proportions of their value; and be it remembered, that the Legislature—and I should imagine, for wise reasons—have confined that statute in its operation to *poor-rate* and *highway-rate*. Such being the state of the law, let me consider the duty of the churchwardens in making a church-rate. They should bear in mind that they are bound to take pains to make the church-rate just and equal, that there is no authority which justifies them simply making the rate according to the *poors-rate*; that there is no legal rule whatever which enables them to say, "I have made this rate according to the *poors-rate*, therefore it must be deemed a valid church-rate." At the same time, as I said before, the presumption, under ordinary circumstances, is in favour of the *poor-law* assessment acquiesced in; but that presumption alone will not do, and they ought to remember the heading of the rate, and it is their duty to be satisfied before they adopt a *poors-rate* as a basis for a church-rate, that the *poors-rate* itself is a just assessment. I will not read the declaration over again, but that declaration states clearly and correctly what the duty of churchwardens is in a matter of this description; and I would that the churchwardens in this case, who seem to have taken great pains in order to make a valid rate, had availed themselves of the assistance of a person exceedingly well qualified to give good advice; I mean Mr. Veley, from his knowledge of Church-rate law. I would that, instead of having consulted him only as to the mere form of making a rate, they had advised with him as to that which is of infinitely more real importance—the justness of the basis upon which this assessment was to be founded. Now, therefore, several things follow from this, and the judgment I am about pronouncing may, when it comes to be made public, and be known in various other parishes so far as I can entertain a humble hope, prevent some of the confusion which is constantly occurring. The churchwardens must remember that the church-rate cannot lawfully be a mere copy of the *poors-rate* assessment, for in church-rate there can be no compounding; every one in strictness ought to be rated, though, under circumstances, the churchwardens may be excused from attempting to enforce a rate upon the very poor.

Passing over, then, a great deal that might be said upon the question of the injustice of the rate, let me briefly advert to the judicial decisions which have taken place upon the question. I hope that in my search I have not omitted any that can have the least important bearing upon it; but there are very few.

PRIV. CO.]

ATTENBOROUGH v. KEMP.

[PRIV. CO.]

With reference to judicial decisions there are not more than two or three cases which have been adverted to as to the adoption of a poor-rate assessment to found a church-rate. They afford, therefore, very little assistance indeed towards the decision of such a case as this, and in fact those cases state no proposition whatever, admitting, as I think, of denial, and are utterly useless for the decision of this case. In *Lamb and Simpson v. Weall*, 4 Hagg. 100, a judgment of Sir John Nicholl, and to his judgments I pay very great respect for his knowledge of the law and his great accuracy. What said Sir John Nicholl? He said, "*Prima facie* the poor-rate seems to furnish a fair ground of analogy. It is generally much higher than a church-rate, and therefore the assessment is laid with greater accuracy." So far good. I accede to that proposition as I have already done before, and say that it affords a strong presumption. "But," adds Sir John Nicholl, "if the poor-rate is not fairly laid over the whole parish, it ceases to be a just rate." That brings us exactly back to the very place in which we were before, namely, whether the poor-rate be a correct assessment or not. Then he adds, "The acquiescence of the parish for some years in this mode of assessment is *prima facie* evidence of its propriety:" a proposition, I think, undoubtedly true—"strong *prima facie* evidence," and unless that *prima facie* evidence was rebutted by evidence at least as strong, the court would pronounce in favour of the rate. This I say has not relieved me in the slightest degree from the task I have to perform. In *Lee and Parker v. Chalcraft*, all Sir John Nicholl said was, "The burden of proof is strongly upon the ratepayers;" and here again I agree with him, and "that if the case was left in reasonable doubt it must be decided against the ratepayer." Admitting all this to be as I have said, I have already expressed my opinion that the assessment of 1859 proves the assessment of 1857 to be erroneous and in some respects unequal. And I am of opinion that it is a question of degree whether it is in such a degree unequal and founded upon erroneous principles as to call upon the court not to enforce the rate. I have read the abridgment which I made, showing what are the variations in this church-rate of 1859, and I cannot reconcile it to my mind to say that these are unimportant variations upon the correct scale. I cannot think that 45 per cent., in one instance 50, in others 30 and 40, and that within a period of two years, are other than substantial variations. Being therefore of this opinion, that a substantial inequality is proved, and that by reference to an assessment which cannot admit of dispute, and which assessment has been adopted and sanctioned by the churchwardens and parishioners for making a church-rate of 10*d*. in the pound; I feel myself compelled to say that I cannot pronounce a decree in favour of a rate with such gross inequalities. The assessment is manifestly founded upon an imperfect and unequal basis; and if an unequal basis, then it is no longer consistent with justice. I cannot conclude this judgment without making a few observations upon the state of the law. With respect to the poor-rate, the Legislature spares no pains. They have afforded every facility for its being made upon a just and equitable basis. Statutes direct upon what basis, and according to what rules poor-rates shall be made. The most ample opportunity is given to individuals overrated to obtain facile and cheap redress, and the means of correction are certain and speedy. Now, look to church-rates: they have existed from time immemorial. All the circumstances and relations of the country have undergone a change. Save the 53rd of Geo. 3 as to the collection of church-rates where the validity is not disputed, not one statute has passed facilitating the making of a legal church-rate; not one statute, allowing a just opportunity to individuals to complain and obtain redress for the overrating or

affording any remedy where the demand was just, save the cumbrous and obsolete proceeding of the Ecclesiastical Court. In such state is the law which I have to administer. Hence such suits as this, which I will not characterise, save to declare my opinion, that if church-rates are to be maintained, there ought to be afforded the means of doing justice, a rule on which the assessment should be founded, means to correct that assessment, and an expeditious and cheap mode of recovering the rates. I attribute no moral blame to the churchwardens. They followed in the steps of those who preceded them; but they have not fulfilled the requirements of the law. They have thought it was a mere matter of course to adopt the poor-rate. Now, hear what Bailey, B. says: "In making church-rates" (reported 9 B. & C.), "the making of church-rates is an act requiring judgment and discretion, affecting the property of others." The churchwardens have not verified the declaration prefixed. They have taken no pains at all, and know nothing of the justice or injustice of the assessment. I cannot pronounce for the rate. Now, as to the question of costs. The general and almost universal rule is, that costs should follow, and be granted to the successful party, and it is a rule that I should be reluctant to depart from, especially where the matter in dispute is of such small value, except upon the soundest reasons. But costs are in the discretion of the court, and I must look to the conduct of all parties, before I determine how I will deal with them. Now, I look to the meeting when this rate was made in June 1857, and I do not find that upon that occasion, any one of the parishioners, Mr. Attenborough who was present, or any one else, objected to the adoption of the poor-rate. I think it would have been but consistent with candour and fair dealing, if, intending to object to this rate upon the grounds of the inequality of the poor-rate, which was then to be taken as a basis for the rate, that declarations had then been made, when the churchwardens might have considered the position which they were in, when they might have corrected any mistake, and when the rate might have been made, perhaps, on a sounder basis. If a party will lie by, and will oppose a church-rate, upon what, I believe, are manifest grounds—opposition to all church-rates whatever—and afterwards base his defence on an inequality which he might possibly have corrected at the time, in my judgment it is not a case for costs, and I shall make no order as to costs.

Mr. Attenborough appealed from this judgment to her Majesty in Council, as regarded the question of costs.

Deane, Q.C. for the app.

Twiss, Q.C. for the resps., was not called upon.

TURNER, L.J.—Their Lordships do not think it necessary in this case to hear counsel for the resps. They do not wish to lay it down as a general rule that in no case will an appeal lie in respect of costs alone; because there may be cases where no discretion has been fairly exercised upon the question, and where the decision of the court has proceeded upon mistake or misapprehension. Their Lordships, therefore, do not think that any general rule can be laid down which is applicable to cases of that description; these cases their Lordships desire to leave untouched. But when there has been a *bona fide* case, and discretion exercised on the part of the judge, then their Lordships have no hesitation in stating their opinion that in such cases no appeal will lie as to costs. Here the learned judge, with respect to the question of costs, weighed the reasons on both sides with due deliberation. He considered on the one hand that the churchwardens followed the course adopted by their predecessors, and on the other that the present app. was present at the time when the original church-rate was made, and took no objection on the ground of the church-rate

V.G. W.]

FRIEND v. DENNETT.

[V.G. W.]

being founded upon the poor-rate. It is manifest, therefore, that the question met with all proper consideration on the part of the learned judge. Their Lordships do not see any ground whatever for differing from him in the discretion which he has exercised, even if that discretion were a question for their consideration. But they think it is not a question for their consideration whether that discretion was well or ill exercised, if it was *bona fide* exercised after due deliberation. Their Lordships, therefore, must advise her Majesty to dismiss this appeal with costs.

*Decree affirmed with costs.*

App.'s proctor, *Crosse*.  
Resps'. proctor, *Puckle*.

### V. C. WOOD'S COURT.

Reported by W. H. BENNETT, Esq., Barrister-at-Law.

March 8 and 12.

FRIEND v. DENNETT.

*Contract — Board of health — Rates — Concurrent jurisdiction — Specific performance.*

*A board of health has no power to enter into a contract which can bind the rates of the particular district, unless such contract is made, and the engagements therein contained entered into, in the mode prescribed by the Act of Parliament.*

*A court of equity, equally with a court of common law, has jurisdiction to adjudicate upon the validity of such contract.*

The object of this suit was to obtain specific performance of a contract entered into by the plt. with the Worthing Local Board of Health, for the drainage of Worthing.

It appeared that the Board of Health of Worthing had, some time ago, entered into a contract with one Dowell, for a portion of the drainage of the town and the construction of certain works in connection therewith. The works were discontinued by Dowell, and the plt., in Nov. 1856, made a tender for executing the drainage required to complete the works upon certain specified terms. The contract was entered into on the part of the local board of health by a resolution, not under seal, and not in accordance with the provisions of the Public Health Act 1848, sect. 85. But it appeared that the deft., the clerk to the board, had prepared a draft contract, and in Dec. 1856 sent it to the plt. for their perusal and approbation, and that they never returned the draft, although requested so to do, which was the reason why the contract was never executed in accordance with the provisions of the Public Health Act 1848.

The plt. were urged to commence operations by the deft. Dennett, the clerk to the board, and in Dec. 1856 they proceeded with the unfinished works. During the progress of the works, the local board paid to the plt. from time to time various sums of money, as the engineer, Mr. Robert Rawlinson, certified the plt. to be entitled to receive them.

Differences very soon arose between the parties as to the works, the plt. complaining that the sewers had not been kept clear of water by the board of health, pursuant to their alleged undertaking. Upon the completion of the works these differences were referred to Mr. Robert Rawlinson, C.E., in accordance with the terms of the draft contract which had been prepared though never executed, and Mr. Rawlinson, on 4th Oct. 1857, certified that there was a final balance due to the plt. of 138*l.* 18*s.* 9*d.* in full of all demands, which was immediately paid by the board. By this certificate Mr. Rawlinson disallowed the claims set up by the plt. by their action at law and by their bill in equity.

In Nov. 1857 the plt. commenced an action against the local board of health to enforce their contract, and

to obtain damages for its nonperformance by the defts. The defts. put in issue the validity of the contract, and the Court of C. B. held that the board of health had no power to bind the rates unless by contracts entered into by the modes prescribed by sect. 85 of the Public Health Act 1848.

The plt. having failed at law, filed their bill praying specific performance of the contract, and that, if necessary, the defts. might be ordered to execute a formal contract under the seal of the board.

*Rolt*, Q.C. and *Kingdon* for the plt.

*Sir H. Cairns*, Q.C. and *Nugent* for the defts.

The cases cited were *Kirk v. Bromley Union*, 2 Phill. 640; *Nixon v. Taff Vale Railway Company*, 7 Har. 136; and *Ambrose v. Guardians of Poor of Dumfries Union*, 9 Beav. 508.

The VICE-CHANCELLOR said:—I cannot decide in favour of the plt. in this case. The deft. Mr. Dennett represents the local board of health, and the local board of health has power to tax the inhabitants of a certain district for certain purposes in a certain way. The case has been tried at law upon this question, and it seems to me that it is very difficult to point out any distinction between what ought to regulate a court of equity and a court of law upon this point. The Act of Parliament points out a certain mode in which contracts should be made. It is not a question of seal only, but a number of points which must be considered important for those who are to be affected by the contract. In truth, the board of health is without power to enter into any contract which can bind the rates, unless they execute the engagement in the manner in which the Act prescribes. The section of the Act in the first place says that the contract shall be under seal if it exceed 10*l.* Then it is provided also that, before contracting, the board shall have an estimate of the probable expense, and it is provided also that before any contract to the amount of 100*l.* and upwards is entered into, ten days' public notice shall be given—not by any means an unimportant provision—expressing the nature and purpose thereof, and inviting tenders for the execution of the same, and the local board are to require and take sufficient security for the performance of the same. Now, in this case, it does not appear that any one of these formalities has been complied with in the case of Mr. Dowell. If the question in dispute on the contract itself were independent of the preliminary question, I should have been very willing to have seen my way to a decision in favour of the plt. if I could possibly have done so, and I began at first to consider how far one could treat Dowell's contract, assuming it to be entered into with all the formalities requisite having been complied with, as simply finished by this gentleman the plt.; but that would not answer the plt.'s view, because, he says, Dowell tendered at a sum which made him fail. He sent in a tender at the time, but he says it was not in the same terms as Dowell's was—that is, as to payment. Further than that, the plt. says, "There is another very important item of the contract upon which I insisted I must be in a better condition than Dowell—that whereas he only had a contract with the board that they would free the sewer of water, but complied with a condition that they were not to be liable to any damage to the trenches in any respect, I said they were to keep it free from water, and were to be liable for any damage;" and the bulk of his claim, now to the extent of 250*l.* against the board of health, is for damage in not doing that which he says, by the contract entered into between them and him, they were bound to do, as varied and distinguished from Dowell's contract. The result would be, if I decided in favour of the plt., that the rate-payers would be bound by a contract not made by advertisement, not complying with all the requisite solemnities, and more than solemnities, because advertising

V.C. W.]

FREED V. DENNETT.

[V.C. W.]

and tenders are things of substance not made in that mode in which the Act of Parliament says alone they were to be bound, and that was the ground of the decision in the court of law. That seems a substantial ground, going far beyond the formality of seal, which this court is bound to attend to quite as much as a court of law. The Chief Justice at first expressed, with a good deal of warmth, his objecting during the opening of the argument to this sort of resistance relying upon the want of compliance with the formalities of the Act. But the counsel proceeded with their argument, and then, further on, the Chief Justice says, "You may say that their power to bind the rate arises entirely from the Act of Parliament, and that unless they observe the Act of Parliament they cannot bind the rates." Then the counsel, proceeding, says, "Exactly so; and on these grounds it is submitted that the rules must be absolute to enter a verdict for the defendants." Then the Chief Justice says: "This rule must be made absolute, a conclusion which I regret to come to. The object of this action is to make the rates liable by means of an action against the clerk of the board. Now the power of the local board to enter into contract, so as to bind the rates, is entirely the creature of the statute; and the statute having prescribed a mode by which these contracts are to be made, that I think is part of the power given; and the board of health has, as it seems to me, no power to bind the rates unless by contracts entered into by the mode pointed out by the Act, and in this view Mr. Field's argument is very powerful." Williams, J. says: "This Act of Parliament publicly says that persons dealing with these bodies can only do it in a particular way. That has not been done here. I am therefore of the same opinion with the Lord Chief Justice." Willes, J. says: "It has been argued on the 85th section that it gave only a mode of entering into a contract; but that is not so, for the first time it gives these bodies a power of binding the rates which did not exist before. Therefore, according to the usual rule, the enactment must be strictly pursued." Now, every one of these observations is just as forcible here as in a court of law. If you find that the ratepayers are only to be bound in a given way, and more especially if you find it is not simply a question of common seal, but whether they are to be bound by a contract entered into without advertisements, and without tenders, and without estimates, the question is whether this court would say that they are to be bound by that, the work itself having been done. Of course I expected the counsel for the plaintiff would say, and he put it very properly, what would this court be disposed to say if the whole work had been done, and there had not been a farthing paid? In that particular point of view, all one can say on such a subject is, that the contractor might possibly, for aught I know, have a remedy against the individuals who contract with him, or he might not, according to the form in which he made the contract. But this court would find great difficulty, as it seems to me, in saying that, if done as against the ratepayers, who are the persons here represented by the defendants, without tender and without any of those solemnities which are required by the Act, independently of the seal, they could be made liable in consequence of the work having been so done by a decree of this court. But, at the same time, I do not forget the class of cases in which even the public have been held bound. There is a class of cases in which the Attorney-General has been held bound by acquiescence. That was well considered in the case of *The Attorney-General v. The Sheffield Gas Consumers Company*, and in the case of *The Attorney-General v. Johnson*, in which it was held that, at all events, to the extent of laches and acquiescence, the public could be bound and the Attorney-General could be bound as regards the public, by a certain degree of laches or acquiescence. Here

the lightest case that is put is a simple case of money demand against a body of this description with reference to work which is said to have been executed for their benefit. At present my feeling is, that I should have the same difficulty even if the whole had been done, and nothing paid for it, which I have now that the bulk has been done; and it is only a question of what is now to be paid for a small amount. There is a difficulty in seeing what right this court would have to say that, in consequence of acquiescence, these persons could be bound to consent to the levying a rate for the purpose of reimbursing the contractor, who had done the work according to the terms of the contract so entered into. Whether or not one would find a way to do justice in the best mode that could be done in such a state of circumstances I will not stop now longer to consider, feeling that the difficulty would be very considerable even in such an extreme state of things as I have suggested. But the difficulty is much greater with reference to the case before me. The difference here is simply this—the work has been done, and the work, with the exception, I think, of the timber, has really been paid for according to the contract. It is a question whether there was not something left undone by the contracting parties for which they are liable in damages. The question raised is this—not whether you have not paid us (except a question about the amount of timber that may be left in the trenches), but having entered, as the plaintiff says, into a contract by which you were bound to keep this main sewer free from water, in consequence of your not doing so, the work became more expensive than it otherwise would have been, and I have suffered damage in respect of that which I now claim to be paid for. There is no provision in the contract that in the event of your not doing it you are to pay a specified sum, but having been paid for my contract, I want to make the ratepayers liable for the damage which has accrued from one portion of the contract not having been fulfilled. That is an exceedingly different case. But further than that I think the contract is hardly brought so high, because it stands thus in the absence of all evidence on the one side or on the other. The agreement is to do it according to Mr. Dowell's specification; that is the agreement which the plaintiff insists upon. Then besides that, these words are added—the board are to pay such and such a sum of money, the works are to be completed within six months from the commencement, and "the existing sewers or drains to be kept clear of water by the board. That is how it stands. Now neither side denies that Dowell's contract, except so far as it may be varied by that, is embodied in the agreement. In Dowell's contract there were two very distinct matters: the one that the contractor was to keep his new works free from water; but the other was that the board were, as soon as the sewage pumps were sent, to free the existing sewers from water, and the contractor might then drain any trenches in which he was at work into such sewers, "but the board will not be responsible for damage or otherwise in such trenches." As soon as the pumps are set, Dowell's contract, it is said by the plaintiff's counsel, is an unintelligible contract to a certain extent—namely, that they contract to do that, and say they will not be liable for any damage which may result from its not being done. At all events, this is the contract that Dowell was content to enter into, neither does it seem to me so extremely insensible because it might give this right—"I cannot begin my work, you cannot have any damages against me for not performing the work, because I cannot do it, you not having performed your part of the contract." That is one way in which he might assert his right; but the board say, "You shall not assert your right in the shape of damages if you choose to work." That might very well be their reason. It was a new engine. The

contract says, "When the sewage pumps are set." It seems they were about to set a new engine, and they might well say, "We engage to free the water, but we do not intend to make ourselves liable in the event of any damage by flooding or otherwise to the trenches." Then the question is, whether these words, "the existing sewers or drains to be kept clear of water by the board," coupled with the engagement to act entirely under Dowell's contract, supersede that last clause. It might have been argued that they were inconsistent with it, if you had not found the identical clause that is put in conjunction with that clause. It might be open to argument to say, "If I stipulate that you are to keep the thing clear of water, you must be answerable for damages," if you did not find in the contract itself that there is that identical contract, and that they did stipulate to keep them free from water, and did not make themselves answerable for damages. Why are you to say that that proviso is not to be tacked on to this—"The existing sewers or drains to be kept clear of water by the board?" The plt. to a certain degree feels that, no doubt. I have not the least doubt myself that he is saying what he believes to be true, but he is contradicted by the other persons who were present. That might have been his intention; but the question is, whether he sufficiently expresses that intention. He says, "My intention was to cut out the two clauses of the agreement—the one that I was to be obliged to keep the trenches dry; and also to cut out the clause that you were not to be liable for damage." That is what he says. But the three persons who were present say that not a word of that kind was said. One of them says: "I made a memorandum of what did pass, and it does not contain any such entry; I showed that to the gentleman at the time, and he did not make any remark upon it;" so that you have to read the two agreements together. It is rather of very considerable doubt whether one would be able to come to any conclusion in favour of the plt. even upon his own view, if the whole matter were open now upon that part of the case. But I make this further observation. It results in a claim for damage—not for any benefit done by him in respect of works beyond what he was bound to do; but he says, "I have in doing this work been put to more expense than I should have been, and I want to fasten that upon the ratepayers." It seems to me, for the reasons given by the learned judges, that it was intended the ratepayers should have all the benefit of notice, and so on, and that I cannot fix them with the consequences of this alleged damage in respect of this breach of the contract in a case in which the contract has not been made in a form by which they might reasonably be expected to be bound. There is the other claim about the timber, which is a claim to be paid for things actually furnished. There is nothing here in the shape of fraud alleged—it is nothing like the case of *Macintosh v. The Great Western Railway Company*. It stands thus: There is a dispute upon the effect of the contract. The contract with Dowell is, that wherever timber is put in by the order of the engineer or the surveyor, then you are to be paid for that timber if it is left, unless the engineer or surveyor certifies that it was from your fault that it was left. I rather agree with Mr. Rolt: he says it does not turn upon whether they gave the order to put that timber in. I do not find a dispute that timber in certain specified places was necessary. There is no certificate that this was not necessary, therefore I presume it was considered on all sides to be necessary. But they raise a question upon the effect of the contract, whether the fact that he was to have higher prices in certain specified places did or did not include a higher price in consequence of timber being necessary, and therefore was not provided for under Dowell's contract. If it rested upon Dowell's contract alone, for the reasons for which I say, it

appears to me the plt. would have a difficulty in saying that his debtors had varied the contract; I should rather have been inclined to say that no reference being made to the contract, the contract would not be superseded, and it would rest upon Dowell's contract. [Sir Hugh Cairns.—Your Honour has not heard us upon the construction of this.] That would be my impression, but there is no question of fraud at all, and it comes back to the contract, it is a question of the construction of the contract. This gentleman does not say these things have not been ordered, neither does he say—"I have certified that they are good for nothing; that the timber was occasioned by your default;" but he leaves it upon the construction of the contract if I could get at it, but it seems to me I cannot get at it. I doubt exceedingly whether I could get at it in a much stronger case than this; but with regard to these adjuncts to the case with reference to the damage done by something which the defendants averred on their part to have performed, and with reference to the payment of the timber, I do not see how I can fix upon the ratepayers these liabilities. This gentleman with his eyes open—because the Act of Parliament is presumed to be known to him—has chosen to do that which will not give him a hold upon those who are to be made liable only in specified manner to the engagements which are in the Act pointed out. The courts of common law have gone very nearly as far as courts of equity, where parties have had the benefit of a contract, showing strongly that this decision rests upon a distinction which they are bound to follow. *Renter v. The Electric Telegraph Company* is a strong case where a company is a trading company, a railway or other company, who for their own benefit may get an act done by their own directors whom they have chosen—that is by their own agents: the question is very different. The court has found the means of getting at them when they have had the benefit of the arrangement. But the class of persons who are appointed by Act of Parliament with certain powers of taxation, to be exercised in a given mode, are in a position extremely different from those who are to be affected by those powers of taxation or those who are the recognised and chosen agents, as in the case of a company who are transacting their business for them, and who being limited to do it in a particular way, do it in another way. On the other hand, the ratepayers have, by authority of Parliament (and they are supposed to give their consent by sending their representatives to Parliament), appointed over them certain persons who have a right of raising money from them, but they have no right unless they comply with the regulations of the Act of Parliament, which says how that money is to be raised, and how the contracts are to be entered into which are to bind those ratepayers. I think, therefore, in that view of the case, the decision of the court of law really precludes me from entering into other considerations which are raised here upon the contract, and I must therefore dismiss the bill, and necessarily with costs. *Decree accordingly.*

Solicitors: *Bischoff and Co.*, Coleman-street: *Griffith*, Temple.

## HOUSE OF LORDS.

Reported by JAMES PATRICKSON, Esq., of the Middle Temple, Barrister-at-Law.

Saturday, May 18.

CLERK v. THE QUEEN.

*Venue—Quo warranto—Change of venue—Inherent power of court.*

*The Court of Q. B. has an inherent power to change the venue in the trial of a quo warranto information, and even in a trial for murder, on a suggestion that it will be more conveniently tried elsewhere than in the original venue.*

H. OF L.]

CLERK v. THE QUEEN.

[H. OF L.]

This was a writ of error upon a judgment of the Ex. Ch., affirming a judgment of the Q. B. in favour of the prosecutor of an information in the nature of a *quo warranto*.

Liverpool.—Be it remembered that Charles Francis Robinson, Esq., coroner and attorney of our Sovereign Lady the Queen, &c., at the relation of Thomas Rigby, of the borough of Liverpool, wine and spirit merchant, according to the form of the statute in such cases made and provided, brought into the court of our said Lady the Queen before the Queen herself, then here, a certain information in the nature of a *quo warranto* against John Clerk, late of the borough of Liverpool aforesaid, merchant, which said information follows in these words, that is to say, In the Q. B. of Hilary Term in the twenty-second year of Queen Victoria. Liverpool.—Be it remembered that Charles Francis Robinson, Esq., &c., at the relation of Thomas Rigby, of the borough of Liverpool, &c., gives the said court here to understand and be informed, that the borough of Liverpool is one of the boroughs named in the schedule (A.) annexed to the Act of Parliament made and passed in the sixth year of the reign of King William the Fourth, intituled “An Act to provide for the Regulation of Municipal Corporations in England and Wales,” and that within the said borough, according to the provisions of the said Act, there are and of right ought to be divers, to wit, sixteen wards of the said borough, one whereof is called and known as No. 4 or Saint Paul's Ward, and that within the said borough, according to the provisions of the said Act, there are and of right ought to be divers, to wit, forty-eight councillors of the said borough, that is to say three councillors of and for each of the said sixteen wards of the said borough, to be elected in the manner in the said Act specified, and that the place and office of a councillor of the said borough is a public office of great trust and pre-eminence within the said borough, touching the rule and government of the same (that is to say), at the borough of Liverpool aforesaid in the county of Lancaster, and that John Clerk, late of the said borough of Liverpool merchant, heretofore, to wit, on the 1st Nov. 1858, at the borough of Liverpool aforesaid, in the county aforesaid, did use and exercise, and from thence continually afterwards to the time of exhibiting this information hath there used and exercised, without any legal warrant, royal grant or right whatsoever, the office of a councillor of and for the said ward, called No. 4, or St. Paul's Ward, in the said borough, and for and during all the term aforesaid hath there claimed, and still doth there claim to be a councillor of and for the said ward, and to have, use and enjoy all the liberties, privileges and franchises to the office of a councillor of and for the said ward belonging and appertaining, which said office, liberties, privileges and franchises he the said John Clerk for and during all the time aforesaid upon our said Lady the Queen, without any legal warrant, royal grant or right whatsoever, hath usurped and still doth usurp, that is to say, at the borough of Liverpool aforesaid, in the county aforesaid, in contempt of our said Lady the Queen, to the great damage and prejudice of her royal prerogative and against her crown and dignity: whereupon the said coroner and attorney of our said Lady the Queen, for our said Lady the Queen, prayeth the consideration of the said court here in the premises, and that due process of law may be awarded against him the said John Clerk to make him answer to our said Lady the Queen, and show by what authority he claims to have, use and enjoy the office, liberties, privileges and franchises aforesaid.

Plea.—That under colour of the premises contained in the said information he is greatly troubled and vexed, and that by no means justly, because protesting that the said information and matters therein contained are not sufficient in law, and that he need not nor is

obliged by law to give any answer thereto, yet for plea in this behalf the said John Clerk says, that he did not use or exercise the said office of a councillor of and for the said ward, nor claim to be a councillor of and for the said ward, nor to have, use, or enjoy the liberties, privileges and franchises of the said office of a councillor of the said ward belonging or appertaining or any part thereof in manner and form as by the said information is above laid to his charge, and of this he puts himself upon the country, &c.

Issue thereon.

And now on the 2nd March 1859 it is suggested and manifestly appears to the court here, that the trial of the said issue above joined between the said coroner and attorney and the said John Clerk may be more conveniently had in the county of Middlesex than in the county of Lancaster. Therefore, according to the statute in such case made and provided, let a jury of the said county of Middlesex come, &c. The record then set out a verdict of guilty, and the judgment of the Court of Q.B. therein.

A writ of error having been brought to the Ex. Ch. the judgment was affirmed, whereupon a writ of error was brought to the H. of L.

The assignment of errors was as follows:—That it appears by the said record that the issue joined in the said information was tried in and by a jury of the county of Middlesex, and not in or by a jury of the county or place where the venue in the said information is laid, wherefore in this there is manifest error; and there is also error in this, that there is no statute or law to warrant a trial of the said issue by a jury of the county of Middlesex upon a suggestion that the trial thereof might be more conveniently had in that county than in the county of Lancaster, wherefore in this there is manifest error; and also there is error in this, that the judgment aforesaid of the said court of our lady the Queen before the Queen herself by the record aforesaid appears to have been given for our lady the Queen against the said John Clerk, whereas by the law of the land the said judgment ought to have been given for the said John Clerk against our said lady the Queen, therefore in this there is manifest error; and also there is error in this, that the judgment aforesaid was affirmed in the Court of Ex. Ch. of our said lady the Queen, whereas by the law of the land the said judgment ought to have been reversed, therefore in that there is manifest error: And the said John Clerk prays, that the judgment and affirmance thereof aforesaid, for the errors aforesaid and for other errors in the said record and proceedings being, may be reversed, annulled and altogether holden for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment and the said affirmance thereof.

Brett, Q.C., for the plt. in error, contended that there was no power in the court below to change the venue on a mere suggestion of greater convenience attending the trial in Middlesex. [Lord Chancellor CAMPBELL.—Then you must contend that the trial was utterly bad. It is too late to insist on such a ground of contention. Even in the case of murder the venue has been changed in the same way again and again. The Court of Q. B. does this by its own inherent power. It is vain for you to go on arguing this case.]

Milward, for the deft. in error, was not called upon.

Lords CRANWORTH, WENSLEYDALE and CHELMSFORD concurred.

By the COURT,—

*Judgment for the deft. in error.*

*Plts. in error's attorney, Makinson and Carpenter.*

*Defts. in error's attorney, Wright and Venn.*

## ROLLS COURT.

Reported by H. R. YOUNG, Esq., Barrister-at-Law.

May 25 and June 22.

Re RAMSAY'S SETTLEMENT.

*The Succession Duty Act 1853—The 16 & 17 Vict. c. 51, s. 2—Settlement—Predecessor—Donee of a power.*

*A husband, by his marriage-settlement, in consideration of 6000*l.* then settled by his intended wife, and for other considerations, covenanted to pay, and afterwards paid, 10,000*l.* to the trustees of the settlement, to be invested for the benefit of the wife, for her life, and then for her children (if any) by him, and in default of such children, for the children of the wife by a former marriage. The wife had no children by her second husband:*

*Held, that the children by the first marriage took the 10,000*l.* as strangers, and that under the 16 & 17 Vict. c. 51, s. 2, the second husband was, as to them the "predecessor" in the fund, and that they must, therefore, pay 10 per cent. duty.*

*Where a settlement contains a power of appointment, in some one other than the settlor, and the exercise of the power transfers the property from the settlor to some one else, the donee of such a power is the "predecessor" of the appointee under the above Act.*

This was a petition presented by a Mr. and Mrs. Batten and the trustees of their marriage-settlement. Mrs. Batten was the daughter of the late Lady Ramsay. The petition prayed the payment out of court of a sum of 5845*l.* 5*s.* 3*d.*, which had been paid in under an order made in a suit of *Sandiman v. Mackenzie*. The question now argued was, to what amount of succession duty the Commissioners of Inland Revenue were entitled upon the fund? and the answer to that question depended on the ascertaining whether Sir Thomas Ramsay or Lady Ramsay was the "predecessor" within the meaning of the 16 & 17 Vict. c. 51, s. 2.

By the 16 & 17 Vict. c. 51, s. 2 (the Succession Duty Act), it is enacted as follows:—"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

The facts of the case were shortly the following:—By the marriage-settlement of Sir Thomas and Lady Ramsay, and which was dated the 10th June 1819, after providing that a sum of 6000*l.*, to which Lady Ramsay was then entitled, and all the real and personal estate which she might acquire during the coverture, should be vested in the trustees of the settlement upon trust for herself for her life, with remainder to Sir Thomas for his life, and on his death as she should appoint, and in default of appointment, to her next of kin, and if he died in her lifetime, then for her absolutely; Sir Thomas agreed to pay the trustees the sum of 10,000*l.* upon trust to invest the same, and pay the

interest to him for his life, remainder to Lady Ramsay for her life, and at the death of the survivor, upon trust for the children of the marriage, as Sir Thomas should appoint, and in default of appointment to them equally; and in default of issue of the marriage, then in trust, after the decease of the survivor of Sir Thomas and Lady Ramsay, to pay and assign the same trust-fund unto all or such of the children of Lady Ramsay by her late husband Mr. William Chisholm (except her eldest son Alexander William Chisholm), as Sir Thomas should appoint, and for want of such appointment, in trust for all and every the then present children of Lady Ramsay (except as aforesaid) who should attain twenty-one, in equal shares if more than one, and if but one such child (except as aforesaid), then the whole for that one younger child. By an indenture dated the 30th July 1819, and indorsed on the last indenture, Sir Thomas Ramsay released the sum of 10,000*l.* agreed to be paid by him from his power to appoint the same among the children of Lady Ramsay by her former husband; and it was directed that the trustees should stand possessed thereof after the death of the survivor of Sir Thomas and Lady Ramsay, and in case of failure of issue of their marriage, upon similar trusts in favour of the children of her former marriage, as before declared, except that Lady Ramsay was substituted for Sir Thomas as the appointing party. Lady Ramsay had at that time three children only, viz. A. W. Chisholm, her eldest son, Duncan Macdonald Chisholm, and Jennina Chisholm. Sir Thomas Ramsay paid the 10,000*l.* to the trustees of the settlement, who invested the same in the purchase of 11,903*l.* 19*s.* 1*d.* Consolidated Bank Annuities; and he died in 1830, leaving Lady Ramsay, but without leaving any issue of his marriage with her. 1500*l.* Consols (part of the 11,903*l.* 19*s.* 1*d.* like annuities) was in 1837 advanced and paid to Mr. Duncan Macdonald Chisholm by Lady Ramsay's direction and appointment. By an indenture dated the 28th July 1843, being the settlement made on the marriage of Miss Jennina Chisholm and Mr. Edward Batten, the sum of 5951*l.* 19*s.* 6*d.* Three per Cent. Annuities, which represented her moiety of the sum of 11,903*l.* 19*s.* 1*d.* like annuities invested in the name of the trustees of Sir Thomas and Lady Ramsay's settlement, was assigned by Miss J. Chisholm, with the privity and consent of Lady Ramsay and Mr. E. C. Batten, to trustees upon certain trusts to take effect after the death of Lady Ramsay, as thereby declared. Lady Ramsay died in Oct. 1859 without having exercised the power of appointment reserved to her by the deed of the 30th July 1819. In March last the sum of 5845*l.* 5*s.* 3*d.* Bank Three per Cent. Annuities (the balance of the 5951*l.* 19*s.* 6*d.* like annuities, after providing for certain costs, charges and expenses payable thereout under an order made in the suit of *Sandiman v. Mackenzie*) was paid into court under the Trustees Relief Act. That was done in consequence of the question which had arisen as to the amount of succession duty payable in respect of the fund upon the death of Lady Ramsay. The Commissioners of Inland Revenue claimed the succession duty at the rate of 10 per cent., considering that Sir Thomas Ramsay was the person from whom the interest of Mrs. Batten in the trust-fund was derived; while the petitioners were advised that Lady Ramsay was the person from whom the interest of Mrs. Batten was derived, and that the duty was only 1 per cent. The petition prayed to the effect already stated, and that the proper directions might be given for the payment of the succession duty.

R. Palmer, Q.C. and G. O. Morgan appeared for the petitioners, and contended that Lady Ramsay was the "predecessor," for by her marriage with Sir Thomas Ramsay, by the settlement of her 6000*l.* then, and by the benefit which she had conferred on him when he released his power over the 10,000*l.* Lady

[ROLLS.]

REG. v. BOYES.

[Q. B.]

Ramsay purchased the fund for the benefit of herself and her children by her former husband. They cited *Price v. Halkaway*, 6 Madd. 304; *Attorney-General v. Baker*, 4 Hurl. & N. 19; *Roe v. Milton*, 2 Wils. 356; *Newstead v. Seearles*, 1 Atk. 265; *Dickenson v. Wright*, 29 L. J. 150, Ex.; *Re Jenkinson*, 24 Beav. 64.

The *Attorney-General* (Sir R. Bethell, Q.C.) and *Hanson* appeared for the Commissioners of Inland Revenue, and contended that the arguments addressed to the court for the petitioners were merely "moral," and would, if allowed to prevail, lead to the wildest confusion. The original owner of the property was the true "predecessor" within the Act, and when Sir Thomas Ramsay agreed to settle the property of which the fund in question was a part, he was the original owner of it. But the agreement in this case to settle it did not alter that ownership; and the settlement or payment afterwards made, only carried out the agreement. Therefore Sir Thomas, and not Lady Ramsay, was the predecessor in this case.

R. Palmer, Q.C. in reply.

The MASTER of the ROLLS.—The question in this case is, what is the proper rate of succession duty payable under the provisions of the Succession Duty Act, the 16 & 17 Vict. c. 51, upon a sum of 5845*l.* 5*s.* 3*d.* Bank Annuities, now in court, and which the petitioners pray may be paid out to them? The petitioners are a Mr. and Mrs. Batten, and the trustees of their marriage-settlement. Mrs. Batten is the daughter of the late Lady Ramsay, and the fund in question forms part of a sum of 10,000*l.* which was invested in Consols, in pursuance of a covenant by Sir Thomas Ramsay to that effect in his marriage-settlement. The 5845*l.* 5*s.* 3*d.* Bank Annuities became, under the trusts of the settlement and on the death of Lady Ramsay, the property of Mrs. Batten; and the question is, whether Sir Thomas or Lady Ramsay is to be considered, as to these annuities, the "predecessor" within the 2nd section of the Succession Duties Act? If Sir Thomas Ramsay was the predecessor, the rate of duty would be 10 per cent.; but if Lady Ramsay was, then the rate of duty would be only 1 per cent. The second section of the Succession Duty Act is as follows:—[His Honour read the section as above stated, and continued.] The argument on behalf of the petitioners, who, of course, are the "successors" in this case, was, that the predecessor need not be the person to whom the fund actually belonged in the first instance, but the person who either pays the consideration which induces, or who may induce another party to create the fund. That was illustrated in this way: if a person buys a charge on the estate of another, the purchaser in reality creates the fund; he, therefore, is the predecessor, and not the person who for value received originally charged his estate with the amount which he afterwards sells. So here, it was contended that Lady Ramsay, by her marriage with Sir Thomas Ramsay, by her then settling 6000*l.*, and by the benefit she conferred on him when he released his power over the 10,000*l.*, purchased that fund for her children by her first husband. Lady Ramsay was the person who bought the property, who in reality created the fund. She, therefore, and not the person who originally advanced the 10,000*l.*, was the predecessor. Lady Ramsay, it was also said, by the payment of the 6000*l.* to the trustees of the settlement made on her marriage with Sir Thomas, and by the gift to him of a life-interest therein induced him to create a charge in favour of her children by a former marriage. She, therefore, by so creating the fund became the "predecessor" as to it. *Jenkinson's* case, which was cited in the argument, was different from the present. There the tenant for life made an arrangement with the tenant in tail in remainder, to enable the tenant for life to settle a certain sum of money; and I there held that the

tenant for life was the "predecessor." I do not think that the circumstance here of the 6000*l.* having been paid by Lady Ramsay is material. The marriage was a sufficiently valuable consideration. The real question is, whether, if the owner of an estate marries, and then agrees to settle a sum of money upon the relations of his wife, she is, as to that money, to be considered the "predecessor" within the Act? It is to be observed that where a contract is made for a valuable consideration, by which property is to be settled, it does not belong to the person who induces the other to settle it, but remains in the possession of the owner, subject to the trusts of the settlement; and the word "settlor" is there equivalent to the word "predecessor." If that is not so, the result would be singular, for then the wife's property would be considered to belong to the husband, and the husband's to the wife. Here, in consideration of certain moneys paid by the wife, and of the marriage, the husband agreed to settle a certain sum of money upon the wife for life, and then upon the children of that marriage, and in default of such children, upon the children of the wife by a former husband. The ultimate destination of the fund cannot affect the question who is the "predecessor" as to it. If in this case the ultimate trust had been in favour of Sir Thomas's children by Lady Ramsay, there could have been no doubt but that he would have been the "predecessor." But instead of this, he and she agreed that the fund should be limited to the relations of the wife. That, however, cannot alter the rights of the parties. I think the effect of the statute upon charges on estates is, that if such a charge, created in consideration of a marriage, be settled, or if the estate itself be then settled, whatever the trusts of the settlement may be, the "predecessor" is the person to whom the property charged or settled belonged, and who made the settlement. I think that is the true view; and is so, without taking into consideration the motives which induced him to make the settlement. This qualification, however, and which is essential to the purpose, must be added, viz., that if the settlement gives to a person other than the settlor himself a power to dispose of the property settled—that is to say, if the settlement transfers the property settled to the donee of the power—the latter, when the power is exercised, is the disposer from whom the succession is derived, and was the "predecessor;" the successors in that case taking the property under the exercise of the power, and not under the trusts of the settlement. But here the petitioners take under the exercise of no power, but under the trusts of the settlement itself. The "predecessor," therefore, was in this case Sir Thomas, the settlor; and the duty must be 10 per cent. I do not consider it necessary to refer more particularly to the power in this case, because I have decided it without reference to the power. But in fact the power rather helps to confirm me in my view of this case; for if the power to appoint among the children had been exercised by Lady Ramsay, she would have been the predecessor; but as the petitioners take under the settlement, and not under the power, they take as strangers, and must pay the 10 per cent. If I had been compelled by the statute to give the commissioners the costs of the petition, I should have of course done so; but as that is not the case, I shall not give any costs to the Crown.

#### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTZLET, Esqrs., Barristers-at-Law.

Monday, May 27.

REG. v. BOYES.

Witness—Privilege on ground of tendency to criminate—Pardon—Liability to answer—Accomplice—Corroboration.



*On the trial of an information against the deft., for bribery at a parliamentary election filed, by the Attorney-General, in pursuance of a resolution of the House of Commons, a person, alleged in the indictment to have been bribed, was called as a witness; he refused to answer any question, on the ground that the answer would tend to criminate him. A pardon under the Great Seal was then handed to the witness, but he still refused to answer, upon which the judge compelled him to answer, and on his evidence the deft. was convicted:*

*Held, that the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the Crown was concerned; and that, though the witness might still be liable to an impeachment by the House of Commons, notwithstanding the pardon, by reason of the 12 & 13 Will. 3, c. 2, yet that was so unlikely to happen that the witness could not be said to be in any real danger, and he was therefore rightly compelled to answer.*

*To entitle a witness to the privilege of not answering a question as tending to criminate him, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency.*

Information filed by the Attorney-General against the deft. for bribery committed at the parliamentary election for the borough of Beverley, Yorkshire, in April 1859.

The information contained eight counts, each charging a distinct act of bribery to different voters. The third count, upon which alone a verdict of guilty was found, charged the deft. with having given a bribe to a voter named John Pougher.

The trial took place at the Yorkshire summer assizes 1860, before Martin, B., and the jury thought the evidence in support of all the other counts but the third insufficient. In support of the third count John Pougher, the voter bribed, was called as a witness, and the learned judge considered it to be his duty to tell him that he was not bound to answer, if by answering he would criminate himself. The witness declined to answer the questions. Upon that the Solicitor-General put his hands into a blue bag which was lying before him and produced a document, which he handed to the witness, and said, "There is your pardon." The man looked at it and said, "What have I done to deserve a pardon?" The learned judge, acting upon the authority of two cases which he had before him, considering that he was justified in so acting, said, "I still tell you, if you object to answer the questions, you need not do so." The Solicitor-General contended that he could compel him to answer. Martin, B. said, "I do not like to do that; it is a very serious responsibility, because if I tell him so to do and he refuses, I shall send him to goal; and to act in so summary a way seems to me very undesirable; I cannot, I do not think I ought to do it. I believe that he is not compellable to answer, but I will consult Wilde, B." Having consulted Wilde, B., Martin, B. said that he entertained likewise a strong doubt, but under the circumstances he recommended him, and he should adopt that view, to compel him to answer. "If I am wrong, it must be perfectly understood again by the Solicitor-General that the court is to set me right, and if I am wrong in compelling

this man to answer, the prosecution ought to drop." Pougher then deposed that he went to a room in a house in the borough, where the other witnesses went each upon different times, and that there they saw newspapers and other things. The deft. was in the room conversing with them, and they went from thence into another room, where a man gave them, as runners or watchers, or officers of that kind, 1*l.*, in some cases 2*l.*, and it was stated that the 1*l.* was for the service for so many days, or the 2*l.* if they were required for more days. That was the species of bribery that was proved in these cases. It was contended by the deft.'s counsel, that there was no corroboration of the witness's evidence, and that he being in the nature of an accomplice, the learned judge ought to have directed the jury not to act upon his evidence alone, and to acquit the prisoner. In the summing up Martin, B. thus commented upon the evidence: "If that man's evidence was true, this was the very morning of the election, he went there and saw the deft.; he was desired to go into the room, and after saying, 'Now, my man, is that thou?' and 'I said, of course it was;' he goes into a room, heard a voice saying 'two.' That is followed up by the two sovereigns being put into his hands. He immediately gets into a cab and goes and polls for Walters. Now you must ask yourselves whether you believe that the two sovereigns were given to the man for his vote, and whether you believe the deft. was concerned in the matter, and whether it was done with his authority as part of a transaction in which he was engaged. Assume for the purpose of the present discussion that this man was speaking the truth. Is there any law which prohibits a jury from believing a man who (it must be assumed for the sake of the argument) spoke the truth simply because he is not corroborated? I know of none. I know of no rule of law myself, but there is a rule of practice which has become so hallowed as to be deserving of respect; I believe these are the very words of Lord Abinger, it deserves to have all the reverence of the law. This case is distinguishable from that cited by the counsel for the deft., for they were there accessories properly so called, and all the persons were concerned in the same offence in which they came to give evidence against this man. In this particular case it is not so, because all of these cases are separately gone into, and it is not one and the same offence; and if you think that all these witnesses have spoken the truth, then it is clear that each case is clear and separate; each person giving money is a distinct offence. I have endeavoured as far as I can to explain to you these matters that have occurred in this case. I own I think also that that is a very important point, and that it may be very doubtful whether or not the evidence in this case will be found to be of that corroborative character which the law requires."

The only witnesses called were the voters alleged to have been bribed, each of whom deposed to a separate act of bribery under similar circumstances and about the same time. The same course was pursued as to each of these witnesses in respect to their pardon, and being compelled to answer as in John Pougher's case. It was then arranged that, if the two points or either of them should be disposed of in favour of the deft., a *molle propositum* was to be entered, and that for the purpose of disposing of these points the Court of Q. B. should be in the same position as the judge, and consider whether the judge ought to have told the jury to acquit. The jury returned a verdict of guilty on the third count only.

Nov. 13.—*Edward James (Price and T. Jones with him)* moved for a new trial on the ground, first, that the judge was wrong in compelling the witness Pougher to answer and in receiving the answers as ob-

Q. B.]

REG. v. BOYES.

[Q. B.]

tained; secondly, that there was no corroborative evidence of Pougher's testimony. Suppose the judge was wrong in compelling the witness to answer, and in receiving the answers so obtained.

HILL, J.—Is it a question of improperly admitting evidence? The evidence is proper; the evidence is admissible according to all the rules of law; but there is a privilege in the witness (it may or may not be so) which only appertains to him and does not appertain to the party. Suppose that the witness was perfectly willing, the party could not object, and say, "You are not to answer because you will criminate yourself." He might say, "No; the interests of truth and justice are paramount, and I will give the evidence." The judge might say, "No; I will not allow you that privilege." That is something about which the witness can complain, but the party cannot. The question has arisen in a case where an attorney is asked to disclose that which his professional duty would prevent his disclosing. He is willing to waive it, and the client is willing to waive it. The party in the suit cannot interpose and say he will not have it.

JAMES.—This is a case peculiar in its circumstances. The learned judge, if it had not been thoroughly consented to by the Crown that the deft. was to have the benefit, although there may have been no case in point on this doubtful question, would not have compelled the witness to answer the questions, and the deft. could not have been convicted. In *Re v. Reading*, 7 St. Tr. 296, it was held that the witness was privileged from answering questions respecting the commission of an offence, although he had received a pardon. And by the 12 & 13 Will. 3, c. 2, it is provided that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament. In this case the prosecution was instituted in pursuance of a resolution of the House of Commons. Secondly, there was no corroborative evidence of Pougher's testimony, and the judge ought to have directed the jury not to act upon it. There exists a course of practice in the administration of the criminal law of this country, that a man cannot be found guilty on the simple evidence of an accessory, and it is put upon the principle that if you allow a man who comes forward and states he is guilty of a crime to give evidence against another, you enable a guilty person to come forward and charge an innocent person, and upon his simple statement to convict him. A practice has arisen and been in force for a considerable time, that a man cannot be convicted upon the evidence of an accessory, except there is some corroboration of it. In this case there was no corroboration of any of the witnesses within the true spirit of this rule. At the trial the judge should have adopted the ordinary course, and have told or directed the jury that, as there was no corroborative evidence, they ought not to act upon the evidence of the witness.

COCKBURN, C.J.—If he told them the practice was generally not to act on the evidence of an accomplice without being confirmed, but if the evidence made out to their minds that he was speaking the truth, they ought to believe him. I think his direction was right. I protest against its being the duty of the judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated.

WIGHTMAN, J.—The law does not of necessity require any corroboration.

JAMES.—The subject is discussed in 1 Phillips on Evidence, and the various cases commented upon, and at page 101 it is said: "On a review of the cases above cited, the result that may be deduced from them seems to be, that, on the trial of a prisoner against whom an accomplice appears as a witness, there should be (in order to warrant a judge in advising a jury to give credit to such a witness, and to warrant the jury in convicting) some confirmatory evidence that is proof independent of the evidence of

the accomplice, from which it may be reasonably inferred that the prisoner was concerned with the accomplice in the commission of the crime."

COCKBURN, C.J.—It is stated very well in Taylor on Evidence, 796: "The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said they ought not to believe him unless his evidence is corroborated by other evidence, and without doubt great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists upon the subject, and the jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that judges in their discretion will advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration, and the practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the judge. Considering too the respect which is always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but only advise them not to give credit to the testimony." I think that is a fair exposition of what the present practice is. We think that he ought not to have told the jury to acquit if the witness was uncorroborated.

The COURT, after consulting Martin, B., granted a rule nisi on both grounds.

The Solicitor-General (Sir W. Atherton), Monk and Cleasby showed cause against the rule, and Edward James, Price and T. Jones supported it (Feb. 12 and 13, 1861, at the sittings after Hilary Term). The Court discharged the rule so far as related to the want of corroboration of the witness Pougher, and directed that the other point should be argued in the following Easter Term by one counsel on each side.

CROMPTON, J.—This rule was moved for on one ground that there was no corroboration of the witness Pougher. It may be a question whether Pougher was an accomplice of the deft.'s; but, treating him as an accomplice, the question is, was the judge warranted in the direction he gave to the jury? The law is laid down correctly in *Reg. v. Stubbs*, 1 Dears. C. C. 555, by Jervis, C.J.: "It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice, for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation." To my mind, there was fully sufficient corroboration to warrant the verdict of the jury. It is not necessary that the corroboration should be as to the very facts stated by the witness. What corroboration is sufficient may depend on a variety of circumstances.

The rest of the Court concurred.

April 25.—*Cleasby*, for the Crown, argued the point reserved against the rule, and Edward James supported the rule.

Authorities cited:—Tayl. Ev. 1174; *The People v. Mather*, 4 Wendell's New York Rep. 254; 4 Bl. Com. 259; 4 Inst. 22-3; Com. Dig. Parl. L. 38 to 40; Seld. Jud. Parl. 36; Hallam's Engl. cap. 12, s. 2; Vin. Abr. E. 2; *Fisher v. Ronalds*, 12 C. B. 762; *R. v. Lord Shaftesbury*; 3 Inst. 236; 7 Com. Dig. tit. "Pardon," B.; 9 & 10 Will. 3, c. 32. *Cw. adv. vult.*

C. B.]

TOWNSEND v. READ.

[C. B.]

COCKBURN, C. J.—This case comes before us under peculiar circumstances. On the trial of the deft. on an information by the Attorney-General for bribery, a witness who was called to prove the fact of his having received a bribe from the deft., objected to give evidence, on the ground that the effect of the evidence he was called upon to give would be to criminate himself. Thereupon the counsel for the Crown handed in a pardon under the Great Seal to the witness, who accepted it. The witness, however, still objected to give evidence, and the learned judge who presided at the trial, entertaining a doubt as to whether the witness could be properly compelled to answer, notwithstanding the pardon, an arrangement was come to between the counsel on both sides, with the sanction of the judge, that the witness should be directed to answer, but that the opinion of this court should be taken as to whether the privilege of the witness remained, notwithstanding the pardon, the counsel for the Crown undertaking, in the event of the court holding in the affirmative, to enter a *nolle prosequi* if the deft. should be convicted. We think it necessary to protest against a repetition on any future occasion of a proceeding which we believe to be wholly unprecedented, it appearing to us inconvenient and unbecoming that this court should be called upon to pronounce a judgment which it is without authority to enforce. It is perhaps to be regretted that under such circumstances a rule *nisi* should have been granted. Probably, had the rule *nisi* for a new trial been moved for on this ground alone, we should have refused the rule; but the rule having been moved for on other grounds as well as on this, it was somewhat improvidently allowed on this ground also. Now, however, the matter having been discussed on a rule granted by us, we think it best to pronounce our opinion on the point submitted to us, but we are anxious to protect ourselves against the present proceeding being drawn into a precedent or adopted on any future occasion. Upon the first argument we held that the pardon took away the privilege of the witness, so far as regarded any risk of prosecution at the suit of the Crown; but it was objected that a pardon was no protection against an impeachment by the Commons in Parliament, and on this point the case was argued before us in the last term. The question on which our opinion is now required is, whether the enactment of the third section of the Act of Settlement, the 12 & 13 Will. 3, c. 2, "that no pardon under the Great Seal shall be pleadable to an impeachment by the Commons in Parliament," is a sufficient reason for holding that the privilege of the witness still existed in this case, on the ground that the witness, though protected by the pardon against every other form of prosecution, might possibly be subject to parliamentary impeachment. In support of this proposition it was urged on behalf of the deft. that bribery at the election of members to serve in Parliament being a matter in which the House of Commons would be likely to take a peculiar interest, as immediately affecting its own privileges, it was not impossible that if other remedies proved ineffectual, proceedings by impeachment might be resorted to. It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *mala fide*, would be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale in *Osborne v. The London Dock Company*, 10 Ex. 701, and acted upon by Stuart, V.C. in *Sidebottom v. Adkins*, 3 Jur. N.S. 681 is the correct one, and that to entitle a party

called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Indeed, we quite agree that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by Alderson, B. in *Osborne v. The London Dock Company*, that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to put the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the unhappy, too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied to the case of this witness would be simply ridiculous, more especially as the proceeding by information was undertaken by the Attorney-General by the direction of the House itself, and it would therefore be contrary to all justice to treat the pardon provided in the interest of the prosecution to insure the evidence of the witness as a nullity, and to subject him to a proceeding by impeachment. It appears to us, therefore, that the witness in this case was not in a rational point of view in any the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings, and that it was therefore the duty of the presiding judge to compel him to answer. It follows that, in our opinion, the law officers of the Crown are not bound to enter a *nolle prosequi* in favour of the deft. *Rule discharged.*

#### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs., Barristers-at-Law.

May 15 and July 8.

TOWNSEND (app.) v. READ (resp.)

*Surveyor's accounts—Allowances of law expenses by justices sitting at special sessions—5 & 6 Will. 4, c. 50, s. 111.*

*By sect. 111 of 5 & 6 Will. 4, c. 50, it is enacted that if the inhabitants of any parish shall agree at a vestry to defend any indictment, &c., or to defend any appeal, it shall and may be lawful for the sur-*

[C. B.]

TOWNSEND v. READ.

[C. B.]

*surveyor of such parish to charge in his account the reasonable expenses incurred in defending such appeal after the same shall have been agreed to by such inhabitants at a vestry "and" allowed by two justices of the peace within the division where such highway shall be, which expenses, when so agreed to "or" allowed, shall be paid, &c. :*

*Held, that when such expenses had been agreed to by the inhabitants at a vestry, it was not necessary, under sect. 111, that they should also be allowed by two justices, and that the word "and" before "allowed" in the early part of the section should be read "or."*

This was a case stated by the justices of Wilts, which was sent back by an order of this court, made on May 11th (*vide* 4 L. T. Rep. N. S. 447), to be amended.

Case, as originally stated for the opinion of the court :—

The resp. had been for many years past appointed, under 5 & 6 Will. 4, c. 50, as a salaried surveyor of highways for the parish of Swindon, in the county of Wilts.

On the 25th March 1859 the resp. was, by the inhabitants of the said parish, again elected, and he was duly appointed as such surveyor. On the 29th March 1860 the resp., as such surveyor, made up and signed his accounts for the past year, and laid them before the parishioners in vestry assembled; and afterwards, on the same day, it being a special sessions for the purposes of the highways for the petty division of Swindon, in which the said parish of Swindon is situate, the said resp. laid the same accounts before us; and thereat, at the time of the verification of such accounts, the app., being a person chargeable to the highway of the said parish, made his complaint to us against the surveyor, and we heard such complaint, and we examined the resp. upon oath, and such complaint on the said special session was by us adjourned from time to time unto this day.

The app. objected to sundry items in the resp.'s account, and amongst them were the sums of 15*l.* and 105*l.* 12*s.* 2*d.* We, acting under 5 & 6 Will. 4, c. 50, s. 44, heard the complaint of the app., and examined the resp. on oath. Upon such examination we disallowed the said sum of 15*l.*, but as regarded the sum of 105*l.* 12*s.* 2*d.*, it appeared to have been incurred by the resp., as such surveyor, in law proceedings under sanction of the inhabitants of the parish of Swindon in vestry assembled; and the bill of the solicitor for the resp., by which the said sum of 105*l.* 12*s.* 2*d.* was incurred, was duly taxed by the clerk of the peace of the county of Wilts at that sum. The app. contended before us, that under 5 & 6 Will. 4, c. 50, s. 111, the resp. was only entitled to have charged that sum of 105*l.* 12*s.* 2*d.* in his account, after the same should have been agreed to by the inhabitants at vestry, and allowed by two justices of the peace within the division. We, having duly considered the whole of the circumstances, saw no reason for disallowing that sum, and we made no order respecting it. The accounts were verified and signed, and we signed at the foot of such account the following verification:—"The within and foregoing account was verified before the Rev. Giles Daubeny, clerk, and John Samuel Willes Johnson, Esq., two of her Majesty's justices of the peace for the county of Wilts, at a special sessions for the highways in and for the division of Swindon, at Swindon in the said county, holden on the 29th day of March last, and thence continued by adjournment from time to time until this day. And we, the said above-mentioned justices, present at the special sessions, and also the same and majority of justices now present at the adjournment thereof, and complaint having been then and now at the time of such verification made to us by James

Coplestone Townsend, an inhabitant of Swindon, against such account, and having heard such complaint and examined William Read the surveyor on oath, and having taken the whole of such complaint and objections to such account made by the said James Coplestone Townsend, to order that the sum of 15*l.* for law expenses of Henry Kinner, a solicitor, as per bill, be disallowed, and be struck out of such account, leaving a balance of 107*l.* 13*s.* 2*d.* due to the said surveyor. Dated 24th May 1860." The app. contended that we were wrong in point of law, inasmuch that the said sum of 105*l.* 12*s.* 2*d.* having been objected to by him as an illegal payment made by the resp. out of the highway-rates of the parish as such surveyor, we should upon the verification of such accounts have made an order that that specific sum should have been allowed, as the app. alleged that he might then have claimed a right of appeal against such allowance, as an order made by justices. Whereupon the app. asks the opinion of the Court of C. P.: First, whether under the circumstances stated, the sum of 105*l.* 12*s.* 2*d.* ought to have been allowed or disallowed by us; secondly, whether (if the court should be of opinion that the sum of 105*l.* 12*s.* 2*d.* ought to have been allowed) the aforesaid verification of such surveyor's account by us made is a good and sufficient order and allowance for that purpose.

Amended case.

We, the undersigned, two justices of the county of Wilts, and who granted a case on the 24th May 1860 for the opinion of this court, made on the 11th day of May now instant, ordered to be remitted to us to be amended, by stating, first, the nature of the law proceedings for which the sum objected to was incurred; secondly, the objections taken by the app. As to the first point, we state as to the nature of the law proceedings: It appears to us that the whole of such bill of costs was incurred in respect of proceedings arising out of matters of appeal to the quarter sessions of Wilts, made by Messrs. Barnes, Freeman and Woolford, inhabitants of the parish of Swindon, consequent on their having been assessed to a highway-rate of the parish of Swindon, dated the 9th day of June 1858; and the charges are arranged in such bill under separate headings therein; and, as to one part thereof, they appear to commence with the first item of the date of the 30th Oct. 1858, as the resp.'s costs of appeal from the quarter sessions against a highway rate, such appeal appearing to have been on a case stated from the quarter sessions for the Court of Q. B.; other parts of the bill appear to relate as to costs of appeal by Messrs. Freeman, Woolford and Barnes, to quarter sessions of Wilts; and the remaining portion of the bill "as to proceedings taken before justices in petty sessions at Swindon, and as to enforcing the payment of costs in the above appeals." We also state that, as in the said case, it was found a by us that the sum of 105*l.* 12*s.* 2*d.* appeared to have been incurred by the resp. as such surveyor in law proceedings, under the sanction of the inhabitants of the parish of Swindon, which was and is referred to:—"Parish of Swindon.—Notice is hereby given, that a vestry will be held in the vestry-room of this parish on Thursday, the 23rd day of Sept. inst., at ten o'clock in the forenoon, for the purpose of taking into consideration the notices of appeal against the highway-rate given by William Amos Barnes, Henry Edwards Freeman and William Woolford, and the steps which should be taken thereon. Dated this 18th day of Sept. 1858. James Wise, overseer. (Signed) William Read, surveyor." In pursuance of such notice a vestry was held in the vestry-room of this parish on Thursday, the 23d Sept. 1858. It was proposed by Mr. George Reynolds, seconded by Mr. Charles Hurt, and carried unanimously—"That the appeals by William Amos Barnes, Henry Edwards Freeman and

William Woolford, against the rate made for the repairs of the highways of this parish, bearing date the 9th day of June now last past, which appeals were entered at the general quarter sessions of the peace of our Lady the Queen, held at Warminster on Tuesday, the 29th day of June last, at which sessions it was ordered that the hearing and determination of the said appeals be adjourned until the next general quarter sessions of the peace to be holden in and for the county of Wilts, be defended by the parish." N.B. Mr. Townsend, being professionally concerned for the apps., declined to take any part in the above resolution. Proposed by Mr. J. C. Townsend, seconded by Mr. Hurt, and unanimously carried—"That Mr. Henry Kinneir, solicitor, be instructed by Mr. Read, the surveyor of the highways, to conduct the defence of the appeals mentioned in the last resolution." We also state that it appeared to us that a vestry of the inhabitants of the said parish of Swindon was held on the 29th March 1860, for the purpose of passing the accounts for the past year of the surveyor of the said parish of Swindon, under the 5 & 6 Will. 4, c. 50; and previously to such accounts being made up, balanced and laid before the vestry to be examined and allowed, such bill of 105*l.* 12*s.* 2*d.* was inserted by the surveyor in his account; and at such vestry it was paid by the resp., as such surveyor, to Mr. Henry Kinneir, his solicitor, to whom the bill was due, and at such vestry the surveyor's accounts were produced, examined and allowed. [The case, after stating some facts as to the taxation of the bill, continued.] We also state that we found that the costs incurred in the said bill had been incurred after the inhabitants of the parish had agreed to defend such appeals against the highway-rate, as appears by the extracts of the minutes in the vestry books, which we have above set forth. We also state that such bill of costs did not appear to us to have been allowed by two justices, previous to the same having been charged in the surveyor's account when laid before the vestry and paid by the surveyor. As to the second point, we state the objections taken by the app. to be as follows:—"First, that the said resp. had charged in his account a bill of costs or law expenses, amounting to the sum of 105*l.* 12*s.* 2*d.*, incurred in or about defending certain appeals against the highway-rates for the parish of Swindon, at a vestry convened for the purpose of considering the same, as required by the 111th section of 5 & 6 Will. 4, c. 50. Secondly, that the said resp. had charged in his account such bill of costs or expenses before the same had been allowed by two justices of the peace, as required by the same section of the said Act." The third objection referred to the taxation of the bill of costs, but as nothing turned upon it, it is unnecessary to insert it.

*Phipson*, for the resp., cited *Reg. v. The Justices of the West Riding of Yorkshire*, 1 Q. B. 624; *Reg. v. Justices of Leicestershire*, 8 E. & B. 557, and contended that the allowance by the justices sitting in petty sessions, under sect. 44 was a sufficient allowance by two justices under sect. 111.

*Martin*, for the app., cited *Reg. v. Goodenough*, 2 A. & E. 463, and contended that, by the 111th section, it was necessary that the expenses should be allowed by the vestry and also by two justices, before they could be charged in the surveyor's account, and that the account should afterwards be laid before the justices sitting in petty sessions under sect. 44.

*Cur. adv. vult.*

*July 8.*—*WILLIAMS*, J. now delivered the judgment of the court.—Upon the argument of this case before my brothers Willes, Byles and myself, only one point was submitted for our consideration, namely, whether the justices sitting in petty sessions ought to have disallowed the item in the surveyor's account of 105*l.* 12*s.* 2*d.*, with respect to law expenses. The

question turns upon the 111th section of the General Highway Act, 5 & 6 Will. 4, c. 50, by which it is enacted that: "If the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice of the peace in the execution of any powers given by this Act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, and allowed by two justices of the peace within the division where such highway shall be, which expenses, when so agreed to or allowed shall be paid by such parish out of the fines, forfeitures, payments and rates, authorised to be collected and raised by virtue of this Act; provided, nevertheless, that if the money so collected and raised is not sufficient to defray the expenses of repairing the highways in the said parish, as well as of defending such prosecution, or prosecuting or defending such appeal as aforesaid, the said surveyor is hereby authorised to make, collect and levy an additional rate in the same manner as the rate by this Act is authorised to be made for the repair of the highway." The app.'s contention before us was, that by reason of this enactment the surveyor could not charge his law expenses in his account until after the same had been agreed to by the inhabitants in vestry, and been allowed by two justices of the peace. It was urged in the argument that in the Act it is said that the surveyor may charge his expenses in the account after they have been agreed to at vestry, and allowed by two justices of the peace, and afterwards it proceeds to enact that the expenses, when so agreed to or allowed, shall be paid by such parish, &c., and it was suggested that the word "or" was plainly put by mistake for "and." In our opinion, the inaccuracy is rather in putting "and" for "or" in the earlier part of the section. We are led to this conclusion, not only by considering this construction the more reasonable, but also by referring to the language of the 65th section of 13 Geo. 3, c. 78 (the earlier General Highway Act), for which the present section is substituted, and which is in these words:—"And be it further enacted, that if the inhabitants of any parish, township, or place, shall agree at a vestry or public meeting to prosecute any person by indictment for not repairing any highway within such parish, township, or place, which they apprehend such person was obliged by law to repair, or for committing any nuisance upon any highways, or shall agree at such vestry meeting to defend any indictment or presentment preferred against any such parish, township, or place, it shall and may be lawful for the surveyor of such parish, township, or place, to charge in his account the reasonable expenses incurred in carrying on or defending such respective prosecutions, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by a justice of the peace within the limit where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish, township, or place out of the fines, forfeitures, compositions, payments and assessments authorised to be collected and raised by virtue of this Act." In the case before us, therefore, we think the surveyor was entitled to charge the expenses in question after they had been either agreed to at vestry, or allowed by two justices; and we further think it appears to have been sufficiently agreed to at vestry, having regard to what is stated in the case, to have been incurred at the vestry held on the 29th March 1860; consequently we are of opinion, upon this ground, that the sum in question was properly allowed in the surveyor's account. There-

[ARCHES.]

BURDER v. HEATH.

[ARCHES.]

fore it becomes unnecessary to consider whether the resp. was also right in contending that the allowance by the justices was a sufficient allowance by two justices within the meaning of the 11th section.

*Judgment for the resp.*

### COURT OF ARCHES.

*Saturday, Nov. 2.*

(Before Dr. LUSHINGTON.)

The office of Judge promoted by BURDER v. HEATH.

*Articles of religion—Repugnant doctrines—Obligations of the clergy.*

*The obligations of the clergy are twofold: first, to declare assent and consent to the Book of Common Prayer; second, to subscribe the Thirty-nine Articles of Religion.*

*The court will not take into consideration the internal convictions or animus with which the Articles are subscribed; it will only examine the doctrines impeached, and see if they violate the plain grammatical intent and meaning of the Book of Common Prayer or the Articles of Religion.*

*The construction which the court will put upon those documents is a judicial construction.*

*If the Article admits of several meanings, without any violation of the ordinary rules of construction or the plain grammatical sense, the court will hold that such opinion might be lawfully avowed and maintained.*

*If the doctrine in question had been held without offence by eminent divines of the Church, then, though it might be difficult to be reconciled with the plain meaning of the Articles, blame will not be imputed to those who hold it.*

*This court will not question doctrines that have been allowed or tolerated in the Church.*

*In construing sermons, the court will not be bound by the strict rules which are applied to the construction of the Articles and Book of Common Prayer, but it will allow of a greater latitude of interpretation, and will permit it to be shown that the preacher did not intend to contravene the statute of Elizabeth, or to promulgate doctrines inconsistent with the Book of Common Prayer.*

*The court will not for this purpose assume that anything was done or intended to be done by the authority of the Legislature or of the Church, which it did not find within the four corners of the Articles and the Book of Common Prayer; and, on the other hand, it will not assume that anything therein found was not intended to have its full effect and operation.*

*There are many matters of doctrine de hors both the Articles and the Book of Common Prayer, as to which entire freedom of opinion is allowed. But it is settled law, admitting of no discussion, that the Articles and the Book of Common Prayer must be taken by all who have subscribed them to contain the doctrines of the Church of England, and that these are, so far as there set forth, accordant with Scripture.*

*In the construction of the statute 13 Eliz. the word "advisedly" means "deliberately," as contrasted with "inadvertently," or "intentionally," that is to say, with an express and avowed purpose.*

*The intention will be gathered from examination of the acts complained of.*

*What doctrines are held to be in contravention of the Articles and Book of Common Prayer.*

*The statute leaves a locus penitentie to the deft., who may retract before sentence passed.*

*This case was argued in June last, and his Lordship took time to consider his decision. The questions involved in it, and the form in which they were raised, are fully stated in the judgment.*

[MAG. CAS.]

Dr. Twiss, Q.C. and Dr. Swabey for the prosecutor.  
Dr. Phillimore, Q.C. and Bullar for the deft.

Dr. LUSHINGTON said:—Early in the year 1860 a suit was instituted in this court by the direction of the Bishop of Winchester, against the Rev. D. I. Heath, a clergyman beneficed in that diocese. The object of that suit was to prefer certain charges against Mr. Heath for having printed and published several sermons, called "Sermons on Important Subjects," parts of which were alleged to contain doctrines repugnant to the Articles of Religion, in violation of the statute of Elizabeth and in derogation of the Book of Common Prayer. I must presently enter minutely into the consideration of the articles which contain these charges, but this general description will suffice for my immediate purpose—namely, to make some general observations as to the principles which I believe ought to guide the court in the consideration and decision of cases of this description. The court is fully aware of the deep responsibility which attaches to it in the exercise of this jurisdiction. Questions may arise most important to the Established Church. The abstruse nature of the subject-matter itself, the doctrines of the Church of England, may necessarily introduce considerations of great difficulty. A miscarriage by this court, even if corrected by the court above, would be a serious evil. Again, in weighing the importance of such cases, the court must never forget that the character and interests of the party proceeded against are most deeply involved. It may be met, in the first instance, briefly to recapitulate the obligations which the clergy of the United Church are by law to undertake. They are twofold: they must declare their assent and consent to the Book of Common Prayer, and they must subscribe the Thirty-nine Articles of Religion. In the course of the argument addressed to the court on the part of Mr. Heath much was said as to the animus with which a subscription to the Articles might be made, and the authority of Dr. Paley was cited upon this subject. I disclaim entering into any examination of this argument, for I think that it does not belong to the court to discuss it. I have nothing to do with the internal convictions of any persons subscribing the Articles; neither I nor any other court can know what are the opinions of individuals when they affix their subscriptions—that is a matter to be governed by their own consciences. It may be quite right and fitting that learned divines should discuss the limits within which a person can conscientiously subscribe, but these are not questions for a court of justice. Disquisitions on this subject afford no assistance to the court, and I cannot consent to import into this case or any other similar case the words of learned divines so far as they relate to the *quo animo* with which the subscription may be affixed. The province of a court of justice, when compelled to perform the duty, is to examine the doctrines impeached, and to see that they do not violate the plain intent and meaning of the Book of Common Prayer or the Articles of Religion. I cannot disguise from myself that in discharging the duty now imposed on me there are difficulties which are not to be found in the ordinary course of justice. Such cases as the present are of very rare occurrence, and though the general principles which ought to guide the court may to a certain extent be extracted from the few preceding cases, yet there are not, and there cannot be, any institutional writers to whose authority, as in ordinary legal questions, the court could with confidence appeal; nor are there any decided cases as to the actual construction which ought to be put upon the Articles. True it is that there are a multitude of the most learned works by the most eminent divines as to the meaning of those Articles. But the court cannot venture to make much use of such assistance, and for this reason, that such works naturally and properly constantly refer to the Holy Scriptures. The

3 L

[ARCHES.]

BURDEE V. HEATH.

[ARCHES.]

court, however, ought not to venture into so wide a field of investigation, except so far as may be absolutely necessary to the discharge of its proper duty—viz., the ascertainment of the plain grammatical meaning of the Book of Common Prayer and the Articles. The construction which the court must put upon the Book of Common Prayer and the Articles is a judicial construction. I should not presume to adopt any authority, however high, even though in my own most fallible opinion supported by scriptural quotations, unless such authority concurred with the plain grammatical meaning. With great anxiety, then, I have sought to ascertain what are the principles which should govern the court and guide its judgment in all cases in which charges of false doctrine are preferred, or similar questions demand solution. It is a satisfaction to my mind that the principles generally applicable to all this class of cases have to a very considerable extent been enunciated by the court of the highest authority in these matters—I refer to the decision of the Privy Council in the *Gorkam* case. The judgment therein delivered, being a decision of the Superior Court, is legally binding on me, so far as it declares principles applicable to the trial of the present cause. It is true that I was one of the judges in that memorable case; but the judgment stands upon the authority of Lord Langdale, Lord Campbell, Lord Wensleydale, and Lord Kingsdown, approved by the two Archbishops of the realm. I think that the leading principles there laid down stand also, and most firmly stand, upon the stable basis of sound reason and justice. These principles must govern the present case, and would do so even if the particular decision had been erroneous. In the *Gorkam* case the proceedings were civil and concerned only civil rights, but the rule of construction of the Articles of Religion, the Book of Common Prayer, and the doctrines impugned, must be equally applicable to the present proceeding. In both cases there is the same issue, at least substantially; in both cases the question is, whether the doctrines impugned be or be not contrary and repugnant to the Articles of Religion and the Book of Common Prayer. The following passage occurs in Mr. Moore's report of the judgment of Lord Langdale in the *Gorkam* case, p. 462:—"This question must be decided by the Articles and the Liturgy, and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of all written instruments. We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed. In our endeavour to ascertain the true meaning and effect of the articles, formularies and rubrics, we must by no means intentionally swerve from the old established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in times past, as being, on the whole, the best calculated to determine the true meaning of the documents to be examined. If these principles were not adhered to, all the rights, both spiritual and temporal, of her Majesty's subjects would be endangered." These were the principles by which he purposed to abide, remembering, however, that this was a criminal proceeding, that the offence charged must be clearly proved, and that if doubt existed the accused was entitled to the benefit of it. His Lordship then stated the various steps which had been taken in the suit since its commencement in 1860, and added that the case was fully argued towards the end of last June. He was always, he continued, most anxious to avoid unnecessary delay in the adjudication of the causes in the courts in which he had the honour to pre-

side, but a press of business always prevailed at that period of the year, and the subject-matter of this suit was in itself so important and so difficult, the possible consequences of error so serious, not only to Mr. Heath personally, but also it might be to the interests of the Church, that he deemed it his duty to take such time for deliberation as he could only appropriate to the task during the long vacation. In considering how the principles laid down by the Privy Council were applicable to this case, he apprehended that the course to be followed was, first, to endeavour to ascertain the plain grammatical sense of the Article of Religion said to be contravened, and if that Article admitted of several meanings without any violation of the ordinary rules of construction or the plain grammatical sense, then the court ought to hold that any such opinion might be lawfully avowed and maintained. If, indeed, any controversy arose whether any given meaning was within the plain grammatical construction, the court must form the best judgment it could, with this assistance—that, if the doctrine in question had been held without offence by eminent divines of the Church, then, though, perhaps, difficult to be reconciled with the plain meaning of the Articles of Religion, still a judge in his position ought not to impute blame to those who held it. That which had been allowed or tolerated in the Church ought not to be questioned by that court. In construing Mr. Heath's sermons, however, the court was not absolutely bound down by the same strict rules which applied to the construction of the Articles or the Book of Common Prayer, and therefore it might be that a greater latitude of interpretation should be allowed, and the fullest possible means should be permitted for showing that Mr. Heath did not intend to contravene the statute of Elizabeth or promulgate doctrines inconsistent with the Book of Common Prayer. This was the course he was bound to follow, but there were also things to be avoided. The court must never assume for the purposes of this case that anything was done, or intended to be done, by the authority of the Legislature or of the Church of England, which it did not find within the four corners of the Articles of Religion and the Book of Common Prayer; and, on the other hand, it must never assume that anything therein found was not intended to have its full effect and operation. It was contrary to all probability, as well as irreconcilable with the ordinary rules of construction in so solemn a proceeding as the establishment of the Articles of Religion or Book of Common Prayer, to presume that anything was inserted to be inoperative or rejected. For caution's sake, he would say that he fully recognised the position of the Judicial Committee, that there were many matters of doctrine *dehors* both the Articles of Religion and the Book of Common Prayer, as to which entire freedom of opinion was allowed. It must, however, be assumed as a matter admitting of no doubt, and respecting which the court could have no discussion, that the Thirty-nine Articles and the Book of Common Prayer being established by the highest authority in this realm, must be taken by all who subscribed thereto to contain the doctrines of the Church of England, and so far as therein set forth, to be accordant to Scripture; these were nearly the words which were used in the *Bath* case, and to which he adhered. His Lordship then read the terms of the 13th Elizabeth, and the construction which he had put upon the word "advisedly" in that statute giving judgment in the *Bath* case. One meaning of the word was "deliberately," as contrasted with inadvertently. Another meaning was "intentionally," with an express and avowed purpose. But there was great difficulty in putting the second construction on the word, for it was hardly possible that a clergyman who had signed the Articles would preach or publish anything with

[ARCHES.]

BURDER v. HEATH.

[ARCHES.]

the avowed intention of contradicting them. The question of intention was of the last importance, but the court could only arrive at a conclusion upon that question by an examination of the acts complained of; for in all the transactions of life a man must be judged by the consequences of his acts, and he must be taken to intend that which was the effect of what he had deliberately done. He must apply these same principles to the present case, and hold that the printing and publishing a set of sermons was an act done "advisedly." With these observations he proceeded to examine each of the four accusing articles. The sixth article alleged that certain passages in Mr. Heath's sermons contained doctrines contrary and repugnant to the eleventh Article of Religion. He must compare the passages with that Article. He felt this to be an arduous duty, and he should take especial care not to travel beyond the necessity which the law imposed upon him; but he must, in some part of this judgment, to a certain and limited extent, express a judicial construction of the eleventh Article; for how could he compare the passages in the sermons without so doing? The judicial construction was the plain grammatical sense of the Article. It was no part of his province, and he distinctly disclaimed any attempt, to affix any meaning to this Article by any reference of his own to the Holy Scriptures; but he apprehended that, in case of doubt and absolute necessity, he should be justified in having recourse to the opinions of learned divines of our Church. The first difficulty he had to encounter was that, in ascertaining the plain grammatical meaning of the Article, he had to affix a meaning to words which had not by any commanding authority had any precise meaning affixed to them, and which words might, if Bishop Burnet were right, have been used in the New Testament in different senses. He was then, by the necessity of the case, coerced to give his own construction of the eleventh Article of Religion. First, he held, with Bishop Burnet, that by justification was meant being received into the favour of God; secondly, that the merit of our Saviour was the great cause of that reception; thirdly—and what on the present occasion was perhaps most important—that the person so to be received must have faith in the redemption of mankind through Jesus Christ. He did not enter into the consideration how far a very extended meaning might be given to the expression "by faith;" it sufficed for the present purpose to say, "faith in the redemption through Jesus Christ," and that it must be faith in the person to be justified. As to the latter part of the interpretation, he thought he was confirmed by the grammatical construction; the words which followed were, "and not for our own works or deserving;" the necessary inference was that "our own faith" was contemplated as well as "our own works." The thirteenth Article supported this construction, for there faith in Jesus Christ appeared to him clearly to denote faith in Jesus Christ in the person to be justified. If it were necessary to construe the remaining part, he should say that the words "we are justified by faith only" might mean that faith was indispensable, and without it there could be no justification. The essence of this Article was merits in the Redeemer, faith in the person to be justified. His Lordship then referred to the voluminous extracts from Mr. Heath's sermons set out in the articles, and said that the charges against them, compressed, were, that Mr. Heath affirmed that justification meant the doing strict justice to all both good and bad, and that justification by faith meant justification by the faith of our Saviour in his own Gospel, or our Saviour's trust in the future. He had duly considered these extracts, and he was of opinion that the doctrines maintained by Mr. Heath in the extracts from pages 22 and 23 did not contain the legal and cor-

rect explanation of the meaning of the word "justification." He thought there was a misuse of words, and that an erroneous meaning, not permitted by law, had been attached to the word "justification," as used in the eleventh Article. He thought that every clergyman of the Established Church was bound to bear in mind the Articles of Religion in every sermon which he preached and published. He thought that if in such sermons he maintained a doctrine contrariant and repugnant to the Articles, it was no excuse for him to allege that he did not bear in mind the Articles, and had no intention of contravening them. But, although he deemed this position undoubtedly true, he was also of opinion that it ought not to be pressed with extreme rigidity. But in the passage to which he had referred it was possible that Mr. Heath might have meant, there being no reference to redemption by our Saviour, that the justification of which he was then speaking was simply that the Supreme Being would put all things to rights according to His wisdom. Much as he reprobated the passage as mischievous in every point of view, he should be very reluctant to conclude, if it were isolated, that such single passage was adequate proof of the charge laid in the sixth article. But there were other passages which he could not reconcile with any possible construction to be put on the eleventh Article. That Article expressly declared that justification sprang from the merit of our Saviour, and in no respect whatsoever represented justification to mean the doing strict justice to all, though it might be, and he believed it to be, true that in the scheme of redemption mercy and justice might be so combined that no violation of justice would take place. In other passages Mr. Heath introduced a new ingredient—namely, the personal faith of our Saviour, of which no mention was made in the Article, and which placed justification on a different ground. The Article declared justification to be by the merit of our Saviour, and by the faith of the person to be justified. To place justification upon the personal belief of the Saviour was, he thought, in opposition to the Article itself; for any essential addition to the Article could not be consistent with the Article, which purported to describe all that constituted justification. He could not consider it a harmless innovation, for it discarded the conditions of the eleventh Article, and substituted another instead; and this erroneous doctrine was again repeated in stronger terms. Mr. Heath said: "When I talk of justification by faith, I mean justification by our Saviour's trust in the future. The Saviour still trusts in our Father as He always did; He still has faith, and His faith still works by love; He still believes He can put the world right, and I believe so too." He was under the painful necessity of saying that he could not reconcile these doctrines with the plain grammatical sense of the eleventh Article. He thought that they were contrariant and repugnant thereto, and he must pronounce accordingly. His Lordship next examined the seventh article, wherein it was alleged that the passages extracted were repugnant to the second and thirty-first Articles of Religion. The plain meaning of the conclusion of the second article was, that through the suffering and death of our Saviour His Father was reconciled to us. He was well aware that very much discussion had arisen as to the meaning of the word "reconciled." The ordinary meaning of the word "reconciled," when speaking of two persons, he took to be the removal of some hostile or angry feeling which subsisted between them. When speaking of the Deity we must be careful not to attribute to Him the feelings which belonged to man. The best construction that he felt himself at liberty to put upon this word "reconciled" was the removal of that obstacle which, from the sin of man, existed to his reception into the favour of God, and that being reconciled he would be so received into that favour. Upon a



consideration of the second and of the thirty-first Articles, he could not but think that whoever alleged that the death of our Saviour was not the means to reconcile His Father to us, or who denied that the death of Christ was a perfect propitiation for the sins of the world, must necessarily contravene those two Articles. The question therefore was, whether Mr. Heath had avowed such denial. He need not say that he considered this question—namely, how it was effected—to be one of the mysteries which it had pleased Providence to leave incapable of being explained by man, and he was relieved by thinking that it was his duty merely to ascertain whether the doctrine therein contained had been denied or not. He was in no respect called upon to offer any explanation. His Lordship referred to passages in the sermons which, he said, appeared to him to deny that God was propitiated by the sufferings and death of our Saviour, and not only to deny that doctrine, but to allege that His blood was shed for another purpose. His Lordship next referred to the eighth article, charging Mr. Heath with having advisedly maintained doctrines repugnant to the Apostles' Creed, which declared our belief in the forgiveness of sins, and to that part of the Nicene Creed which declared our belief in one baptism for the remission of sins. It was also charged that these doctrines were repugnant to the eighth, twenty-seventh, and sixteenth Articles of Religion. After reading those portions of the Creeds and the Articles which referred to these points, his Lordship said that the result of them was that forgiveness of sins was avowed and acknowledged as a part of the doctrines of the Church,—forgiveness of sins through the merits of the Saviour by faith and repentance; and the question was whether this doctrine had been denied by Mr. Heath. The first passage bearing upon the question was at p. 161: "For myself I feel beaten to the very ground at the enormity of the task of persuading all England to reject totally the forgiveness of sins as having anything at all to do with the Gospel." If this passage stood alone, if it were not altogether qualified, and a construction put upon it by other parts of the sermon adverse to its *primâ facie* meaning, he did not see how it was possible that any interpretation of its meaning should not convey the doctrine that Mr. Heath denied the forgiveness of sins, nor could he entertain any doubt that a denial of the forgiveness of sins was contrariant and repugnant to the Creeds and Articles. His task, therefore, was narrowed to this—whether he could find in this sermon any satisfactory explanation of the passage he had read. He could find none. The remaining charge was that contained in the tenth article, which charged that certain passages were repugnant to the second Article of Religion, that other passages were repugnant to the Creed of St. Athanasius, to the Apostles' Creed, and to the Nicene Creed, and also complained of a violation of the thirty-first, the sixth and the eleventh Articles. In considering the question whether Mr. Heath had contravened a meaning, so far as he knew, disputed by none, he confessed that he had had great difficulty in believing that Mr. Heath did really mean to express the opinions which his words conveyed, such opinions appearing to him to be entirely contrary to those which any clergyman ought to declare; but he was not able to discover any clue whereby he could venture to say that those opinions were qualified, and to be understood in a different sense from that which *primâ facie* belonged to the words used. At page 117 of the sermons was the following passage: "The more I study my Bible for myself the more astounding I find it—how many of the most fundamental ideas and phrases of modern theology have been foisted in without sanction from that all-sufficing record of our religion. One after another, no less than about twenty ideas or phrases, such as guilty of

sin, paying a penalty, going to heaven, going to hell, immortality of the soul, satisfaction, imputed righteousness, appropriating the work of Christ, necessary to salvation, and many others, have vanished from my system, because, as a minister of Christ, studying these matters professionally, I see them to be phrases and ideas not only absent from Scripture, but darkening and confusing the clearest of the otherwise most intelligible and comforting statements of Holy Writ." The effect of this passage was—first, that guilt of sin had vanished from Mr. Heath's system, because such a phrase and idea were absent from Scripture and darkened the most intelligible and comforting statements of Holy Writ. Now, what said the second Article? That our Saviour died to reconcile us to the Father, and to be a sacrifice not only for original guilt, but also for the actual sins of men. He really could not comprehend how any intelligible meaning could be affixed to this Article, if guilt of sin was to be removed from all Christian doctrine. He could not conceive the idea of actual sin without there being guilt of sin. He should not dwell upon the other expressions which were alleged to be repugnant to the Creeds. He viewed the whole of the passage with astonishment and regret. He thought the words used contained a doctrine, if it was to be so called, utterly irreconcilable with the Creeds. The thirty-first Article was next to be considered. Mr. Heath dismissed from his system the immortality of the soul, satisfaction, imputed righteousness, as darkening and confusing the clearest and the most intelligible and comforting statements of Holy Writ. The thirty-first Article said that the offering of Christ was a perfect satisfaction for all the sins of the world. To deny satisfaction altogether, whatever might be its meaning, as Mr. Heath had done, could not be taken in any other sense than a denial of the truth of the Article itself. The next charge was that Mr. Heath had maintained that the phrase "necessary to salvation," &c. was not only not a scriptural phrase, but a phrase which darkened and confused Holy Writ. Passing by the Creed of St. Athanasius, he would refer to the very words with which the sixth Article commenced: "Holy Scripture containeth all things necessary to salvation." What did Mr. Heath mean by the omission of words as contrary to Scripture, which words contained the very essence of the Article itself? It is with great regret, his Lordship continued, that I have felt myself compelled by a sense of duty to declare that I have no other alternative but to pronounce a judgment condemning Mr. Heath as guilty of the charges preferred against him—namely, preaching doctrine contrariant and repugnant to the Articles of Religion cited in these proceedings. The defence has been maintained with great zeal and learning, and many ingenious arguments have been urged upon the court; but I must say that that which the court wanted from the beginning has never been supplied—namely, some kind of exposition of the doctrines preached by Mr. Heath which could by any possibility, however remote, be reconciled with the plain grammatical meaning of the Articles charged to be contravened. I would with pleasure have accepted in excuse for Mr. Heath any explanation of his doctrines which by any reasonable effort of the understanding could be reconciled with the doctrines of the Church. There has been a complete failure in that respect, not from any want of learning, diligence, or ability of counsel, but because it was not possible rationally to affix any innocent meaning to those doctrines which Mr. Heath has so unfortunately promulgated. I trust I may confidently affirm that I have come to the consideration of this painful case with no disposition to press the clergy of this realm to any narrow construction of the doctrines of the Articles of Religion, but to allow every possible interpretation which

KILKENNY.]

REG. v. JOHN WARRELL—SHIPTON v. GALE.

[BRISTOL.]

would not violate their essence and spirit; to go further would be to abandon the duty of the office I hold, and to do that which the Legislature alone could do—to release the clergy of the Church of England from the obligations contained in the Articles, and to repeal by judge-made law the provisions which Parliament has thought fit to enact by its authority. Before concluding, I think it right to explain why I do not advert to the many authorities which the zeal and learning of counsel have produced. My reason is this, that in my judgment not one of these authorities does that which was required in this case—namely, show that some divine of eminence has held without reproach from ecclesiastical authority doctrines in substance the same as those Mr. Heath has promulgated. Whatever opinions may have been held in the vast field of polemical divinity, I find none which can support Mr. Heath, or justify him. In the *Gorham* case the Judicial Committee had the advantage of being able to quote in support of their judgment, and in justification of Mr. Gorham, passages from the writings of divines of the highest authority. I cannot conclude this judgment without observing that I am well aware of the fallibility of my own opinion, and especially in so peculiar a case as the present; but I have endeavoured, first, to make clear the principles which I intended should govern me; and, secondly, to show plainly how I applied those principles to the case before me. If I have erred in either particular, the judgment of a Superior Court will correct me. It may be, however, that many will think that, though legally right, this judgment recognises too severe restrictions on the clergy, and shuts the door against inquiry and disquisition, which might tend to elucidate the truth. Now, even if this were so, it is not for a court of justice to open a door which the Legislature has shut. It is contrary to all sound principle for a court to seek, as has been formerly done by some judges, ingenious subterfuges to evade or weaken the law, and that upon a notion of its own power to discover what is best and most convenient. Such a course is, I think, not only contrary to principle, but would be most injurious in its effect, for all such attempts to wrest the law according to supposed consequences invariably tend to postpone a remedy if there be a real evil. If there be bonds which press heavily on the clergy—as to which I give no opinion—I repeat that the Legislature imposed them, and the Legislature alone can loose them. I pronounce against Mr. Heath.

*Bullar* asked his Lordship to allow the deft. time to consider what course he should take after the judgment that had been pronounced. Under the statute retraction was open to Mr. Heath.

His Lordship said he would allow ample time for consideration, and the cause was accordingly postponed for that purpose.

## ASSIZES.

### KILKENNY.

(Before CHRISTIAN, J.)

REG. v. JOHN WARRELL.

*Answers of the prisoner elicited by the police, even after due caution, ought to be received in evidence with great jealousy.*

John Warrell was indicted for stealing twenty-one sovereigns, the property of William Farrelly, and in the second count for receiving same.

*Wall, Q.C. and Curtis* for the Crown; *Lover* for prisoner.

The money charged to have been stolen was kept, with other sovereigns, in the house of Farrelly at Thomastown, and prisoner, who had been on a visit with him, left the house on the 23rd Feb. last. He was brought back in custody in about four hours after-

wards by constable Lowry, and prosecutor then searched his desk and discovered 21l. in gold. Farrelly was proceeding to state what passed in conversation between him and the prisoner in the presence of the police-constable, when *Lover* objected to any part of the conversation being given in evidence until it was first sworn by the constable, who had been in charge, that no promise, threat, or inducement, had been held out to him.

CHRISTIAN, J. was of opinion that the constable should be produced before the conversation was proved.

The Crown acquiesced in this course.

Constable Lowry, who arrested the prisoner on suspicion on the morning of the 23rd Feb., while passing through the village of Stoneyford, and having subsequently brought him before Mr. Butler, a magistrate, having given him a caution not to say anything that would criminate himself; witness asked him some questions.

*Lover* objected to any answer being given in evidence, even after this caution. The man was in custody, and only for safe custody, and it was the duty of the constable to bring the accused before a magistrate, an educated gentleman who no doubt discharged his duty under the provisions of the 14 & 15 Vict. c. 93, s. 14, by taking his examination in writing after a proper caution. Counsel cited *Levinge's Justice of the peace*, 55-6: "Constables cannot be too cautious in abstaining from investigating prisoners in their custody. Doherty, C.J. expressed his unqualified disapprobation of the practice of persons, without any lawful authority, interrogating prisoners on the subject of their charge, and declared he would not permit admissions so obtained from prisoners to be given in evidence against them: (*Reg. v. Hughes*, 1 Cran. & Dix C. C. 15.) And it has been held by Lefroy, C.J., that answers given to a constable upon questions put by him, though he had given the prisoner a previous caution, are inadmissible in evidence: (*Reg. v. Grey*, Trim Summer Assizes 1855.)"

*Wall and Curtis* submitted that if once a due and proper caution was given, the statement or answer of the accused were clearly admissible.

CHRISTIAN, J., without ruling the point, observed that there was a difference in the value of testimony voluntarily given and that elicited in answer to questions. He objected to the police questioning prisoners while in their custody on a criminal charge, and he thought the counsel for the Crown ought not to press this particular evidence. The Crown did not insist upon the reception of the evidence, without, however, being understood to assent to the validity of the objection.

## BRISTOL.

Saturday, Oct. 5.

SHIPTON v. GALE.

*Volunteers' exemption from tolls.*

Judgment was given in this case before the sitting magistrates. Mr. D. Burges, sen., read the judgment, which was as follows:—"The point which is raised in this information depends on the construction of the Act of the 24 & 25 Vict. c. 128, which was passed in the last session, for the purpose, as stated in the preamble, of removing doubts which had arisen, how far the exemption from tolls granted to officers and soldiers of the regular army by the General Turnpike Acts of the 8 Geo. 4, c. 128, and the 4 Geo. 4, c. 49, extended to officers and soldiers serving in volunteer corps, and for the more fully defining the exemption of volunteers from toll. The facts of the case are as follows:—On the 10th Sept. last, the complainant, a member of a volunteer corps, and three comrades, all being in uniform, were conveyed through the White Ladies' turnpike-gate, to a place appointed for exercise, in a carriage *bona fide* hired by the volunteers, but which at the same time was

BRISTOL.]

PEDLEY v. DAVIS AND SHIPSTON.

[C. B.]

also employed in conveying to the same place, for the purpose of seeing the exercise, another person, the friend of the parties, but not being a volunteer. The complainant under these circumstances claimed to be exempt from the toll, but the claim was disallowed by the defendant, who was the collector at the gate. For the purposes of the present inquiry, it will be sufficient to refer to the Act of the 3 Geo. 4, c. 126, s. 82, which deals (firstly) with regular soldiers, and (secondly) with volunteers. As regards regular soldiers, it exempts from toll:—(A) Horses on march or duty. (B) Carts and carriages employed, or having been employed, only in conveying arms or baggage. (C) Carts, &c. employed, or having been employed only, in conveying sick, wounded, or disabled soldiers. (D) Waggon, &c. employed, or having been employed, in conveying ordnance and other stores. As regards volunteers, the 3 Geo. 4 exempts from toll:—(E) Carriages conveying volunteer infantry. (F) Horses furnished by or for any person belonging to any corps of yeomanry, or volunteer cavalry, or infantry, and ridden by him on any public duty. Several questions have been raised and submitted to the Superior Courts, how far the above-mentioned exemptions in favour of the regular army applied to volunteers, and for the purpose of solving such doubts, the first clause of sect. 82 of the late statute provides that all such exemptions shall extend to volunteers:—first, as regards horses used or ridden on march or duty; and it then enacts, secondly, as regards carriages, that no toll shall be taken for any cart, carriage, &c., whether public or private, or for any horse drawing the same, employed only in carrying or conveying, or returning empty from carrying or conveying, having been employed only in carrying or conveying any volunteer on march or duty, such volunteer being in the uniform of his corps. This is in fact a new enactment, and as respects the use of the word "only" it assimilates the exemptions for carriages conveying volunteers to those contained in clauses B and C in favour of regular soldiers, while at the same time it renders the exemption for horses identical in both services. Mr. Shipton argued that the word "only" means *bona fide* or substantially, and he contended that if a carriage was *bona fide* employed to convey volunteers, the conveyance therein of another person, not being a volunteer, would not render the carriage liable to toll, and he referred us, as an authority on this point, to the case of *Stephenson v. Taylor*, reported in the Law Journal, new series, vol. 80, p. 145. Mr. Patrick, on the other hand, submitted to us, that "only," in the usual acceptation of the word, means exclusively, and he contended that the case cited by Mr. Shipton, being a decision under the old statute (clause E), which does not contain the word only, cannot be relied on as an authority in this inquiry, which depends entirely on the late Act, with reference especially to the words therein used—"employed only or having been employed only in carrying volunteers."

In *Stephenson v. Taylor*, Cockburn, C.J., said that any carriage *bona fide* employed in conveying volunteer infantry to a place of exercise, or bringing them back from it, was entitled to the exemption, viz. under sect. 82 of the 3 Geo. 4, and he thought that the carriage, to enjoy that immunity from toll, must be employed, he would not say exclusively but substantially, for the conveyance of volunteers, and that if the carriage was *bona fide* hired and used for the conveyance of volunteers, the accidental circumstances of some one else riding in it, who was not obliged to pay hire for the use of his seat in the vehicle, would not deprive the carriage of its exemption from toll. We have quoted this judgment at some length, for the purpose of showing that there is no foundation for Mr. Shipton's argument, that the Lord Chief Justice considered that the word "only" meant *bona fide* or "substantially," the word "only" not being then under consideration; and it being, therefore, unnecessary for the Lord Chief Justice to comment upon or interpret its meaning. In

the same case, Mr. Justice Crompton observed that all the words of the Act of Parliament were to have weight given them; and this is a general principle, which applies as much to the new as to the old Act. We think that the word "only" used in the new Act means exclusively, and as the carriage referred to in this complaint was employed—that is, was occupied, or was being used in conveying four volunteers to a place of exercise, and also in conveying one gentleman not being a volunteer to the same place, we do not see how this can be called an employment in conveying volunteers only. To hold that it is so would be to ignore the word "only" altogether, and to construe the sentence as if the word were not in it—a proceeding which is not consistent with the mode in which Acts of Parliament are interpreted, as defined by Crompton, J., in his observations in *Stephenson v. Taylor*. This view of the case is further illustrated by the meaning which is attached to the word "only" in the earlier part of sect. 82 of the 3rd Geo. 4, where it is expressly provided that carriages having been employed only in carrying dung, &c., be exempt, unless laden with some other things not exempted from toll; in which case they will become liable. We think for these reasons that the exemption claimed cannot be allowed, and we give our judgment for the defendant.

Mr. Shipton thanked their worships for the time and attention which they had paid to the subject, and intimated that he intended taking advantage of the three days allowed by the Act of Parliament, for the purpose of considering whether he should appeal against their decision or otherwise.

#### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MATY, Esqrs.  
Barristers-at-Law.

May 29 and 31, and June 8.

PEDLEY v. DAVIS AND SHIPSTON.

*Abbey Lands Act—Liability of justice of the peace to action of trespass for issuing distress-warrant—Protection of officer acting under such warrant.*

By sect. 13 of 7 & 8 Geo. 4, c. 108, it is enacted that owners of abbey lands shall have power to make a rate upon the owners of such lands; and sect. 15 of the same Act empowers a justice of the peace, in cases of refusal to pay, to summon, and in due course issue a distress-warrant against the person so refusing to pay. The plt. refused to pay a rate levied under this Act, whereupon the deft. D. (a justice of the peace) issued a warrant of distress, which was executed by the deft. S. The plt. then brought an action of trespass against the deft., and the jury found that the land upon which the rate was levied was not abbey land:

Held, that, as the land was found not to be abbey land, such action would lie as against the justice, but that it would not as against the officer, as he was protected by sect. 6, 24 Geo. 2, c. 44.

This cause, which was one of trespass, was tried before Erle, C. J., at the Kent spring assizes, when the verdict was for the plt., leave being reserved to move to set it aside and enter a verdict for the defts. The action was for seizing certain goods and chattels of the plt. for rates under a local Act called the Abbey Lands Act. The deft. Davis was the justice who signed the warrant of distress and Shipston the constable who executed it; and the question for the consideration of this court was, whether (the jury having found that the land was not abbey land) the deft. was protected as a justice, and the deft. Shipston as an officer acting in execution of a warrant.

Look Q.C. (*Matthews* with him) showed cause: (*Harper v. Carr*, 7 T. R. 270; *Weaver v. Price*, 3 B. & Ad. 409; *Newbold v. Colman*, 6 Ex. 169; *Kay v. Groves*, 7 Bing. 312; *Dameson v. Power*, 5 Han.

C. B.]

PEDLEY v. DAVIS AND SHIPSTON.

[C. B.]

415; *Reg. v. Brown*, 13 Q. B. 653; *Reg. v. Pilkington*, 2 El. & B. 546; *Jones v. Vaughan*, 5 E. 445; *Jones v. Chapman*, 14 M. & W. 124; *Wallace v. The Treasurer of the West India Dock Company*, 5 E. 115; *Shaw v. The Churchwardens of Birmingham*, 10 Q. B.)

*Bovill*, Q.C., *Garth* and *Murphy* appeared in support of the rule, and cited *Allen v. Sharp*, 2 Ex. 352; *Newbold v. Colman*, 6 Ex. 195; *The Luton Local Board of Health v. Davis*, 29 L. J. 173, M. C.; *Ratt v. Parkinson*, 20 L. J. 168, M. C.; *Reg. v. Bradshaw*, 29 L. J. 176, M. C. *Cur. adv. vult.*

*Juss* 8.—*ERLE*, C.J. now delivered the judgment of the court.—In this case the *plt.* had been rated as an owner of abbey lands, and the *deflt.* *Davis* issued a distress-warrant to enforce payment of that rate, and the *deflt.* *Shipston* levied under that warrant, and the jury has found that the land was not abbey land, and so the question is raised whether the *deflt.* *Davis* is protected, as justice, or the *deflt.* *Shipston* as an officer acting in execution of a warrant. With respect to the case of the justice, the 7 & 8 Geo. 4, c. 108, s. 13, enables the owners of abbey lands to make a rate upon the owners of abbey lands; and sect. 15 enacts that if any owner of any land in respect of which a rate has been imposed by virtue of this Act. shall refuse to pay, a justice, on proof of demand, may summon, and in due course issue a distress-warrant. If these were all the relevant facts, it would be clear that the justice had acted without jurisdiction, and would be liable in trespass. The ownership of abbey lands is as essential to give jurisdiction to make the rate in question, as occupation of lands within the parish is for a poor-rate; and it is clear that trespass lay before the 11 & 12 Vict. c. 44, s. 4, for levying a poor-rate when the complainant had no lands within the parish: (see *Nicholls v. Walker and another*, Croke, Charles, 394; *Milward v. Caffin*, 2 W.B. 1330; *Newbold v. Colman*, 6 Ex. 195.) The last case bears a strong analogy to the present. There the statute provided that in every case in which a contribution from overseers, required by a board of guardians, shall be in arrear, the justices may summon, and in due course issue a warrant if they think fit. And the question considered was, whether the jurisdiction of the justices extended to inquire into the validity of the order of the board of guardians, and of the appointment of overseers, or was confined to enforcing payment of sums assumed to be legally due. And the decision is, that the existence of a legal obligation to pay the sum claimed is a necessary preliminary condition to the magistrates having any jurisdiction at all, and therefore they have no jurisdiction to decide on the validity of the order; but if the order is legally made, and the party is in arrear, they may issue a warrant or not as the circumstances shall in their discretion seem to require. This reasoning is directly applicable to the 15th section, above recited, relating to rates on abbey lands, under which the justice is directed to begin by inquiring whether the rated owner has refused to pay, not whether the rate is valid. This case answers many of the arguments relied on for the *deflt.* here. If the question is not within the jurisdiction of the magistrates, his adjudication thereon is not conclusive for him in an action. If he has a discretion to grant or refuse a distress-warrant, he may consider whether there is reasonable ground to doubt the validity of the rate; and if he does so doubt, he may exercise his discretion in refusing a distress-warrant, and then the parties may proceed by rule or by indemnity to the justice, if they wish to try the validity of the rate at the usual risk of costs; but if the justice refuse to issue a distress-warrant, because he doubts the validity of the rate, he does not therefore adjudicate thereon as on a matter within his jurisdiction for

adjudication. This case further decides, that in the case of a warrant so issued without jurisdiction, the justice is not within the operation of the 11 & 12 Vict. c. 44, s. 1, relating to actions on the case, but is within sect. 2, relating to actions of trespass for acting where there is no jurisdiction, and is not within sect. 4, relating to poor-rates and the exercise of discretionary power. The distinction between *Newbold v. Colman* and the present case, if any, arises from sect. 36 of 7 & 8 Geo. 4 enacting that if the *app.* on any appeal against a rate shall claim to be exempt because the lands are not abbey lands, and he shall have paid a former rate, the burden of the proof of the exemption shall be borne by him, followed by sect. 42, making the decision of the quarter sessions upon appeal final and conclusive. It was contended that the Court of Appeal had by this section jurisdiction to try the claim of exemption on the ground that the lands are not abbey lands; and if so, that it was a legal consequence that the tribunal appealed from should be construed to have by implication the same jurisdiction. But we do not collect that intention from the language of the sections. It is not probable that the Legislature would subject all lands to a liability to be rated by the owners of abbey lands, having an interest to make the contributories as numerous as possible, and to preclude the owners from the ordinary recourse to the general law. It may be that a party electing to appeal may be bound finally, and still if he elects to try the question by action he may do so. The effect of appealing is not now for us to decide, and we are clear that the language of the 15th section, creating the jurisdiction in the justice to issue the warrant, does not express any intention to give him jurisdiction to try the validity of the rate, and we therefore think that the *plt.* had a right to try the validity of the rate by an action of trespass. It was said that he ought to try the right by an action for money had and received, but it suffices to answer that we see many difficulties in so raising the question. It was further contended that, as the *plt.* might have tried this question upon appeal, he was therefore bound to appeal, and could not bring an action for a matter which was ground of appeal, and he cited *Shaw v. The Churchwardens of Birmingham*, 10 Q. B., but in that judgment the distinction is clearly taken between cases on the one hand where there is jurisdiction to make the rate, and the party has a ground of appeal against a rate made within jurisdiction, and cases on the other hand where there was no jurisdiction to make the rate, and so no jurisdiction to issue distress-warrant. The court says, if in the first instance the court has gone beyond its jurisdiction, the Act is void; the party grieved may, if he please, appeal, because excess of jurisdiction is as much a ground of appeal as a merely erroneous decision, and if the Court of Appeal erroneously confirm the act of the court below, it may be that the party appealing cannot object to the want of jurisdiction in any collateral proceeding. His own act may estop him personally, but he is not bound to appeal, he is not at liberty to treat the Act as void. This reasoning we think applies to the case before us, and answers the objection that the *plt.* was bound to appeal. Our judgment, therefore, is, that the *plt.* is entitled to his verdict against the *deflt.* *Davis*. With respect to the *deflt.* *Shipston*, we think that he is protected by 24 Geo. 2, c. 24, s. 6, enacting that no action should be brought against any constable, head borough, or other officer, for anything done in obedience to a warrant without compliance with certain provisions which need not be specified, the question being whether *Shipston* was an officer within the meaning of this section. The *plt.* contended that he was the private agent of the owners of abbey lands, collecting money for them in their private capacity, and not entitled to the protection due to officers of the law acting in execution of the law. But as the statute requires

[EX. CH.]

MERSEY DOCKS AND HARBOUR BOARD v. JONES AND OTHERS.

[EX. CH.]

the warrant to be directed to the collector, and requires the collector to execute the same, he comes within the principle of the protection created by the statute. He is acting in execution of the law, he is bound to obey the commands in the warrant, and although he might resign his office and avoid receiving a warrant, he is not the less acting under legal compulsion if he is in office, and receives the warrant. We consider that the decisions extending the protection of the statute to churchwardens and overseers executing a warrant of distress for poor-rates, according to *Nutting v. Faulkner*, Buller's Nisi Prius, 24, and *Harper v. Carr*, 7 T. R. 270, authorises us to hold that the collector executing a warrant of distress in this case is protected. The result is, that the rule is made absolute as to the *deft. Stipston*, and discharged as to the *deft. Davis*.

*Rule absolute as to deft. Stipston, and discharged as to deft. Davis.*

### EXCHEQUER CHAMBER.

Reported by W. MATY, Esq., Barrister-at-Law.

Monday, May 13.

MERSEY DOCKS AND HARBOUR BOARD v. JONES AND OTHERS (Churchwardens and Overseers of the Poor of the Parish of Liverpool).

*Poor-rates—Liverpool Docks not subject to—Acquiescence by Legislature in the decisions of courts of law.*

*The trustees of certain public docks were by their local Acts empowered to take tolls from vessels entering such docks, and the proceeds were to be applied to the repair and maintenance of the docks and harbour; and if the amount so raised should be more than sufficient for such purpose, then the tolls were to be lowered. By later Acts the trustees were empowered to raise money for building additional warehouses, and to levy rates for payment of the expenses, paying interest and maintaining the buildings so erected; but such additional warehouses were to be rateable to the poor as in the case of premises of which there was a beneficial occupation.*

*A case, known as the Liverpool case, reported in 7 B. & C. 61, was decided in 1827, in which the parties were to all intents and purposes the same as in the present case, and the court held that the dock company were not rateable in respect of the dock dues, nor of the premises used for the purposes of the dock, no individual having any beneficial occupation of the premises:*

*Held in the present case (affirming the decision of the Court of C. B.), that, as the Legislature, by its declaration as to the rateability of the additional warehouses and buildings created under the authority of the later Acts, had, by implication, acquiesced in the decision in the Liverpool case, it was not competent to this court to interfere with that decision; and that therefore this particular property was exempt from poor-rates.*

This was an appeal against a decision of the Court of C. B. upon a special case. By a rate made for the relief of the poor of Liverpool, on the 2nd June 1858, the pils. were assessed at 20,580*l.* 18*s.* 8*d.*, in respect of the dock estates within the parish. The rate was not appealed against, but the pils. did not pay, consequently a distress was levied for nonpayment, and the present case was stated in an action of replevin. The dock estates were originally vested in the corporation of the borough, as trustees under several statutes. Some portion of those estates was granted voluntarily by the corporation, other portions were sold by them to the trustees, and the remainder were bought by the trustees from private individuals, under certain statutory powers contained in twenty-two Acts of Parlia-

ment, from 1 Anne to 21 Vict., the material clauses of which will be found set out in the case below, reported in 8 C. B., N.S., 114-145. The question for the consideration of this court was, whether the Mersey Docks and Harbour Board were rateable to the poor for the property mentioned in the assessment, but on this point the court gave no decision, but affirmed the decision of the court below, on the ground which will be found in the judgment.

*Bovill, Q.C. (Mellish, Q.C. with him) appeared for the churchwardens and overseers.*—In the *Birkenhead* case, 2 E. & Bl. 148, where the docks were under the same trustees as here, the premises were held rateable, and many early and late cases, not distinguishable from the present, are to the same effect, and the principles laid down in that case should be affirmed. [CROMPTON, J.—If you are right with reference to the *Birkenhead* case, what do you say to the *Liverpool* case? BLACKBURN, J.—Assuming the decision in that case to be erroneous, nevertheless it has not been overruled, but has been acted upon for many years.] The *Liverpool Docks* have never been rated, and *communis error facit jus*. [CROMPTON, J.—Where legislation has taken place with reference to an assumed state of the law, it is dangerous to disturb it.] No reason can be assigned why these, of all others, should be exempt. The *Liverpool* case proceeded upon that of *Salter's Load Sheds*, 4 T. R. 730; but in *R. v. Temple*, 2 E. & B. 168, Lord Campbell questions the propriety of the construction put upon the statute. He cited the *West Derby*, 6 E. & B. 711; the *Lea*, 19 J. P. 310; the *Chirton*, 28 L. J. 140, M.C.; the *St. Luke's Hospital*, 2 Bur. 1053; the *Exminster*, 12 A. & E. 2; *Longwood*, 13 Q. B. 116; *Harrogate*, 15 Q. B. 1012; *Manchester*, 17 Q. B. 859; *Badcock*, 6 Q. B. 787.

Sir F. Kelly (*Parker* with him) contra.—It is not necessary to overrule any case in order to support the judgment given in this; but this judgment could not be reversed without upsetting the *Liverpool* case, and other decisions founded thereon. Under the statute of Elizabeth it was an essential condition for the imposition of this rate that there should be a beneficial occupation; but from the time of Anne till now it has been held that no individual had any beneficial occupation, but that the docks were for public purposes. By the decision in the *Liverpool* case, tried in 1827, these premises were exempted, and that decision has been recognised by the local Acts referred to in the case, 4 & 5 Vict. c. 30, s. 71; 9 & 10 Vict. c. 109, s. 34; 11 Vict. c. 10, s. 4; 18 & 19 Vict. c. 64, s. 31. Previous decisions ought to be adhered to, and the case of *Crease v. Sawle*, 2 Q.B. 885, is an authority on that point. [BLACKBURN, J.—It is clear that when the Legislature passed these Acts it never intended to upset the *Liverpool* case.] He was stopped.

CROMPTON, J.—If it were necessary to decide this case upon an examination of the *Liverpool* case decided in 1827 and the cases since that time, I should have wished to have heard further argument; but those decisions have been acquiesced in, the Legislature has acted upon them, and people have been induced to advance their property upon faith in them and the recognition of them by the Legislature, and I think that previous decisions upon which the Legislature has acted ought to be adhered to; perhaps those decisions are right, but in any case I agree with the observations made by Tindal, C. J., in *Crease v. Sawle*, when speaking of the importance of abiding by previous decisions with respect to the rateability of property, and I am disposed to act upon them. I also think that it is very desirable to preserve uniformity of decision if possible: (*R. v. Chirton*.) In the present case, however, I do not propose to deal with any other property than that now before us. Although from the time of Queen Anne this property had not been rated,

[BAIL.]

Re THE REV. J. M. BARLOW.

[BAIL.]

an attempt to impose a rate upon it was made in 1808. But in 1827 the case came directly before the Court of Q. B. at about the same time as *R. v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, and that court then decided that this property was not rateable. Legislation, with respect to this property, acquiescing in that decision, has since taken place; and at the present time many millions are advanced on the faith of that acquiescence. We find that by 4 & 5 Vict. c. 30, s. 52, the trustees are empowered to build warehouses on the quays of one of the docks, and to borrow largely on the property; and by the 71st section, warehouses are expressly made subject to all parochial and other rates. That section is strong to show, by implication, that the docks themselves were not regarded by the Legislature as property which was beneficially occupied so as to be subject to the rate. It would be a strange construction of that statute, and one which persons who have advanced their money upon faith in its provisions would be entitled to complain of, that when it expressly provides that the new works are to be rated, the old works were not exempt. In 9 & 10 Vict. c. 109, and through the whole course of this legislation, there is a provision running in effect—"Mind the newly constructed warehouses are to be rated;" and, to my mind, the implication raised thereby is, that the docks were not to be rated. Where a decision has been thus acquiesced in by the Legislature, it is not competent to a superior court or to a court of error to interfere with it. If it be found to be attended with any hardship, that must be left to the Legislature to remedy. I confine my judgment in this case entirely to this particular property.

The rest of the Court concurred.

*Judgment affirmed.*

### RAIL COURT.

Reported by T. W. SANDERS, Esq., Barrister-at-Law.

June 12 and July 9.

(Before HILL, J.)

Re THE REV. J. M. BARLOW.

*Mandamus—Disqualified churchwarden—Quo warranto.*

*Where by the custom of the parish one churchwarden was elected annually by the parishioners, and the other annually by the rector, and the latter appointed as his churchwarden a person who was not a parishioner, nor an inhabitant of or occupier of property in the parish:*

*Held, that a mandamus to the rector to appoint a churchwarden is the proper process by which to question the validity of the appointment:*

*Seemle, that though a quo warranto will lie for usurping an office, whether created by charter or an Act of Parliament, provided the office be of a public nature and a substantive one, yet the office of churchwarden does not come within that rule.*

This was a rule obtained by *Prideaux*, calling upon the Rev. John Mount Barlow to show cause why a *mandamus* should not issue commanding him to nominate a churchwarden for the parish of Ewhurst, of which he is the rector. It appeared that by custom the parishioners at Easter nominated one churchwarden, and the rector the other, and that at Easter last the parishioners having nominated their churchwarden, the rector nominated as his a Mr. Steers, who was afterwards sworn into office. This gentleman, however, though upon the rate-book as rated for some property in the parish, was not a resident in or occupier of any house or land in the parish, and the ground upon which the rule was obtained was that his nomination was void.

*Clearby*, Q.C. showed cause, and contended that

whether or not Mr. Steers was ineligible to be nominated as churchwarden, the present proceeding by *mandamus* was erroneous, for that the proper proceeding should be by *quo warranto*. Moreover, that the rector cannot be compelled to appoint a churchwarden, for that if he neglects his right in this respect the parishioners may themselves appoint both churchwardens: (*The Churchwardens of Northampton*, 1 Carth. 118; *Darley v. The Queen* (in error), 3 Cl. & Fin. 520.)

*Prideaux*, contrà, argued that the proceeding by *mandamus* is the proper one, and that the rector can be compelled to appoint: (*R. v. Shepherd*, 4 T. R. 381; *R. v. Danberry*, 2 Stra. 1196; *R. v. The Governors of St. Martin's-in-the-Fields*, 20 L. J. 423, Q. B.; *R. v. The Mayor of Cambridge*, 4 Burr. 2008; *Reg. v. Birmingham*, 7 A. & E. 254-.)

*Cur. adv. vult.*

July 9.—HILL, J.—The object of the present application was to question the validity of the rector's appointment on the ground that the person appointed was not legally qualified. Cause was shown against the rule that a *mandamus* ought not to be granted, because it was contended that if the rector's nomination was void, the parishioners had the power to nominate a second churchwarden, and in support of that proposition, the *Churchwardens of Northampton* case was relied on; and further, it was argued that a *quo warranto* would lie, and therefore that a *mandamus* ought not to be granted. It is well settled that, where there is a remedy equally convenient, beneficial and effectual, a *mandamus* will not be granted. This is not a rule of law, but a rule regulating the discretion of the court in granting writs of *mandamus*; and unless the court can see clearly that there is another remedy equally convenient, beneficial and effectual, the writ of *mandamus* will be granted, provided the circumstances are such, in other respects, as to warrant the granting of the writ. With respect to the first ground relied on in showing cause against the rule, the authority cited fails to establish the proposition for which it was referred to. It merely shows that a *mandamus* will be granted to swear in two churchwardens, chosen by the parishioners, where the vicar for the time being was under a deprivation. It has been decided that the archdeacon, or other ordinary, has only a ministerial duty to perform in swearing in a churchwarden, and cannot object to do so on the ground of disqualification in the party claiming to be sworn. *Reg. v. Rice*, 1 Ld. Raym. 138, and further, the case cited from Carthew, does not show that if there be an incumbent capable of nominating a churchwarden, that the parishioners in such a case have a right to nominate a second, where the incumbent, according to custom, ought to nominate one, and claims to exercise the right by nominating any individual alleged to be disqualified. As to the second ground, that a *quo warranto* would lie, the authorities show that if such be the case a *mandamus* will not be granted. It was admitted that, according to the older cases, a *quo warranto* was held not to lie in respect of the office of churchwarden. But it was argued that all those decisions were prior to *Darley v. The Queen*, and that, according to the principle laid down in the H. of L. in that case, a *quo warranto* would lie for usurping the office of churchwarden. The rule established by *Darley v. The Queen*, as stated by Coleridge, J., in *Reg. v. The Guardians of St. Martin's*, is difficult of application; but as I understand the rule it is, that a proceeding by *quo warranto* will lie for usurping an office, whether created by charter alone or under the authority of an Act of Parliament, provided the office be of a public nature and a substantive office. In my opinion, the office of churchwarden does not come within that rule. It is not necessary that I should go so far in expressing my opinion. It is sufficient if I am enabled to say, in the

Q. B.]

REG. v. KIRBY—PEASE AND OTHERS v. CHAYTOR AND ANOTHER.

[Q. B.]

language of Littledale, J., in *Reg. v. Birmingham*, "I do not see my way so clearly to another remedy as to say here that a *mandamus* ought not to go." The rule, therefore, will be made absolute.

*Rule absolute.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTLEY, Esqrs., Barristers-at-Law.

Thursday, Nov. 7.

REG. v. KIRBY.

*Quo warranto*—Parish vestries—Election of vestry-clerk—Right to vote in respect of property to which voter is assessed as executor—Entry on rate-book—58 Geo. 3, c. 69, s. 3—13 & 14 Vict. c. 57, s. 6.

*An inhabitant of a parish assessed and charged in the last rate made for the relief of the poor is entitled to add property for which he is so assessed and charged in the said rate as "executor of A.," to property to which he is assessed and charged in his own individual capacity for the purpose of making up his qualification as a voter under 58 Geo. 3, c. 69, s. 3, and it is immaterial that his name is not entered as being one of the executors in the rate-book.*

Lush, Q.C. (Field with him) showed cause against a rule calling upon Mr. Kirby to show cause why a *quo warranto* should not issue directing him to show cause by what authority he exercises the office of vestry clerk of Bicester, Oxfordshire, it being alleged that he was not properly elected. There were several votes stated to have been improperly received and rejected, but the only one on which any legal point arose was that of William Palmer, who claimed to be entitled to two votes. The 58 Geo. 3, c. 69, s. 3, regulating the manner of voting in vestries enacts, "That in all such vestries every inhabitant present who shall by the last rate which shall have been made for the relief of the poor have been assessed and charged upon or in respect of any annual rent, profit, or value not amounting to 50*l.* shall have and be entitled to give one vote and no more; and every inhabitant there present who shall in such last rate have been assessed or charged upon, or in respect of any annual rent or rents, profit, or value, amounting to 50*l.* or upwards (whether in one or in more than one sum or charge), shall have and be entitled to give one vote for every 25*l.* of annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes; and in cases where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where only one of the persons jointly rated shall attend he shall be entitled to vote according to and in respect of the whole of the joint charge." Wm. Palmer was rated on the last poor-rate as follows:

William Palmer, value .....	£27 10 0
Finch's executors, 7 cottages, value...	12 0 0
William Palmer, value .....	21 15 0

Making in all, 61*l.* 5*s.* William Palmer was one of Finch's executors, and supposing the other executor to be present, he would still be assessed to property to the annual value of 55*l.* 5*s.*, and it was now contended that being so assessed, he was entitled to two votes.

Hindleston, Q.C. (H. Sawyer with him) contra.—He is not an occupier within the meaning of the Act to that property to which he is assessed as executor. He is not an assessed inhabitant as to that property. It is necessary by the Act that he be assessed and charged in the rate, and as to the 12*l.* he is not assessed and charged: the rate merely states "Finch's executors, seven cottages." [BLACKBURN, J.—Can it

not be shown who Finch's executors are? COCKBURN, C.J.—Suppose a firm assessed in the usual names, Child and Co., for instance; could not the present partners vote, although, perhaps, there might be no one of the original names in existence?] He cannot join the qualification he holds in his representative character to that which he possesses in his individual character. [WIGHTMAN, J.—What is the object of giving one vote to one man and several to another?] It depends upon the interest the man has in the parish, but then that interest must be in his own right. [WIGHTMAN, J.—As executor he is individually liable to poor-rates.] Palmer does not swear he was assessed and charged; he merely says he was rated. [BLACKBURN, J.—That is the same thing.]

COCKBURN, C.J.—This rule should be discharged. The question turns only on Palmer's case, and whether he is entitled to one or two votes. It is clear he is entitled to one in his individual capacity; then was he entitled to the second? Since the property to which he was assessed and charged in his individual capacity was not sufficient to give him two votes, he proposed to add to it other property to which he was assessed and charged as executor, and the question is, whether the one property can be added to the other to make up the amount requisite. It is clear on the statute, and is admitted, that properties can be added together, and that the aggregate amount makes up the qualification. Then what is there to prevent an executor so doing? There is nothing in the Act. I see nothing which should exclude executors, or any reason why we should try to put a forced construction on the Act to exclude them. An executor is the legal owner, and I see no reason why he should not exercise the right of voting if he be properly assessed. I think this case is within the spirit of the Act, and that Mr. Palmer was entitled to two votes.

WIGHTMAN, J. concurred.

BLACKBURN, J.—I am of the same opinion [his Lordship read the section of the Act and stated the facts of the case]. If Palmer had been assessed to 49*l.* 5*s.* only, viz., in 27*l.* 10*s.* and 21*l.* 15*s.* for the property he held in his own individual capacity, it is clear he could not have been entitled to two votes; but then comes the additional 12*l.* assessed to Finch's executors, and the question is, whether he can add that amount, or even half of that amount, as one of two persons jointly rated, to the 49*l.* 5*s.*, so as to give him a valid qualification for two votes. Now, although his name does not appear on the rate, it clearly is open for him to show that he is one of Finch's executors, and when he has done that he may add the qualification thus obtained to his own individual qualification, so as to entitle him to two votes. It seems to me to be exactly as if the rate-book said, "A. B. and W. Palmer, Finch's executors." If the other executor were present Palmer would be entitled to vote only in respect of one-half, but that would be sufficient to settle the present question. Looking at the Act, I think it clear, as has been observed by the L. C. J., that this case comes within its spirit. *Rule discharged with costs.*

Friday, Nov. 8.

PEASE AND OTHERS v. CHAYTOR AND ANOTHER.

*Justices*—Action against for acting without jurisdiction—Church-rates—Validity of rate disputed.

*The declaration alleged that the pte. were summoned for payment of church-rates, and at the hearing before the defts. (two justices) they the pte. in good faith disputing and intending to dispute the validity of the rate, gave to the defts. notice that they disputed the validity of the rate, and required the defts. to forbear from and not to give judgment on the matter; that there was not evidence given to or before the defts. that the pte. did not, in fact or in*

[Q. B.]

PEASE AND OTHERS v. CHAYTOR AND ANOTHER.

[Q. B.]

*good faith, dispute the validity of the rate, yet that the defts., not acting bona fide in the belief that they were acting in conformity with law, but wilfully disregarding such notice and their duty, and contrary to law, assuming to act as justices in the said matter when they knew that they had not jurisdiction to proceed further, nevertheless proceeded to and did give judgment, and made an order for a distress-warrant to levy the rate; that the plts.' goods were seized, and the plts. obliged to obtain a certiorari to quash the order, and to incur certain expenses:*

*Held, on demurrer, that the declaration sufficiently alleged that the defts. were acting without jurisdiction, and that the 11 & 12 Vict. c. 44, s. 2, was applicable to the case, and that it was not necessary to allege that the defts. acted maliciously, and without reasonable and probable cause.*

Declaration.—That the defts. were two of her Majesty's justices of the peace for the county of Durham, and the plts. were lessees and occupiers of a colliery and premises in the chapelry of St. Helen's Auckland, in the said county, in and by the name or style of "Joseph Pease and others, or company, owners of St. Helen's colliery," and were rated to a church-rate for the said chapelry in the sum of 8*l.*, the validity of which said rate was at the time of the making of the said rate, and from thence hitherto has been, and still is disputed by the plts., and the plts. were after the making of the said rate, by virtue of a summons or warrant under the hand and seal of Henry Stobart, Esq., one of her Majesty's justices of the peace in and for the said county, convened and summoned to appear on the 23rd Dec. 1858, before her said Majesty's justices of the peace acting in and for the said county, at the justice-room in Bishop Auckland, and in the said county of Durham, to answer a certain complaint that the plts. had refused to pay unto David Vitty, churchwarden of the said chapelry, the sum of 8*l.* 5*s.* 4*d.*, being the amount of the said sum of 8*l.*, together with a certain other sum of 5*s.* 4*d.* to which the plts. had also been rated in like manner as aforesaid, to the said church-rate, the validity of which they disputed as aforesaid. And the plts. by their agent in that behalf duly attended before the said justices in and for the said county, pursuant to the said summons, and at the place and time therein mentioned the hearing of the said complaint mentioned in the said summons was thereupon in due form of law adjourned to the 6th Jan. 1859, and upon the same 6th Jan. the plts. again, in pursuance of the said adjournment, duly attended by their said agent at Bishop Auckland aforesaid, before the defts., then and there being and acting as two of her said Majesty's justices of the peace in and for the said county of Durham. And the matters of the said complaint were then entered into and heard by the defts. so being and acting as such justices. And the plts. say that at the time of the hearing of the matter of the said complaint they (the plts.) in good faith, truth and sincerity disputing and intending to dispute the validity of the said rate, upon the hearing of the said complaint by their said agent, gave to the defts., then being and acting as such justices as aforesaid, notice that they the plts. disputed the validity of the said rate, and required the defts., as such justices as aforesaid, to forbear from and not to give judgment in respect of the matters of the said complaint. And the plts. further say, that upon the said hearing of the said complaint by the defts. as such justices aforesaid, there was not evidence given to or before the defts. that they the plts. did not in fact or in good faith dispute the validity of the said rate, or that they did not in good faith give such notice to the defts. as aforesaid. Yet that the defts. afterwards, and not acting bona fide in the belief that they were acting as such justices aforesaid, or that they were acting in conformity with law, but wilfully, wrongfully and of set purpose disregard-

ing the said notice and the duty of the defts. as such justices as aforesaid, and knowingly and wilfully disregarding and disobeying the statute in such case made and provided, and wrongfully and oppressively and contrary to law assuming to act as such justices as aforesaid, in the matters of the said complaint, when they knew they had not jurisdiction to proceed further thereupon, or to make or give any other direction or judgment upon the matters of the said complaint; and, notwithstanding such disputing by the now plts., and such notice thereof to them the defts. given as aforesaid, proceeded to give and did give judgment in respect of the matters of the said complaint, and did then make a certain order in writing under the hands and seals of them the defts. for the payment by the plts. of the said sum of 8*l.*, together with a sum of money for costs, in which order the plts. were described by the name or style of "Joseph Pease and others, owners of the St. Helen's Colliery," and which said order by the defts. so made as aforesaid was as follows:—

"Order for payment of church rates."

"Durham to wit,—Whereas information and complaint have been made unto Henry Stobart, Esq., one of her Majesty's justices of the peace in and for the said county, by David Vitty, one of the churchwardens of the chapelry of St. Helen's Auckland, in the said county, that J. Pease and Co., owners of St. Helen's Colliery, in the county aforesaid, have refused and still do refuse to pay to him, the said David Vitty, as such churchwarden as aforesaid, the sum of 8*l.*, being the sum duly rated and assessed in the churchwarden's rate, made the 28th April 1858, and which is now justly due from the said J. Pease and Co. unto him, the said David Vitty, as such churchwarden. And whereas by summons under the hand and seal of the said H. Stobart, so being such justice as aforesaid, the said J. Pease and Co. have been duly summoned to appear before us, George Pearson Wilkinson, clerk, and Henry Chaytor, Esq., two of her Majesty's justices of the peace in and for the said county, being the county where the church is situated, in respect whereof the said rates have been made, and being neither of us patron of the said church, nor in any way interested in any of the rights, dues, or other payments belonging to the said church; we, the said justices, therefore having considered the premises, and having also duly examined into the merits and truth of the said complaint upon oath, do find that there is justly due the aforesaid sum of 8*l.* from the said J. Pease and Co. to the said David Vitty, as such churchwarden as aforesaid, and do order and direct the said J. Pease and Co. to pay or cause to be paid the same unto the said David Vitty, together with the further sum of 9*s.* for such costs and charges concerning the premises as upon the merits of the case do appear to us to be just and reasonable. Given under our hands and seals at Bishop Auckland, in the said county, the 6th Jan. 1859."

And which said order was afterwards removed into the court of our Lady the Queen, before the Queen herself here, by virtue of our said Lady the Queen's writ of *certiorari*, issuing out of the said court, and under the seal thereof, and which same order was afterwards, and before the commencement of this suit, quashed by the judgment and consideration of the said court here; and the plts. further say that, after the making of the said order by the defts. so made unlawfully and without jurisdiction, and before the removal thereof into the said court here, the defts. having notice of the premises, and that the said order was null and void, and of no force or effect in law, and that they, the defts., as such justices, had no jurisdiction, power, or authority to act further in the matters of the said complaint, and no jurisdiction, power, or authority, by distress and sale of the goods of the plts. or otherwise howsoever, to levy the said sums of money by the said order of the defts. so wrongfully and unlawfully ordered to be



Q. B.]

PEASE AND OTHERS V. CHAYTOR AND ANOTHER.

[Q. B.]

paid by the plts.; yet, nevertheless, the defts. further wilfully, wrongfully and unlawfully assuming to act as such justices, and for the purpose of unlawfully and wrongfully levying the amount of the said sums of money in and by the said order so unlawfully and wrongfully ordered to be made by distress and sale of the goods of the plts., by their warrant under the hands and seals of them, the defts., and directed to the constable of West Auckland and all other peace-officers in the said county of Durham, did unlawfully and wrongfully command the said constable and peace-officers in her said Majesty's name forthwith to make distress of the goods and chattels of the plts., who were described as J. Pease and Co., and which said warrant of the defts. was and is in these words:

"To the constable of West Auckland and to all other peace officers in the county of Durham.

"Durham to wit.—Whereas, on the 16th Dec. last past, complaint was made to H. Stobart, Esq., one of her Majesty's justices of the peace in and for the said county of Durham, by David Vitty, one of the churchwardens of the chapelry of St. Helen's Auckland, in the said county, for that J. Pease and Co., owners of the St. Helen's Colliery, in the said county, being persons commonly called Quakers, had refused and neglected within six calendar months then last past, on demand duly made, and still did refuse and neglect to pay unto the said David Vitty, as one of the churchwardens of the chapelry of St. Helen's Auckland aforesaid, the sum of 8*l.*, being the sum duly rated and assessed upon the said J. Pease and Co. in the churchwardens' rate for the same chapelry made the 28th April last, and justly due from them J. Pease and others unto the said D. Vitty, as such churchwarden, and whereof the validity or the liability of the said J. Pease and Co. to pay the said rate had not been questioned in any Ecclesiastical Court, and afterwards, to wit, on the 3rd of Dec. last, at the justice-room in Bishop Auckland in the said county, the said parties appeared before the justices then and there present, and the hearing of the said case was adjourned to the 6th Jan. last, and on the 6th Jan. last, at the justice-room in Bishop Auckland aforesaid, the parties appeared before us, George Pearson Wilkinson, clerk, and Henry Chaytor, Esq., two of her Majesty's justices of the peace of and acting in and for the said county, being the county where the church is situated in respect whereof the said rates have been made, and being neither of us patron of the said church, nor in any way interested in any of the rights, dues, or other payments belonging to the said church, to be further dealt with according to law; and thereupon having considered the matter of the said complaint, and having also duly examined into the merits and truth of the said complaint upon oath, it appeared to us, the said justices, that there were justly due the aforesaid sum of 8*l.* from the said J. Pease and Co. to the said D. Vitty as such churchwarden; and we adjudged the said J. Pease to pay to the said D. Vitty, as such churchwarden, the sum of 8*l.*, and also to pay to the said D. Vitty, as such churchwarden, the sum of 9*s.* for his costs in that behalf; and we thereby ordered that if the several sums should not be paid, the same should be levied by distress and sale of the goods and chattels of the said J. Pease and others. And whereas the said J. Pease and others have not paid the said several sums of 8*l.* 9*s.*, or any part thereof, but therein have made default. These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said J. Pease and Co., and if within the space of four days after the making of such distress the said last-mentioned sums, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale unto William Trotter,

the clerk of the justices of the peace for the north-west division of Darlington Ward, in the said county, that he may pay and apply the same as by law directed, and may render the overplus (if any), on demand, to the said J. Pease, and if no such distress can be found, then that you certify the same unto us, to the end that such proceedings may be had therein as to the law doth appertain.

"Given under our hands and seals, 3rd Feb. 1859, at Bishop Auckland aforesaid.

(Signed)

"HENRY CHAYTOR.

"G. P. WILKINSON."

And by virtue of which said warrant of the defts. so wrongfully and unlawfully made and issued and delivered to the said constable and peace officers, divers of the cattle, goods and chattels of the plts. were unlawfully and wrongfully seized, taken and distrained, whereby the now plts. were obliged to apply and did apply to her said Majesty's said court here for and obtain a writ of *certiorari*, which issued out of and under the seal of the said court here, to remove the said order, with all things touching the same, unto the said court here, and after the said order had been and was by virtue of the same writ removed and brought into the said court here, were also obliged to apply and did apply to the said court here for and obtained a rule and order at the said court here to quash the said order of the defts., and were also obliged to cause the said order of the defts. to be and the same was accordingly quashed by the said court, and certain cattle, goods and chattels of the plts. having been seized under and by virtue of the said warrant of distress, the plts. were put to and incurred great expenses, costs and charges in and about and for the purpose of making the said applications to the said court of her said Majesty here, in and about the preparing, obtaining, issuing and serving the said rules, and in and about the quashing of the said order of the defts. and in and about the proceedings necessarily incident thereto and to the matters aforesaid. And the plts. were otherwise injured, vexed, harassed and oppressed, and suffered great damage by reason of the premises in this count mentioned.

Demurrer to the declaration.

There were demurrers to the defts.' pleas, but these were abandoned by the plts.; and there was also a second count in the declaration, to which there was a demurrer, but the count was substantially the same as the first count, the difference being that the cause of action arose upon another rate that was due.

*Hindmarsh* in support of the declaration.—It appears that the point relied upon by the defts. is, that the count should have alleged that the defts. acted maliciously. It is submitted on behalf of the plts. that that is unnecessary, inasmuch as the declaration sufficiently shows that the defts. acted without jurisdiction. The jurisdiction to enforce the payment of church-rates under a certain amount is given to magistrates by the 53 Geo. 3, c. 127, s. 7; and that enactment contains this proviso, "that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereon." The averments in the declaration meet the case provided for in the proviso; and it was the duty therefore of the defts. to have held their hands, as their jurisdiction then ceased. Having, however, assumed to go on, they have rendered themselves liable to an action, and the remaining question is, whether the case falls within the 1st or 2nd sections of the 11 & 12 Vict. c. 44 (an Act to protect justices of the peace from vexatious actions for acts done by them in execution of their office). Sect. 1 enacts, "That every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such

Q. B.]

PEASE AND OTHERS V. CHAYTOR AND ANOTHER.

[Q. B.]

justice with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause, and if at the trial of any such action, upon the general issue being pleaded, the plt. shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defts." The 2nd section enacts, "That for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made, or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before, the passing of this Act, without making any allegation in his declaration that the act complained of was done maliciously and without reasonable and probable cause." The case of *Somerville v. Mirehouse*, 3 L. T. Rep. N.S. 294, will be relied upon for the defts.; but that is distinguishable; that was the case of an erroneous decision by magistrates upon a matter within their general jurisdiction; but this is a proceeding where they had no jurisdiction at all. [COCKBURN, C.J.—Would the magistrates here not have had to decide whether a *bond fide* dispute as to the validity of the rate existed?] The declaration meets that case. It avers that at the hearing there was no evidence that the plts. did not, in fact or in good faith, dispute the validity of the rate, or give notice thereof, yet, &c. &c. The demurrer admits all these averments; and if it was intended to rely on this, that the magistrates found that the rate was not *bond fide* disputed, that is matter of defence which should be pleaded to this declaration: (*Barton v. Bricknell*, 13 Q. B. 393; *Leary v. Patrick*, 15 Q. B. 266. If any point should be taken about the plts. being Quakers, the case of *Backhouse v. The Churchwardens of Bishop Wearmouth*, 9 C. B., N. S., 315, shows that they are entitled to the protection of the proviso in 53 Geo. 3, c. 127, s. 7.

*Heath* for the defts.—It appears, on the face of the warrant, that the plts. were Quakers, and therefore the 7 & 8 Will. 3, c. 34, s. 4, governs the summary proceedings against them before the magistrates; and if so, the magistrates had jurisdiction. [By the Court.—The 53 Geo. 3, c. 127, s. 7, is an Act applicable to all her Majesty's subjects, and therefore to Quakers among others; and not the less so because the 7 & 8 Will. 3, c. 34, s. 4, was especially applicable to them. This was decided in *Backhouse v. The Churchwardens of Bishop Wearmouth*. We are bound by that decision.] The following cases were then cited:—*Toser v. Child*, 7 E. & B. 377; *The Marshalsea* case, 10 Co. Rep. 68; *Garnett v. Ferrand*, 6 B. & C. 611; *Hamond v. Howell*, 1 Mod. 134; *Ackerley v. Parkinson*, 3 M. & S. 411; *Theobald v. Crickmore*, 1 B. & Ald. 227.

*Hindmarch* in reply.

COCKBURN, C. J.—I am of opinion that the declaration is good. The question turns on the true construction of the 53 Geo. 3, c. 127, s. 7, which must be looked at with reference to the facts disclosed in the declaration. We must take it as admitted on the record, that upon the information against the plts. for non-payment of these church-rates coming on to be heard, the plts. *bond fide* disputed the validity of the rate, and their liability to pay it, and gave the necessary notice thereof to the magistrates, and that the magistrates were satisfied that that notice was *bond fide* given, and that there was a *bond fide* dispute as to the validity of the rate, but that they nevertheless proceeded in defiance of these facts to deliberate upon and to determine the case. Now the jurisdiction, as regards magistrates, to act in case of nonpayment of church-rates, is given for the

first time by the 53 Geo. 3, c. 127, and in the same section which gives the jurisdiction (sect. 7), there immediately follows the enactment giving the jurisdiction this proviso, "that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same shall give notice thereof to the justices, the justices shall forbear giving judgment thereupon." The effect of the enactment, coupled with the proviso, is to give jurisdiction to the magistrates to enforce the payment of rates except in cases where the validity of the rate, or liability of the person summoned to pay the same, is disputed. I admit that the question whether the validity of the church-rate is *bond fide* disputed, and whether notice of the intention to dispute it has been properly given to the magistrates, is a question which it is competent to the magistrates to decide at the hearing of the information; but if it is intended to rely on this, that the magistrates decided that there was not a *bond fide* dispute as to the validity of the rate, or that proper notice was not given, that is matter in the nature of a plea to this declaration. In this case the magistrates had these facts before them, and they had no cause to believe that the validity of the rate was not *bond fide* disputed, or that due notice thereof had not been given to them, and therefore there being a valid plea to the jurisdiction of the magistrates, they were ousted of their jurisdiction, and they had but one course to pursue, viz. to forbear from giving judgment upon the case. From that moment the parties were in the same position as if the 53 Geo. 3, c. 127, s. 7, which gave them their jurisdiction in the first instance, had not passed; notwithstanding which they proceeded to give judgment and make an order, and issue their warrant for levying the rate by distress, under which the plts.' goods were seized. Upon these facts, therefore, I am of opinion that the plts. are entitled to our judgment upon this demurrer.

WIGHTMAN, J.—I am of the same opinion. The plts. in the declaration complain that the magistrates, without any jurisdiction so to do, have issued a warrant of distress, under which the plts.' goods have been seized. The question is, whether the magistrates had jurisdiction so to do, or whether this is a case in which there is some irregularity merely in the proceedings, and it is necessary therefore in the declaration to aver that the magistrates acted maliciously and without reasonable and probable cause. It appears to me, upon the facts stated in the declaration, that they issued their warrant without jurisdiction when they found that the validity of the rate was *bond fide* disputed, and notice was given to them that the parties *bond fide* intended to dispute it, and that they ought then to have held their hands and forbore giving judgment in the case. It appears clear upon the declaration that the plts. intended *bond fide* to dispute the validity of the rate, and gave notice of their intention so to do, and that no attempt was made to impugn their good faith; and that the defts., knowing all this, and although they had no jurisdiction in the matter, nevertheless proceeded to give judgment and issue their warrant of distress. I think, therefore, that the declaration may be supported, although it does not allege that the defts. acted maliciously, and without reasonable and probable cause.

BLACKBURN, J.—I am of the same opinion. The jurisdiction is given to the magistrates by the 53 Geo. 3, c. 127, s. 7. It appears quite sufficiently upon the declaration that there really existed a *bond fide* dispute as to the validity of the rate, and that notice thereof was properly given to the magistrates at the hearing. The magistrates should therefore have forbore to give judgment in the case. It might have been that the magistrates erroneously decided that a *bond fide* dispute as to the validity of the rate did not

Q. B.]

REG. v. R. J. ELLINGTON AND H. H. ELLINGTON.

[Q. B.]

exist, and in such a case their proceeding to give judgment would have been wrong, and their judgment void, and their acting in the matter would have brought them within 11 & 12 Vict. c. 44, s. 1. The 11 & 12 Vict. c. 44, ss. 1, 2, has been said on several occasions to be one that it is very difficult to construe. Upon this declaration I agree with my learned brothers that we must construe the language as asserting that the magistrates did not wrongly determine that there was no *bona fide* intention to dispute the validity of the rate, but that knowing that there was a *bona fide* intention to dispute it, they chose to go on and give judgment in the case, and that therefore they have rendered themselves liable, within sect. 2 of 11 & 12 Vict. c. 44, for acting without jurisdiction.

*Judgment for the plts.*

Saturday, Nov. 9.

REG. v. R. J. ELLINGTON AND H. H. ELLINGTON.

*Indictment—Aggravated assault—Previous dismissal by justices and certificate granted—Demurrer.*

*A certificate of justices of the dismissal of an information for a common assault may be pleaded in bar to an indictment founded upon the same assault, though the assault in such indictment is alleged as having caused grievous bodily harm.*

*An information was laid against the defts. before justices for a common assault. Upon the hearing it was dismissed, and the justices granted their certificate of such dismissal pursuant to sect. 27 of the 9 Geo. 4, c. 31. The prosecutor then preferred an indictment against the defts. upon the same facts, and inserted therein three counts: the first for an assault, doing grievous bodily harm; second, for an assault, causing actual bodily harm; and, third, for a common assault. To this indictment the defts. pleaded the former information for the assault, its dismissal, and the certificate of justices; to which pleas the prosecutor demurred:*

*Held, that the certificate granted by the justices was a bar to the indictment.*

This was a demurrer to certain pleas to an indictment.

It appeared that on the 6th Sept. 1860 an information was laid before certain justices acting for the division of Brentford, Middlesex, by Edward Hamilton Finney, against the two defts., for a common assault. Upon the hearing of such information upon the 10th of the same month, the justices dismissed it as not proved, and thereupon they gave the defts. a certificate thereof, pursuant to sect. 27 of 9 Geo. 4, c. 31. Subsequently, on the 23rd of the same month, the prosecutor preferred an indictment at the Middlesex sessions against the two defts., in respect of the same transaction. The indictment, however, contained three counts: first, for assaulting and doing grievous bodily harm; secondly, for assaulting and doing actual bodily harm; thirdly, for a common assault. This indictment the prosecutor afterwards removed into this court by *certiorari*. Each of the defts. pleaded to each count the former hearing and dismissal of the information for the assault, and the granting of the certificate, and that the assaults mentioned in the indictment are one and the same as that adjudicated upon by the said justices, and in respect of which the said certificate was granted. The prosecutor demurred to the pleas to the first and second counts of the indictment. The ground of demurrer was, that the offence stated in the two first counts of the indictment was not the same offence as that stated in the pleas and the certificates.

By sect. 28 of the 9 Geo. 4, c. 31, it is enacted that "if any person against whom any such complaint shall have been preferred for any common assault or battery shall have obtained such certificate as afore-

said, . . . in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

*Kibton* (Collins with him) now appeared in support of the demurrer, and contended that a certificate granted upon a dismissal of an information for a common assault is no bar under the statute to an indictment for an assault inflicting grievous bodily harm: (*Re Thompson*, 9 W. Rep. 203.) [BLACKBURN, J.—The case of *Reg. v. Walker*, 2 Moo. & Rob. 446, is a strong authority against you. There it was held that a plea of *autrefois convict* of an assault before justices, under the 9 Geo. 4, c. 31, is a bar to an indictment for feloniously stabbing in the same transaction.] That was merely the decision of a single judge upon circuit. [BLACKBURN, J.—It was the decision of an eminent judge, Colman, J., and the facts in that case were stronger than those in the present case. COCKBURN, C. J.—The inconvenience of such a prosecution is palpable: a man is punished for a common assault by the magistrates, and yet you say you may afterwards indict upon the same facts for an aggravated assault, so that he would not only be twice tried, but twice punished.] But the judge in such a case would take notice of his first punishment and deal with him accordingly. The summary powers of the justices are confined by the statute to common assaults. [COCKBURN, C. J.—May it not have been the intention of the Legislature to give the justices a discretion to deal with such a case as they might think proper? Suppose the party had been tried upon an indictment for a common assault and acquitted or convicted, and should be afterwards indicted for an aggravated assault; could he be convicted, the facts being the same?] It is not certain that it would be a bar. But an indictment differs from an information, for in an indictment the prosecutor shapes his charge as he likes, but upon an information it is the justices who, in fact, shape the charge, for they deal with it as they like. [COCKBURN, C. J.—The case of *Reg. v. Stanton*, 5 Cox Crim. Cas. 324, is a very strong authority against you. There it was held that a conviction for an assault under the statute, followed by payment of the fine or endurance of the imprisonment, may be pleaded in bar of an indictment for felony in respect of the same assault charging an assault and wounding with intent to murder. There the learned judge felt so strongly upon the point, that although the prior summary conviction was not pleaded, yet, as it came to his knowledge in the course of the trial, he acted upon it and imposed no actual punishment.] That case does not appear to have been argued. Many instances may be suggested in which great injustice would be done by preventing a prosecutor from preferring an indictment for an aggravated assault. The justices may choose to treat such an assault as a merely common assault, impose a nominal fine, or dismiss the charge, and so a great offender might escape.

*Robinson and Poland*, contra, were not called upon. COCKBURN, C. J.—I am of opinion that there must be judgment for the defts. We cannot speculate upon hypothetical cases when we are dealing with a demurrer. Upon the facts as stated it appears that there was an information before justices for a common assault. Upon the hearing of that information it was dismissed by them, and they granted their certificate under the statute. The prosecutor then prefers an indictment in respect of the very same transaction, and the defts. then plead the former information and certificate as a bar. Now the Act of Parliament expressly enacts that when the justices dismiss an information for a common assault they may grant a certificate, which is to be a bar to all further or other proceedings, civil or criminal, for the same cause. Then how was it in this case? Here the magistrates did hear the information, and they dismissed it and gave a certifi-

cate.

case. There is then an indictment preferred, and not only is there a count for a common assault, but in respect of the very same transaction two other counts are added, merely varying the character of the assault. Now upon this very question we have two decided cases, *Reg. v. Walker*, and *Reg. v. Stanton*, in both of which the learned judges held that the former proceeding upon the information before the justices was a bar to an indictment founded upon the same assault. I think those decisions were correct. There may possibly be some inconvenience occasionally arising out of this state of the law, as referred to by Mr. Ribton; but it is a fundamental rule of law that out of the same facts a series of charges shall not be preferred. The words of the statute are express, and this case clearly comes within them.

BLACKBURN, J.—I am of the same opinion. The statute gives the justices a power to decide upon a charge of a common assault, and it authorises them to give a certificate, which is to be a bar to all further proceedings, civil or criminal, for the same cause. Mr. Ribton suggests a possible case—that when a party complains of one thing, the justices may adjudicate upon another; but here the party went before the justices and made a complaint of a common assault. In such a case the statute gives the magistrates three alternatives—they may convict the party, or they may dismiss the complaint, or they may commit for trial. Now it seems to me, that the assault and battery, though stated in the two first counts with aggravation, are the same assault and battery upon which the justices adjudicated. *Reg. v. Walker* is certainly precisely in point. It would be extremely inconvenient if, when the justices have adjudicated, their decision could in fact be reviewed by the sessions upon another charge upon the same facts.

*Judgment for the defendants.*

### V. C. WOOD'S COURT.

Reported by W. H. BENNET, Esq., Barrister-at-Law.

July 16 and 17.

FITZGERALD v. CHAMPNEYS.

*Injunction—Church Building Acts—District parishes—Rights of incumbents to publish banns and celebrate marriages in—Local Act—Construction of, with reference to Public General Act—New Parishes Act 1856.*

*The incumbent of a district parish created such by a private Act of Parliament, will not be allowed to restrain the incumbent of the mother church from publishing banns and celebrating marriages between persons resident in the district-parish, nor from receiving ecclesiastical dues.*

*The provisions of a local Act governing a district-parish remain in force, where they are not specially repealed by the Public Church Building Acts.*

*The general Acts 7 & 8 Vict. c. 37, the 7 & 8 Vict. c. 94, and the 19 & 20 Vict. c. 104 (Lord Blandford's Act), considered in connection with a private local Act, 56 Geo. 3, c. xxxix. for the building, &c., of a district-church.*

This was a bill filed by the incumbent of Camden-down Chapel, describing himself as "the incumbent of the new parish of Camden-town," against the vicar of the parish of St. Pancras, to have it declared that the district described in an order in council of the 26th Dec. 1851 as the district chapelry of Camden-town became on the avoidance of the vicarage of St. Pancras by the last incumbent thereof a new parish; and that the plt., as incumbent of such new parish, was solely entitled to publish banns of matrimony, and to solemnise marriages between persons usually resident in such parish; that the plt., as such incumbent, was entitled to receive for his own use and benefit the fees payable in respect of such marriages; and solely

entitled to collect and receive all Easter offerings and other ecclesiastical dues payable and paid by persons residing within the boundaries of such new parish; for an account and payment to plt. of such, lately received by the vicar of the mother church; and for an injunction to restrain him from publishing such banns of matrimony and solemnising such marriages and receiving the Easter offerings and ecclesiastical dues in future.

The case made by the bill, the facts of which were not disputed, was the following:—

By a local Act of Parliament, passed in 1816 (56 Geo. 3, c. xxxix.) "for the building a new parish church and parochial chapel in the parish of St. Pancras, and for other purposes relating thereto," and which was declared to have the effect of a public Act, certain trustees were enabled to purchase land for the purpose of erecting there a new parish church and a parochial chapel. By the 42nd section it was enacted that such new church, when erected and consecrated, should from thenceforth be called and known by the name, and should, to all intents and purposes, be the parish church of the parish of St. Pancras, and that Divine service, the solemnisation of matrimony, burial of the dead, and all other matters and things whatever which were or of right had been used to be celebrated, solemnised, administered, had, done, or performed in the parish church, should and might from and immediately after the consecration of the said new church be celebrated, solemnised, administered, had, done and performed in such and the like manner, in the said new church, and vaults and catacombs to be built under the same. By the 43rd section the then vicar of St. Pancras was to be the minister of the said new church, and after death or avoidance the person to be nominated and appointed minister was to be entitled to receive the oblations, &c., and other ecclesiastical dues. By 45th section the church was to be called Camden Chapel, and the usual divine service, and the other ecclesiastical duties performed as the vicar of the parish for the time being should think fit to direct and appoint, except only the solemnisation of matrimony and publication of banns of marriage as after mentioned. There were other sections as to the appointment of assistant ministers, &c., and performance of the duties by the ministers.

The trustees, under the powers conferred by this Act, purchased certain lands, and built the church and chapel, which were duly consecrated and called Camden Chapel.

In the year 1851 an order in council, on the representation of the then vicar, dated 26th Dec in that year, was obtained and published in the *Gazette*, in the usual way, an assignment of a district was directed adjoining Camden Chapel, and was to be called a district parish of St. Pancras. This order was duly enrolled and registered, but the representations and order in council were not concurred in by the patron of the said parish of St. Pancras, nor by the trustees for putting the local Act into execution.

The bill then set out the provisions of the 11th, 12th, 14th, 15th and 30th sections of the 19 & 20 Vict. c. 104 (Lord Blandford's Act 1856), being an Act to extend the provisions of the 6 & 7 Vict. c. 37, for making better provision for the spiritual care of populous parishes, and further to provide for the formation and endowment of separate and distinct parishes.

These sections are severally referred to and commented upon in the V. C.'s judgment.

In 1858 the Ecclesiastical Commissioners, acting in pursuance of the New Parishes Act 1856, on the application of the plt., and with consent of the bishop, authorised the publication of banns and solemnisation of marriages, baptisms and churchings in Camden Chapel.

On the 10th July 1860 an avoidance of the incumbency of the parish of St. Pancras took place in conse-

quence of the resignation of the then vicar (Canon Dale), and on the 27th July 1860 the deft. was duly presented, admitted, instituted and inducted to the vicarage under the last-mentioned Act of Parliament; the plt. alleged that the district chapelry of Camden-town became, upon the happening of such avoidance, and was in fact, "the new parish of Camden-town," and that he was entitled to style himself "the incumbent of such new parish," and he submitted that he had the sole right of publishing banns and solemnising marriages within such new parish; that the fees in respect thereof were payable to the plt. and not to the deft.; and that he had also the sole right of receiving the Easter offerings and other ecclesiastical dues within the district of such new parish.

*Willcock, Q.C., J. C. Traill and W. Brandt* for the plt.

*Giffard, Q.C. and N. Lindley*, for the deft. the vicar, contended that the provisions of the *Pancras Local Act*, before referred to, were not affected by the various General Church Building Acts, such provisions not having been expressly repealed by them or either of them; that the district chapelry of Camden-town had never been constituted into a new parish. They also contended that the fees, &c., which the present vicar had received were for work and labour done by him in respect of the performances of the particular ceremonies at which he had assisted.

In addition to the several Acts of Parliament, local and general, before referred to, the following cases were cited: *Vaughan v. The South Metropolitan Cemetery Company*, 1 Joh. & Hem. 257; S. C. 3 L. T. Rep. N. S. 727 (and printed therefrom by the parties); *Jackson v. Courtney*, 8 Ell. & Bl. 8; *The Birkenhead Dock Company v. Laird*, 4 De G. M. & G. 732; *King v. Alston*, 12 Q. B. Rep. 976; *London and Blackwall Railway Company v. Limehouse Board of Works*, 3 K. & J. 123.

The VICE-CHANCELLOR said:—The point in this case, although a very full argument has been had upon it, is really one which is brought within narrow limits. It depends simply, as it appears to me, upon the construction of the General Public Acts of the 2 & 3 Vict., with relation to the condition of populous parishes, as contrasted with the local Acts which have been passed for the parish of St. Pancras with reference to the Camden Chapel, as one of such. Now the local Act was an Act of a very precise character, which recited that there was the old parish church, which was in a condition making it expedient that it should no longer continue to be the parish church, but that a new one should be built. It was expedient that that should be treated as a chapel. There is another chapel, called Kentish-town Chapel, in existence, and there was the one in question contemplated. Taking notice, therefore, of the intention to build a new parish church, and the intention to convert the old one into a chapel of ease, which, together with the Kentish-town and Camden-town chapels, when built, would form three chapels with this one parish church, there is a complete, elaborate, and somewhat minute arrangement, by which the vicar is put in this position—he is to be the incumbent of the parish church, he is to name and present to the licence of the bishop gentlemen who are to officiate in the several chapels, those gentlemen when licensed by the bishop are to be completely under the direction of the vicar, they are not to depend upon him for their stipend (that is provided for in another way), but they are to perform in those chapels such duties as he may assign, except the solemnising of matrimony, which it seems he has not even himself the power of delegating—that was left to the state of things as it might be under the existing law; with that exception he is to direct entirely what is to be done in those churches, they are to be under his control in that respect; in fact they are to be under

his control in every respect, except that there are licensed and irremovable curates, and their salaries are provided for in a special manner by the 47th clause, which directs that for the maintenance and support for the time being respectively of such minister to the present church to be called the parish chapel, and also the minister to the said chapel so to be erected, the said trustees shall, by and out of the fees to be received and the rates directed to be made under and by virtue of this Act, yearly and every year well and truly pay, or cause to be paid, to each of such ministers or curates respectively for the time being a sum of not less than 150*l.*, nor more than 200*l.* per annum, without any deduction or abatement whatsoever. The Act is not very clear, but it is elucidated afterwards by the 1 & 2 Geo. 4, as to the exact mode in which these salaries shall be paid: the expression here is 'out of the fees to be received, and the rates directed to be made;' that seems rather more to apply to the pew-rents than anything else, and a direction is made by the subsequent Act that the pew-rents shall be applied in that manner. It is sufficient to say, as far as this Act is concerned, there is a complete arrangement made, by which the incumbent has to a great extent the control over those who may serve in those several chapels, and several trustees named and appointed in the Act, with provision for their succession, are to be the persons to receive the funds to be collected under that Act, certain rates which have since ceased; they were to collect all the pew-rents and certain fees which are specially mentioned, which rather had more bearing upon the burial fees to be collected for the parochial officers than any special purpose. That being the case, and these special arrangements being made, the 58 Geo. 3 is passed, which constituted that body known as the Church Building Commissioners. Those Church Building Commissioners had by that Act large general powers, making two distinct arrangements: the one was the building of churches; the other was the separation of districts for those churches which they should so build, and those districts they might separate either into district parishes for all purposes, with the consent of the bishop only, without requiring the consent of the patron and incumbent, and which were to be fixed by metes and bounds, and when so separated were to have certain jurisdiction with reference to the district parishes so separated. The 21st section of the Act of Geo. 3 says: "That in any case in which the said commissioners shall be of opinion that it is not expedient to divide any populous parish or extra-parochial place into such complete, separate and distinct parishes as aforesaid, but that it is expedient to divide the same into such ecclesiastical districts as they, with the consent of the bishop, signified under his hand and seal, may deem necessary for the purpose of affording accommodation for the attending divine service according to the rites of the United Church of England and Ireland, to persons residing therein, in the churches and parochial chapels already built, or additional churches or chapels to be built therein, and as may appear to such commissioners to be convenient for the enabling the spiritual person or persons who may serve such churches or chapels to perform all ecclesiastical duties within the district to such respective churches and chapels, and for the due ecclesiastical superintendence of such district, and the preservation and improvement of the religious and moral habits and so on. They are to make the boundary, and then in any case in which the said commissioners shall be of opinion that it is not expedient any such division into such ecclesiastical districts as aforesaid should be made, the commissioners may build, or aid the building, of any addi-

tional chapels in any such parishes or extra-parochial places, to be served by curates to be respectively nominated and appointed by the respective incumbents of the churches of the respective parishes or extra-parochial places and licensed by the bishop of the diocese, such curates to be paid such salaries as shall be assigned by the said commissioners under the provisions of this Act in manner hereinafter directed. That is one of the things they have power to do. That was not the actual case of an ecclesiastical district, but a case where something short of an ecclesiastical district is to be made; they are to have certain powers of causing curates to be named, and the commissioners are the persons to provide them their salaries. Further than that, there are several other consequences which seem to me to arise on looking through the Act, from the circumstance of the district itself being alone formed. Now there is an arrangement with regard to the district chapels. It is further enacted, "that every church and chapel built or acquired under the provisions of this Act, and appropriated to any district or parish, so made under the provisions of this Act, shall be deemed a perpetual curacy and shall be considered in law as a benefice representative, so far only as the licence thereto shall operate in the same manner as institution to any such benefice, and shall render voidable other livings in like manner as institution to any such benefice, and the spiritual person serving the same shall be deemed the incumbent thereof. And all persons shall be subject to all jurisdictions and laws, ecclesiastical or common, and to all provisions, regulations, penalties and forfeitures contained in any Acts of Parliament in force." Then it is further enacted in the 27th section, which is important, "that all Acts of Parliament, laws and customs, relating to publishing banns of marriage, marriages, christenings, churchings and burials, and the registering thereof, to all ecclesiastical fees, oblations or offerings, shall apply to separate and distinct parishes and district parishes when they shall so become complete, separate and distinct parishes under the provisions of this Act after the death, resignation, or other avoidance of the existing incumbents respectively in each parish or extra-parochial place, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls, or serving the same in like manner in every respect as if the same respectively had been anciently separate and distinct parishes and parish churches by law, to all intents and purposes." Then there are certain provisions about how banns shall be published and marriages solemnised; and then there are arrangements also with reference to the fees in case there should be such separation of the parish into a district parish. All this of course is extremely inconsistent with the arrangement which had been made by which the incumbent was to remain having the control over the several ministers of those chapels, directing what they should do, and what they should not do with regard to the ecclesiastical offices in their several chapels. Without stopping to consider a minor question of law created by the defective wording of the 58 Geo. 3, c. 45, and the 59 Geo. 3, assuming, as I would in trying the question *in limine*, that those words had been as large as the 2 & 3 Vict. c. 49, "any augmented church or chapel," the question would arise which was discussed in the case of *The Birkenhead Railway Company v. Laird*, 4 De G. M. & G., how far, where you find a special Act of Parliament creating special rights and enforcing special duties, it could be taken as repealed by a subsequent general Act which makes no reference to it. In that case it is mentioned that certain provisions were made with reference to leases by tenants in tail, which were held not to apply to a special Act of Parliament, by which certain tenants in tail were enabled to grant certain leases; that was held not in any way to affect that special Act.

[MAG. CAS.]

So I add the illustration of the Fines and Recoveries Act lately passed, in which, in the largest words, every tenant in tail is authorised to bar his entail, even including those estates tail in which the reversion is not in the Crown, which former could not be barred. Yet nobody could think of arguing, or could argue successfully, that this provision would affect the entail made by special Acts of Parliament, such as the Marlborough, the Wellington, and the Shrewsbury entail. The reason was simply this: the Legislature having had its attention directed to a special subject, having observed all the circumstances of the case, having provided for all its circumstances, does not intend, by a general enactment, afterwards to derogate from its own act, for it is the act of the Legislature by which this special Act of Parliament is made law; they are not to be supposed to derogate from that which they have carefully supervised and regulated by a general Act of Parliament applicable to all cases making no special mention of their intention to derogate from this Act. It has been argued that it is to be supposed that for all time these persons who might be connected with this particular church, this parish chapel and its neighbourhood, were to be precluded from the advantage intended to be conferred by the general Acts of the 58 & 59 Geo. 3. So far as the general Act will interfere with the special Act, of course not. So far as the two can hold together, as far as the one set of arrangements does not clash with the other set of arrangements, they will have every benefit, and they have had it, for it appears that churches were built by the Church Commissioners in this district, and as far as I am at present advised I see nothing to prevent assignment of districts to churches built by the Church Commissioners, or any church not affected by the special Act. But when you ask me whether they are intended for all time to be excluded from the benefit of general legislation, the simple answer is, not a moment longer than Parliament chose to express its intention. If Parliament thought a special arrangement was injudicious it could in the next or even the same session of Parliament alter the arrangements which they considered injudicious. It cannot be contended that any inference is to be formed from the supposed absurdity of leaving those persons under a special Act, whereas others have all the benefit of the general Act. The simple answer is that Parliament has done so. If it had been thought desirable to sweep into the general provisions of the Act the persons affected by the local Act they would have said so. There is an instance of that in Lord Blandford's Act, in one of the clauses, where it says expressly this, it is the first clause: "It shall be lawful to constitute districts under the provisions of the said Acts, notwithstanding there may be within the limits of any such districts a consecrated church or chapel, any local Act to the contrary notwithstanding." If Parliament meant the 58 & 59 Geo. 3 to apply to a case where they had given special directions, they would say it may be done notwithstanding the special directions given in any local Act. That is the only true and effective mode of dealing with places which Parliament has dealt with by special legislation. Now, no doubt the case would stand in that way, as it seems to me, as if it rested on the local Act of Geo. 3 alone; but when you come to the Acts of 1 & 2 Geo. 4, c. 24, it becomes a stronger case than any of the cases cited on the subsequent matter; because what do you find in the 1 & 2 Geo. 4, but this—that the Acts of the 58 & 59 Geo. 3, having been passed, the commissioners are minded in this very parish of St. Pancras to build certain churches, and they build two churches; but this then occurs to the Legislature, as expressed in the 1 & 2 Geo. 4, that even as regards those new churches the special clause which the Legislature has pointed out is in its mind so preferable as regards the parish of St. Pancras in particular,

3 N

that they say even as regards the new churches built by the commissioners the Legislature preferred that this special course of legislation adopted at St. Pancras shall to this extent be continued: that whereas we had vested the chapel in trustees, and given them certain powers under the local Act, with certain directions as to the vicar, and so on, we will put all churches under their management there about to be built by the commissioners under the trustees in one shape, but subject to this—that, as regards the new churches built by the commissioners, we will have the whole brought under the governance of the trustees, but as regards the churches built by the commissioners, and over which they have power, and which the Legislature intended they should have power over, the regulations of the trustees as to those should be subject to the regulations of the commissioners. As to the others, the local Act is to prevail; and it is re-enacted by the 6th section of the 1 & 2 Geo. 4. By that Act provisions are made of a very remarkable nature as to the pew-rents. The pew-rents of the parish church are to be brought into a common fund—not merely the pew-rents of the chapels, but all of them are to come into one common fund, out of which certain necessary payments are directed to be made; among others, a payment is directed to be made to a lecturer to be appointed by the incumbent in his own parochial church. That is an object of some importance to him in his public duty to have the advantage of, and is an object of importance to the parishioners in respect of the benefit they may derive from it; and those funds are to be so appropriated and in a common form, and the surplus, if there is any, handed over to the other purposes, and with a provision that you shall, out of the pew-rents of each particular church, pay what may be necessary to the minister of that particular church, and subject to that the surplus is to be brought into a hotchpot and applied to general purposes. The whole scheme of that shows that Parliament drew the line of distinction which the law, as I apprehend, in construing Acts of Parliament, has inferred, namely, “We never thought in a general Act of Parliament of dealing with St. Pancras at all; on the contrary, finding an existing or general Act, and that in the parish of St. Pancras to the extent to which we can exercise it, it will be actually advantageous to apply some of the provisions of the local Act, we apply some of the provisions of the local Act to the general Act, and we leave the parish of St. Pancras untouched as to the purposes which before existed, re-enacting it in order to give the full force and sanction of parliamentary reconsideration to the whole scheme.” The next thing we find is the Act of 2 & 3 Vict. c. 49, which is the Act on which this question must no doubt turn. After providing certain arrangements for making it more possible to apply the benefit of Queen Anne's Bounty to churches under the control of the Church Building Commissioners, it says, in large words, “any chapel, where there is any chapel, the district may be formed by the commissioners,” &c., “any law or statute to the contrary notwithstanding.” I have already reasoned on what would have been my view had I found these words in the original Act. I think they apply to 1 & 2 Geo. 4, which intervened between the first local Act and the two first Church Building Acts, and every observation that he (the V.C.) had made upon the construction of general Acts applies more strongly to that statute. He (the V.C.) could not say that the general rule of construing Acts of Parliament should be obviated because some persons, in their anxiety to protect themselves, have inserted a saving clause. Besides, it is strongly indicated by the Legislature itself in the 1 & 2 Geo. 4, that the Legislature conceived the local Act was unaffected by the 58 & 59 Geo. 3; and again, you have a strong indication as late as the 14 & 15 Vict.

c. 97, which was immediately before the order in council which established the districts of Camden-town, that the Legislature took that view which the courts of law in construing these Acts of Parliament have always attributed to them, namely, that they do not interfere with local Acts, unless specially mentioned. In the 21st section of that Act it is enacted “that, wherever, under and by virtue of any local Act now in force, any parish cannot be brought within the provisions of the Church Building Acts touching the formation thereof of a parish or district, and whenever a representation is made to the said commissioners by the patron and incumbent of such parish, &c.,” a definite form is prescribed. I have already said I do not think it necessary to hold that the circumstance of its being beneficial to St. Pancras that it should be brought under the operation of these Acts would induce me to say that therefore I must alter the ordinary construction with regard to the force of a general Act of Parliament, because, for the numerous reasons I have already given, it is so easy for Parliament to alter it whenever it thought fit. Although the parish may be capable of being brought under the Act for a hundred different purposes, if there is any one in which any obstacle remains which prevents the operation, there seems to be a mode definitely pointed out for that purpose. Upon the whole, I think therefore, that the general principle of construction is in this case fortified strongly by the 1 & 2 Geo. 4, and the view the Legislature there takes of it is fortified by the view of the 14 & 15 Vict. c. 97, by the circumstance that in Lord Blandford's Act the very case is dealt with in the manner it ought to be dealt with in the first section; and I must hold that the order in council was *ultra vires*, by which it was attempted with the consent of the bishop alone to assign the district into the hands of the Church Building Commissioners, which power I do not hold them to have. I cannot conclude this case without expressing my satisfaction at the mode in which it has been brought forward, a mode highly creditable to the two gentlemen interested in the case, who obviously have wished only to have their respective rights and positions ascertained. I have done my best to assist them, and the result must be one of two things—I must either dismiss the bill or retain it for twelve months to see if the plt. would be advised to take any legal proceedings, it being a legal right on which the result was dependent. *Bill dismissed generally.*

Solicitors, *Hilliard, Dale and Stretton.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HERTSLIT, Esqrs., Barristers-at-Law.

Saturday, Nov. 9.

WILLIAMS (app.) v. THE CHURCHWARDENS OF LLANGENWEN (resps.)

*Poor-rate—Tithe rentcharge—Deduction of curate's salary.*

*If the rector of a parish cannot, on account of the extent, populousness, &c. of such parish, perform his clerical duties without the assistance of a curate, and therefore engages one, the salary which he pays may be deducted from the gross sum of the rateable tithe rentcharge.*

*The app. was presented by the patron to the rectories of parishes A. and B., which from time immemorial had always been under the spiritual care of one rector, there being no parsonage-house for either parish, but a house appointed by the bishop in his licence for the rector. For all secular parochial matters the parishes, though adjoining each other, were distinct.*

[Q. B.]

REG. v. THE INHABITANTS OF BIRMINGHAM.

[Q. B.]

*In consequence of the bishop of the diocese requiring divine services to be performed twice on Sunday in each parish church, it became necessary for the rector to engage a curate, which he did at a salary of 80*l.* per annum:*

*Held, that this salary was a proper deduction in estimating the rateable value of the rector's tithe rentcharge.*

This was a case stated under the 12 & 13 Vict. c. 45, upon an appeal by the app. against an assessment to the poor-rate of the parish of Llangeinwen, in the county of Anglessea.

It appeared from the facts that in the year 1829 the app. was presented to the parishes of Llangeinwen and Llangaff by the patron, the Earl of Pembroke; that the two parishes adjoin each other, each having a definite boundary line and its own church; that each parish separately maintains its own poor, and has separate churchwardens and overseers, a distinct vestry and distinct church-rate, poor-rate and tithe apportionment; that the two parishes are in rural districts, and include an area of 6079 acres, the population of one parish being 943 and the other 139; that the two churches are about two miles distant; that there is no parsonage-house, but a house appointed by the bishop in his licence, which is two miles from one church and four and a-half miles from the other; that from time immemorial there has been a single rector, who has been presented, admitted, and instituted to and in both parishes, there being no instance of their having been held separate; that from time immemorial down to the time of the appointment of the curate hereinafter mentioned, it has been the uniform custom to have a single performance of divine service only in each of the churches on Sunday; that the rector latterly, in consequence of the wish of the bishop, has held two performances of divine worship in each church; that the curate is licensed by the bishop at a stipend of 80*l.* per annum to perform the office of stipendiary curate in the parish of Llangeinwen; that the rector devotes all his time to the cure of souls, and performs two services in one of the churches on each Sunday.

It appeared he was assessed to the poor-rate of Llangeinwen in respect of the tithe rentcharge, without being allowed any deduction for his curate's salary, which was the ground of his appeal. The question for the opinion of the court was, whether, for the purpose of ascertaining the value of the said tithe rentcharge, the app. is entitled to have the gross sum received by him reduced by the curate's salary?

*W. Williams* appeared for the resps., and argued that, as the two parishes were entirely distinct, the circumstance that they had the same rector was not to be considered, and that as the rector of each could perform the entire duty without the assistance of a curate, the deduction ought not to be allowed: (*Reg. v. Goodchild*, *El. Bl. & El. 1.*)

*Beavan*, for the app., was not called upon.

*COCKBURN, C.J.*—I think that the present case cannot be distinguished from that of *Reg. v. Goodchild*. It seems to be laid down that if a rector cannot perform the usual celebration of divine service without the assistance of a curate, and either because his bishop could compel him to employ a curate, or because from his own sense of the religious obligation incumbent upon him he actually employs one, then in either case the salary which he pays to the curate may be deducted from the gross sum of the rateable tithe rentcharge. It is true that if he employs a curate on account of his own personal absence or infirmity, he cannot make this deduction, but if the extent and population of the parish make it necessary for him to employ a curate he can do so. Now the principle in the *Hackney* case (*Reg. v. Goodchild*) seems to be equally applicable to this case, where, owing to the distance of the two churches, in both of which divine service was neces-

sarily performed contemporaneously, it was impossible for one rector to be present at both. In such a case it was impossible for one person to do the duty at both places, and therefore the salary of the curate is a proper deduction in estimating the rateable value of this tithe rentcharge.

*WIGHTMAN* and *BLACKBURN, JJ.* concurred.

*Judgment for the app.*

Saturday, Nov. 16.

REG. v. THE INHABITANTS OF BIRMINGHAM.

*Poor-law—Renting a tenement—Amount of rent paid—Hearsy evidence—Declaration of deceased tenant.*

*Upon an appeal against an order of removal the resps., in proof of a derivative settlement by renting a tenement, tendered evidence of the amount of rent paid by the ancestor, that he, whilst in the occupation of the said tenement, said to his son that he occupied the same as tenant at a rent of 20*l.* per year:*

*Held, that the evidence was admissible to prove that fact.*

This was a case stated by the sessions for Birmingham upon an appeal against an order of removal, whereby Sarah, the wife of William Day (absent from her), and their four children were ordered to be removed from the parish of Birmingham to the parish of Kingswood, as their place of legal settlement. The court of quarter sessions quashed the said order, subject to the opinion of this court.

The case stated that the resps. proved that John Lockyer Day, deceased, the father of the said William Day, had occupied a tenement from the year 1829 until his death in 1847, in the said parish of Kingswood, the rent for which was settled in account with the landlords, and was found by the court to have been paid by the said John Lockyer Day. To prove the amount of that rent evidence was tendered by the resps., and objected to by the app.'s counsel, that the said John Lockyer Day, whilst in occupation of the said tenement, said to his son Thomas Day, that he (the said John Lockyer Day) occupied the same as tenant at a rent of 20*l.* per year.

If the court should be of opinion that evidence of the declaration of the said John Lockyer Day was admissible for the purpose of proving the amount of the rent and the nature of the occupation, then the order of quarter sessions is to be quashed, and the order of removal confirmed; otherwise the order of quarter sessions is to be confirmed, and the order of removal quashed.

*O'Brien* and *Cockle* now appeared in support of the order of quarter sessions, and contended that the evidence was inadmissible. This was a derivative settlement by the renting of a tenement by the ancestor of the pauper's husband, and although a declaration against a party's interest, as an admission that he is tenant and not the owner of property, is receivable, no such admission is receivable for any other purpose, the declaration of the payment of a certain amount of rent not being a declaration necessarily against his interest, as it may in fact be a declaration in favour of his interest: (*Chambers v. Bernasconi*, 1 Cr. M. & R. 347; *Peacable v. Watson*, 4 Taunt. 16; *Davies v. Pearce*, 2 T. R. 53; *Papendic v. Bridgwater*, 5 El. & Bl. 166; *Doe dem. Baggally v. Jones*, 1 Camp. 367; *Human v. Pettett*, 5 B. & Ald. 223; *Doe dem. Welsh v. Langfield*, 16 M. & W. 514.)

*Spooner* and *M. Smith*, contra, argued that the whole admission as to his holding of the premises was admissible: (Lord Ellenborough's judgment in *Roe dem. Brune v. Rawlings*, 7 East, 290; *Higham v. Ridgway*, 10 East, 109; *Percival v. Nanson*, 7 Ex. 1; *The Sussex Peetage* case, 11 Cl. & Fin. 113; *Cowas*



C. B.]

LUCKETT v. VOLLER. LUCKETT v. GOLLOP. LUCKETT v. GILDER.

[C. B.]

v. *Garment*, 1 Bing. N. C. 918; *Gleason v. Atkin*, 1 Cr. & Mee. 410.)

COCKBURN, C.J.—I am of opinion that this evidence was admissible and ought to have been received. It is well-established that the declaration of a deceased person that he holds premises as tenant is admissible to rebut the presumption of law that he has the ownership in fee. The question here is, whether the declaration of the amount of rent which he pays, made at the same time as his declaration of tenancy, is admissible, or whether the evidence must be confined alone to his declaration as to his tenancy? It has been held again and again that the declaration may be received not only for the purpose of proving a fact adverse to the interest of the party, but also collateral facts. Now that being settled, I cannot see why the same effect should not be given to a declaration as to the pecuniary as to the proprietary interest of a party. I quite admit that, as regards the effect of the evidence, there is a great difference between an oral declaration and a written entry made in the ordinary course of business; but that goes rather to the weight of the evidence than to its admissibility. There are, however, the same legal incidents in an oral as in a written admission, and the same consequences should follow. As soon as it is established that the declaration is receivable, it is receivable not only as a declaration against the interest of the party who makes it, but for all other purposes not in themselves inconsistent.

BLACKBURN, J. concurred.

*Order of sessions quashed.*

#### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs.  
Barristers-at-Law.

#### REGISTRATION APPEALS.

Nov. 11 and 15.

LUCKETT (app.) v. VOLLER (resp.)

LUCKETT (app.) v. GOLLOP (resp.)

LUCKETT (app.) v. GILDER (resp.)

#### *Election law—Practice—Notice of appeal.*

The revising barrister decided a case on the 11th Oct., and it was appealed against. On the 6th Nov., being within the first four days of Michaelmas Term, the app. lodged the case signed by the revising barrister with the master of the court, in compliance with the requirement of sect. 62 of 6 Vict. c. 18, and gave notice of appeal to the resp. The court fixed the 11th Nov. as the first day for hearing registration appeals:

*Held*, that there having been sufficient time between the date of the decision of the revising barrister and the first day fixed by the court for taking appeals, to enable app. to comply with the requirements of the statute, that ten clear days' notice of appeal should be given to the resp., the court would not postpone the day for hearing the appeal, under the proviso to the 64th section, giving the court a discretion to postpone the hearing of an appeal in such case as to the court may seem meet.

*Adey v. Hill*, 4 C. B. 38; 8 L. T. Rep. 189, followed.

*Fawcett* moved herein for an order of the court that the hearing of these appeals should be postponed until the 19th inst., which was one of the four days fixed by the court for taking appeals from the decisions of revising barristers. The 62nd section of the Registration Act, 6 Vict. c. 18, requires that every app. who intends to prosecute his appeal shall, within the first four days of Michaelmas Term next after the decision to which such appeal relates, transmit to the masters of the Court of C. B. the statement in writing so signed by the revising barrister, and shall also therewith give or send a notice, signed by him, stating therein his inten-

tion to prosecute the said appeal, and the app. shall also give or send a notice, signed by him, to the resp. in the said appeal, stating his intention duly to prosecute such appeal in the said court. Sect. 64 enacts that no appeal shall in any case, &c., be heard or entertained by the said court unless notice shall have been given by the app. to the master of the court at the time and in the manner hereinbefore mentioned; and no appeal shall be heard in the said court in any case where the resp. shall not appear, unless the app. shall prove that the notice of his intention to prosecute such appeal was given or sent to the said resp. ten days at least before the day appointed for the hearing of such appeal, provided always that if it shall appear to the said court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the said court to postpone the hearing of the appeal in such case as to the court shall seem meet. It is under the proviso to this section that this application is made. The app. here lodged the case stated by the revising barrister with the Masters, and gave the requisite notice of appeal to the resp. on the 6th Nov., that is to say, within the four first days of term; but inasmuch as the 64th section requires that ten clear days' notice of appeal be given to the resp. before the day appointed for hearing of such appeal, and the court fixed the 11th Nov. to take registration appeals, the requirement could not be complied with. It is contended that the words of the 62nd section, "within the first four days of Michaelmas Term," refer not only to lodging the appeal and giving notice to the master, but also to the sending the notice of appeal to the resp. If this be so, the act of the court in fixing so early a day for taking these appeals precludes the possibility of giving ten clear days' notice; and this being so, the court will exercise the discretion given to it by the proviso to the 64th section, and postpone the hearing of these appeals until the 19th instant, when the ten days' clear notice will be complete: (*Pring v. Escourt*, 4 C. B. 73.) [ERLE, C. J.—There are two or three cases against you; and amongst them is *Adey v. Hill*, 4 C. B. 38. You sent notice to the master, and to the resp. within the first four days of term, complying with what you ought to do under sect. 62.] Yes. The days for taking registration appeals have this year been appointed a week or ten days earlier than usual, and this fact has created the difficulty.

ERLE, C. J.—We are bound to refuse this application, because the case of *Adey v. Hill* contains an elaborate judgment by the Lord Chief Justice against you. We cannot postpone the hearing on the ground urged.

Nov. 15.—*Fawcett* renewed his application in this case, urging as ground therefor, that the revising barristers are required by sect. 32 to hold their courts for the revision of the lists of voters between the 15th Sept. and the last day of October inclusive, and this being so, if the court will not exercise the discretion given it under the proviso to the 64th section, then it might happen that when a revising barrister holds his court on the last day of October, and the court fixes so early a day as the 9th Nov. for hearing appeals, the provisions of the statute as to giving notice of appeal could not possibly be complied with: (*Norton v. The Town Clerk of Salisbury*, 4 C. B. 32.) [ERLE, C. J.—You are aware that this has been decided?] Yes, but the court is prayed to reconsider the point; for, on looking closely at the 62nd section, it will be seen that it is within the first four days of term that the app. must give notice of appeal to the resp. Then again, when, as in the present instance, the court fixes four days at wide intervals, for hearing registration appeals, to what day does the ten days' notice apply—whether to the first, second, third, or fourth day?

[Ex.]

EASTON v. ALCE.

[Ex.]

ERLE, C. J.—In this case I am not at liberty to grant your application. The point has been raised more than once, and has received the deliberate judgment of the court, the decision being that app. must give to the resp. ten clear days' notice that he intends to appeal before the first day fixed by the court for taking registration appeals. This as a general rule. No doubt the proviso to 64th section creates some difficulty, and there may be circumstances which form a reasonable ground for indulgence. Here, however, the revising barrister gave his decision so long back as the 11th Oct., but the attorney, inexperienced perhaps in such matters, does not give the notice required by the statute until the 6th Nov. We cannot, therefore, accede to this application.

WILLIAMS and BYLES, JJ., concurred, adding that *Adey v. Hill*, and the other cases, had been rightly decided, and must be followed. *Order refused.*

### COURT OF EXCHEQUER.

Reported by F. BAILLY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, Nov. 18.

EASTON v. ALCE.

*Rye Harbour Improvement Act, 1 Will. 4, c. 135, s. 2—Appointment of commissioners under—Qualification by rating—Action for penalty for acting without being duly qualified—Meaning of the words "rated to the relief of the poor by one or more rates to the amount of 10l."*

*The Rye Harbour Improvement Act, 1 Will. 4, c. 35, s. 2 (local), provides for the appointment, as commissioners, of "twelve inhabitant householders rated to the relief of the poor of the said parish, by one or more rate or rates, to the amount of 10l. per annum," and by a subsequent section a penalty of 50l. is inflicted on any person acting without being duly qualified. An action having been brought for the penalty against the deft. as an unqualified commissioner, a special case, for the opinion of the Court of Ex. on the construction of the above words of the 2nd section of the Act, was stated by order of the learned judge (Cockburn, C. J.): Held, that a reasonable construction must be put on the words of the Act of Parliament, and that the words in question mean that a person, to be qualified, must be rated to the annual value of 10l., and not to such an amount as would render him liable to pay rates to the amount of 10l. a-year.*

*Per Pollock, C. B.—To rest the qualification, not on the value of the property but, on the accidental payments, a man may have made, would be absurd and inconvenient, and contrary to the numerous Acts which have been passed in reference to qualifications. An Act of Parliament should be clear and beyond all doubt, to warrant the court in inflicting a penalty under it.*

This was a special case stated by order of Cockburn, C. J., for the opinion of the court upon the construction to be put on sect. 2 of 1 Will. 4. c. 135, a local Act, for authorising the appointment of commissioners of the harbour of Rye, in the county of Sussex. The section in question provides for the appointment of certain *ex officio* commissioners, and also for the appointment, as commissioners, of "twelve inhabitant householders resident in the town of Rye, rated to the relief or maintenance of the poor of the said parish, by one or more rate or rates, to the amount of 10l. per annum." By sect. 6 it is enacted that "if any person not being so qualified as thereinbefore is mentioned, shall act as a commissioner, every such person so offending shall, for every such offence, forfeit and pay the sum of 50l. to any person who shall sue for the same, to be recovered, together with the full costs of suit, in any of her Majesty's courts of record in England, by action of debt or on the case," &c.

The deft. was duly nominated and elected at a vestry meeting. He is an inhabitant householder, resident in the town, and is rated on a gross rental of 25l., the rateable value of his house being 15l. The question for the court to decide is, whether the meaning of sect. 2 is, that a commissioner must pay a poor-rate or rates in one year to the amount of 10l., or must he be merely rated to that amount?

*Hance* for the plt., who was suing for the penalty.—The deft. was not duly qualified. What is the construction to be put on "rated to the amount," &c., and "by one or more rate or rates?" It is contended a person is not qualified unless he be rated on such an amount as would render him liable to pay rates to the amount of 10l. a-year. [WILDE, B.—The assessment is one thing, the rate is another. In some parishes the assessment is much higher than in others; you contend that he must be rated on such an assessment as would amount, when paid, to 10l.?] Yes. [POLLOCK, C. B.—Then, if there were no poor to be relieved and no rate made in any year, every commissioner would be disqualified; and again, in a year of great distress the rates might be raised to 20s. in the pound; and so every one who paid the rate would be qualified.] Such is, if it is submitted, the construction of the Act; the words "by one or more rate or rates" must have been introduced for some purpose; again, the words are not "rated at," but "rated to" the amount.

*Lush, Q. C.* for the deft.—The word rate means assessment, and the words "one or more rate or rates" may be read as "one or more ratings;" that is a clear and sensible interpretation and consistent with the ordinary course and practice in such matters; and a sufficient answer to plt.'s claim. [POLLOCK, C. B.—A man may be rated on his dwelling-house; he may be rated also on a counting-house, and on various other tenements, and that would be "one or more rate or rates."] If it be not, as is contended on the deft.'s part, no man could be sure whether, on his election as commissioner, he were or not liable to this penalty. [WILDE, B.—If the language of the Act is used correctly and strictly, you are wrong; but if in a general and popular sense, e. g. rate for assessment, you are right.] Look at the policy of the Act. (He was here stopped by the court.)

POLLOCK, C. B.—To rest the qualification not on the value of the property, but on the accidental payments a man may have made, would be absurd and inconvenient, and if Mr. Hance's construction is right, this Act would stand alone amongst the numberless Acts of Parliament which have been passed in reference to qualifications. But in order to warrant us in inflicting this penalty, the Act of Parliament should be clear and beyond all doubt. We do not think it is so; and no matter what it means, provided it does not mean enough for that purpose. Our judgment will therefore be for the deft.

BRAMWELL, B.—I am of the same opinion. Leave out the words "one or more" for a moment, then it stands that a person to be qualified must be "rated to the amount of 10l. per annum." What is the meaning of "per annum?" Yearly. It cannot mean in the year, but has reference to the character of the holding, as of a house. It means he must be rated to an annual value of 10l.

CHANNELL, B. concurred.

WILDE, B.—A reasonable construction must be put on the words of the Act of Parliament. An exact and strict construction of them would probably be in favour of the plt. A reasonable construction is in favour of the deft.

*Judgment for deft.*

Attorneys for plt., Messrs. J. and S. Langham, 10, Bartlett's-buildings, Holborn.

Attorneys for deft. Messrs. Kingsford and Dorman, 23, Essex-street, Strand.

**CROWN CASES RESERVED.**

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 9.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., MARTIN and CHANNELL, BB.)

REG. v. WILLIAM WEBSTER.

*Friendly society—Larceny by member—Ownership of property—Trustees—Bailees.*

*II. a member of a friendly society, was in possession of a shop where goods were sold for the benefit of the society. Each member partook of the profit, and was subject to the loss arising from the shop. H. had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of the management. The prisoner, also a member of the society, assisted in the shop without salary, and was indicted for stealing some marked money which H. had placed in the till. The money was laid in the indictment as belonging to H.:*

*Held, that the money was properly laid in the indictment as belonging to H., and that the prisoner, although a member, could be convicted of larceny.*

Case reserved for the opinion of this court by the chairman of the West Riding Sessions, held at Sheffield.

William Webster was indicted at the West Riding of Yorkshire spring intermediate sessions, held at Sheffield, on the 22nd May 1861, for stealing, on the 11th of May, at Ecclesfield, three sovereigns and one half sovereign, the property of Samuel Fox and others.

It was proved on the trial that James Holt was in possession of a shop, where goods were sold for the benefit of a society called the "Stockbridge Band of Hope Co-operative Industrial Society."

Each member of the society partook of the profit and was subject to the loss arising from the shop. Holt (being himself a member) had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management. The prisoner, also a member of the society, assisted in the shop without salary. On the occasion of the alleged larceny, Holt had marked some sovereigns and half-sovereigns, and placed them in the till. The prisoner was suspected of taking some of them, and when charged with this, he admitted that he had taken the coins which formed the subject of this charge, and produced them from his pocket.

The prosecution failing to prove that this was a friendly society duly enrolled, elected to amend the indictment by substituting the name of James Holt for that of Samuel Fox and others, and the same was amended accordingly.

The counsel for the prisoner put in a copy of the rules of the society, with the name of John Tidd Pratt printed at the end thereof, and proved that this copy had been examined with the original copy, signed and sealed by the registrar of friendly societies, but which was not produced. He also put in a conveyance of the shop and premises to Samuel Fox and others as trustees.

No other evidence of the trusteeship was given.

The counsel for the prosecution objected that in order to prove the society to be a friendly society under the 18 & 19 Vict. c. 63 it was necessary to produce the original copy signed by the registrar, or to account for its absence sufficiently to justify the admission of secondary evidence.

I overruled this objection, and admitted this evidence as proof that the society was duly enrolled.

It was contended for the prisoner that Fox and others were the trustees; that this was a friendly society, and that the property should be laid in Fox and others, and not in Holt, and that the prisoner could not therefore be convicted on the indictment as amended; that as to any special property Holt might

have in the money taken, he was joint owner of it with the prisoner, and as partner with him was equally in possession of it, and could not therefore be convicted.

The Court overruled these last-mentioned objections, and the prisoner was convicted and sentenced to be imprisoned in the house of correction at Wakefield for nine calendar months, subject to the opinion of the Court of Criminal Appeal whether under the circumstances the conviction was right.

The prisoner was admitted to bail to await the decision of the Court of Criminal Appeal.

A copy of the rules of the society accompanies this case, and is to be taken as incorporated therewith.

WILSON OVEREND, Chairman.

*T. Campbell Foster* for the prisoner.—It is contended that the indictment as amended was not proved, and that the property ought to have been laid as in Fox and others, the trustees of the friendly society. The prosecutor having failed to prove that the property was rightly laid in Fox and others, and the court having amended the indictment by substituting Holt's name instead of Fox and others, the prisoner produced the proper evidence to show that Fox and others were the trustees of the society, and then objected to the indictment as amended, on the ground that by the 18 & 19 Vict. c. 63, s. 18, the property of the friendly society was vested in the trustees. Sect. 19 empowers the trustees to bring or defend, or cause to be brought or defended, any action, suit, or prosecution in any court of law or equity, touching or concerning the property, right or claim to property of the society, and such trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded in their proper names as trustees of such society without other description.

MARTIN, B.—What evidence was there to show that Holt was not in possession of these sovereigns as of his own lawful property?

WIGHTMAN, J.—Again, he was a partner, and had the personal possession of these moneys.

*T. Campbell Foster*.—It is submitted that the only possession Holt had, was that of a servant to the friendly society. If he had taken and appropriated any of the moneys received by him, he might have been indicted for embezzlement, and therefore he was a servant, and his possession was that of the society his masters.

WIGHTMAN, J.—He was not a servant; he was an owner, and had the sovereigns in his personal possession.

MARTIN, B.—He had the sole management of the shop, and was answerable for the safety of all the property and money coming to his possession in the course of such management.

*T. Campbell Foster*.—Then the prisoner being also a member of the society, was a partner, and could not be convicted of stealing his own property.

WILLIAMS, J.—There is the well-known case of a man, when the hundred was liable, being convicted of stealing his own money from his own servant: (*Foster*, 123, 124.)

WIGHTMAN, J.—These sovereigns were not part of the goods in the shop, but money for which Holt had to account. He cannot be treated as a servant, because it would then follow that he was one of the persons appointing himself.

MARTIN, B.—Holt had got the sovereigns in his own pocket, as it were, and suppose that while walking in the street some one had picked his pocket of them, could not the thief have been indicted for stealing his money?

*T. Campbell Foster*.—The prisoner was assisting in the shop as a partner without salary.

WIGHTMAN, J.—No. Holt had the sole management of the shop.

WILLIAMS, J.—How does this case differ from *Reg. v. Bramley*, R. & R. 478, where a member of a benefit

C. CAS. R.]

REG. v. THOMAS MOSELEY—REG. v. ANN CHARLES.

[C. CAS. R.]

society entered the room of a person with whom a box containing the funds of the society was deposited, and took and carried it away, and it was held to be larceny, and the property to be well laid in the bailee?

**POLLOCK, C. B.**—No doubt a man who has pawned his watch with a pawnbroker may be indicted for stealing it from the pawnbroker. The present case finds that Holt was in possession of the shop, and had the sole management, and was answerable for the safety of all the property and money coming to his possession in the course of such management, and therefore he may, *quoad hoc*, be treated as the owner of everything in it.

By the COURT, ————— Conviction affirmed.

Saturday, Nov. 16.

(Before **POLLOCK, C.B., WIGHTMAN AND WILLIAMS, JJ., CHANNELL, B. and KEATING, J.**)

REG. v. THOMAS MOSELEY.

*False pretences—Evidence—Person from whom property obtained.*

*The indictment charged the prisoner with obtaining the sum of 5s. 6d., the moneys of G. B., by false pretences from G. B. It was proved that the prisoner falsely pretending to be an agent for a loan society, and that he could procure a loan from it for G. B., claimed 5s. 6d. for his charge, G. B. sent him to his wife for it, and she gave the prisoner 5s. 6d. of her husband's money:*

*Held, that the evidence supported the allegation in the indictment that the prisoner obtained the money from G. B.*

Case reserved for the opinion of this court by the chairman of the quarter sessions for the county of Chester.

The prisoner was tried and convicted at the last July quarter sessions for the county of Chester on a charge for obtaining money by false pretences.

The indictment charged that the prisoner Thomas Moseley unlawfully and knowingly did falsely pretend to George Birtles that he, the said Thomas Moseley, was an agent for a loan society in Manchester, and would get the sum of 10*l.* (meaning the loan of 10*l.*) for the said George Birtles, but he, the said George Birtles, must pay him, the said Thomas Moseley, the sum of 5s. 6d., by means of which said false pretences the said Thomas Moseley then unlawfully did obtain from the said George Birtles certain money, to wit, the sum of 5s. 6d. of the moneys, goods and chattels of the said George Birtles with intent thereby then to defraud.

It appeared from the evidence that the prosecutor wanted to borrow 10*l.* to purchase the discharge of his son, who was in the army. The prisoner came to him and said he could get 10*l.* for him, and that he was an agent of a loan society in Manchester. Prisoner said that the charge would be 5s. 6d., and prosecutor told him to go to his wife for it. The prisoner went to prosecutor's wife and said he came for 5s. 6d., as the man from the loan office was waiting for the money. The wife gave the prisoner 5s. 6d. of her husband's money. Evidence was given to negative prisoner being an agent to any loan society in Manchester. The prisoner did not get the loan for prosecutor.

It was objected by the prisoner's counsel that the indictment was not supported by the evidence, for that the prisoner did not obtain the 5s. 6d. from the prosecutor as laid in the indictment, but from the prosecutor's wife.

I reserved this objection for the decision of this court.

The jury found the prisoner guilty, and thereupon I postponed the sentence, but the prisoner being unable to find the bail required, he was committed to prison.

The question which I respectfully submit for the decision of the court therefore is, whether the indictment is supported by the evidence.

**LEE P. TOWNSEND,**

Chairman Quarter Sessions, County of Chester.  
20th Aug. 1861.

No counsel appeared to argue on either side.

By the COURT, ————— Conviction affirmed.

REG. v. ANN CHARLES.

*Disorderly house—25 Geo. 2, c. 36, s. 5—Prosecuting keeper of—Jurisdiction of borough sessions.*

*The 25 Geo. 2, c. 36, s. 5, directs the parish constable, on receiving due notice from two inhabitants, of any person keeping a bawdy-house or other disorderly house, and upon their making oath before a justice as to the truth of the notice, and undertaking to give material evidence against such person, to enter into a recognisance to prosecute with effect such person at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county: Held, that a borough sessions had jurisdiction under this enactment.*

Case stated by the recorder of Grantham for the opinion of the judges of the Court of Criminal Appeal.

Ann Charles was indicted at the quarter sessions for this borough, held on the 9th July last, for keeping a disorderly house.

The prosecution had been instituted under sect. 5 of 25 Geo. 2, c. 36, which enacts that "if any two inhabitants of any parish or place, paying scot, &c., therein, do give notice in writing to any constable (or other peace-officer of the like nature, where there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house in such parish or place, the constable or such officer as aforesaid so receiving such notice shall forthwith go with such inhabitants to one of her Majesty's justices of the peace of the county, city, riding, division, or liberty, in which such parish or place does lie, and shall (upon such inhabitants making oath that they do believe the contents of such notice to be true, and entering into recognisances, &c., to give or produce material evidence against such person for such offence) enter into a recognisance in the penal sum of 30*l.* to prosecute with effect such person at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie, as to the said justices shall seem meet."

These provisions of the Act of Parliament had been duly complied with.

On the deft. being called upon to plead, it was objected, on her behalf, to the jurisdiction of the court, that the words "at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie," meant only "at the quarter sessions or assizes for the county," and that they must be held to exclude the jurisdiction of the borough quarter sessions.

The recorder overruled the objection.

The deft. thereupon pleaded "Not guilty."

The jury found the deft. guilty.

The deft. remains in gaol for want of bail.

Should the judges be of opinion that the clause above cited does by implication or otherwise take away the jurisdiction of the borough sessions to try the offence in question, the judgment will be arrested and the prisoner discharged. Should the court be of opinion that the recorder was right in overruling the objection, then sentence will be passed at the next quarter sessions for the borough.

**W. H. ROBERTS,**

Recorder of the borough of Grantham.

No counsel appeared to argue on either side.

By the COURT, ————— Conviction affirmed.

[IRELAND.]

HAMILL v. HENRY.

[IRELAND.]

## Ireland.

## COURT OF COMMON BENCH.

Reported by W. S. B. KAYE and WALTER BOYD, Esqrs.,  
Barristers-at-Law.

Monday, Jan. 21.

(Before the FULL COURT.)

HAMILL v. HENRY.

*The Corrupt Practices Prevention Act 1854, s. 24—  
Qui tam action—Security for costs.**The court will not, in an action brought to recover a penalty under the provisions of the Corrupt Practices Prevention Act 1854, compel the plt. to give security for costs because he is a pauper.*

This was a motion to have further proceedings stayed until the plt. should give security for costs. The action was brought to recover damages under the provisions of the Corrupt Practices Prevention Act 1854. The summons and plaint contained two counts. The first alleged that after the passing of the said Act, and whilst the same was in force, an election for a member to serve in Parliament for the borough of Newry was duly held at Newry in the month of May 1859, and the plt., who was then an elector for said borough, voted for F. M., a candidate at said election, and one P. Q. was also then a candidate, and was afterwards at said election duly returned as a member to serve in Parliament, and after said election, to wit in the month of April 1860, the deft. practised intimidation upon the plt. on account of the plt. having voted at said election, contrary to the statute, &c. The second count differed from the first by alleging that the deft. threatened the infliction of injuries upon the plt. on account of his having voted at said election, &c. The affidavit of the deft. filed in support of the motion stated, that he had a good defence on the merits, and had not the slightest doubt that he would get a verdict in the action; that neither directly nor indirectly had he practised intimidation, nor threatened the infliction of any injury, on account of the plt. having voted at the election; that the plt., who was a labourer, was a poor man, and not able to pay the costs of the action; that he believed the action was really brought by persons who had taken an active part in the election, and the plt. was merely a nominal party, and under the circumstances, injustice would be done unless security for costs were given. The plt. made an affidavit to oppose the motion, in which he stated that it was untrue that the action was brought at the instigation of any other person, or that he was merely a nominal party; that he had a small shop, and was reduced in his circumstances, principally by the conduct of the deft.; that he had been an elector of the borough for over thirty years, and at the last election voted for F. M.; that the deft. was the brother-in-law of P. Q.; that the plt. was tenant of two denominations of land within the borough, containing about four acres, under the trustees of the Kilmorney estates, whose agent the deft. was; that previous to the election he was canvassed by the deft. for the said P. Q.; that he refused to give any promise to vote, whereupon deft. said he had twelve men on his list, and that he knew what to do with them after the election, and that such conversation occurred a few days before the election; that the election being in May 1859, on the 24th April 1860 he was served with a notice to quit; that in Nov. 1860 possession was demanded, and two ejectments served; that he had been a tenant from 1833, and having paid his rent up to 1860, he instructed his attorney to get the address of the trustees of the estate, they being resident abroad, and leaving the management of the property to the deft.; that the practice of the estate was to let a half-year's rent lie with the tenants; that the ejectment was heard in December last, when the deft.

was examined before the assistant-barrister, and was asked where the trustees resided, but refused to tell; that he believed that it was in consequence of his having voted for F. M. that notice to quit was served; that the deft. had driven many of the tenants from the estate in consequence of their political opinions; that the action was brought on his own account; and he believed, from the circumstance of the deft. having refused to give the residence of the trustees of the estate, that the ejectments were brought by the deft. upon his own authority alone; and that the present action was brought for the purpose of recovering the penalty given by the Act, and in other. The plt.'s attorney also made an affidavit, in which he stated that he had been retained by the plt. alone, and that no other person was responsible to him for the costs of the action. The deft., by affidavit in reply, denied that any such conversation as that relied upon by the plt. had taken place, and deposed that he did not know that the plt. had voted at the election until the writ was issued in the present action; he also denied several other statements contained in the affidavit of the plt.

*Macdonagh, Q.C. and W. B. Kaye* were in support of the motion, and relied on the 24th section of the 17 & 18 Vict. c. 102. The 10th and 13th sections were also referred to, and the following cases:—*Tenant v. Brown and others*, 5 B. & C. 208; *Rice v. Dublin and Wicklow Railway Company*, 8 Ir. C. L. Rep. 155; *M'Leister v. Quinn*, 10 Ir. C. L. Rep. 358.

*Heron, Q.C.*, contra, was not called on.

*MONAHAN, C.J.*—His Lordship having referred to the pleadings and affidavits which had been filed, said, that the judgment which that court had pronounced in the case of *M'Leister v. Quinn*, was relied upon in support of the present motion. The distinguishing feature in that case, he added, did not exist in the present. There it was a conceded fact that the action was not *bona fide* the action of the plt., that it was not brought in the hope or for the purpose of recovering a single sixpence in damages, but with the view of obtaining information for the advantage of third persons, and that the plt. was only a nominal party put forward by others. All these facts were uncontradicted, neither the plt. nor his attorney having made any affidavit. The affidavit of the deft. in this case is substantially an affidavit of merits, the facts of which are controverted, and the court has not now either the means or the inclination to inquire into their truth. The plt., who brings this action at his own risk, is a pauper, and on that circumstance the present application is founded. We cannot decide this case upon that ground. We think this Act of Parliament, "The Corrupt Practices Prevention Act," should receive a liberal construction, and that it was not the intention of the Legislature that the sections referred to in support of the motion should be applied to a case like the present, in which the only fact relied on is the poverty of the plt.

*CHRISTIAN, J.*—Although, in the case of *M'Leister v. Quinn*, I laid more stress upon the 24th section of the statute than the other members of the court. I did not mean to say that under that enactment any more than under the common law, we would be authorised to compel a real plt. to give security for costs, merely because he was a pauper. What I said then, had reference, as will be seen by the report, to the particular facts of that case. These facts were admitted to be, that the person whose name was used as plt. knew nothing of the case; that the real object of the action was to fish for evidence, to be used in another place; and that the particular plt. was a pauper, and was selected for that reason. Under circumstances such as those, I considered that the express enactment of the statute relieved the case from all difficulty, and enabled the court to deal with it disembarassed of the difficulties and contradictions

[BAIL.]

REG. v. THE RECORDER OF LIVERPOOL.

[BAIL.]

which are presented by the cases which have arisen under the common law jurisdiction. It would be superfluous to dwell upon the total absence of resemblance between the facts of that case and the present.

BALL and KEOGH, JJ. concurred.

*Motion refused with costs.*

### BAIL COURT.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Monday, Nov. 25.

(Before CROMPTON, J.)

#### REG. v. THE RECORDER OF LIVERPOOL.

*Appeal—Notice of—Resps. having a community of interest—Service upon one only—Recognition—Mandamus.*

*A. B. was adjudged, by justices acting under the Mersey Dock Acts Consolidation Act 1848, s. 95, to pay 50*l.* to William Boylan, for and on behalf of the owners of a certain vessel, for an injury caused to such vessel by the said A. B. The said A. B. thereupon appealed, and gave notice of appeal to all the part owners of the said vessel at different times between the 23rd Sept. and the 5th Oct. On the 25th Sept. he entered into the recognisance as required by the Act. At the hearing the appeal was dismissed because the recognisance was not entered into within three days after all the notices had been served. By sect. 335 of the foregoing Act, a power of appeal is given, such app. first giving ten days' notice in writing of his intention to bring such appeal, and of the cause thereof, to the person who is intended to be or may be affected by such appeal, and within three days after such notice given entering into a recognisance to try such appeal, &c.:*

*Held, that service on one of the joint owners was good service for all, and that the recognisance therefore was properly entered into.*

This was a rule calling upon the Recorder of Liverpool to show cause why a *mandamus* should not issue commanding him to enter continuances and hear the appeal of William Jevons against a summary conviction of justices.

It appeared that on the 30th July last a complaint was heard before certain justices of Liverpool, at the instance of William Boylan, the master of a schooner, *Lord Byron*, for and on behalf of the owners thereof, against William Jevons, the person having the charge and management of a steam-vessel, *Cognac*, for negligently and carelessly causing certain damage to be done to the said *Lord Byron* to the amount of 50*l.*, and upon such hearing the said William Jevons was ordered to pay the said William Boylan, for and on behalf of the owners of the said vessel, the *Lord Byron*, the sum of 50*l.*, the amount of the damage of which complaint was made. Notice of appeal was then given, and on the coming on of the same for trial at the Liverpool quarter sessions, the app. was required to prove his notice and the due entering into his recognisance. He thereupon proved that notice of appeal was served upon William Humber and William Hill, two of the registered owners of the *Lord Byron*, on the 24th Sept. last; also upon John Preston, another registered owner, upon the 25th Sept.; also upon several other registered owners on the 26th Sept.; upon the representative of a deceased registered owner upon the 3rd Oct.; and upon one other registered owner upon the 5th Oct. It was also proved that the recognisance was duly entered into on the 25th Sept. The affidavits were conflicting as to when notice of appeal was given to William Boylan, there being no evidence as to the actual day of service; but it appeared from the affidavit of the attorney for the said William Boylan that subsequently to the entering into the recognisance by

the app. he accepted service of the notice of the appeal on behalf of the said William Boylan. Each notice was directed to all the resps.

Upon the hearing it was objected on the part of the resps. that the notice or notices of appeal were not sufficient, and that the recognisance did not appear to have been entered into within the time required by the statute. The Recorder being of opinion that the recognisance was not entered into in proper time, refused to hear the appeal.

By the Mersey Docks and Harbour Act, 21 & 22 Vict. (local), sect. 95, it is enacted that if the master of any vessel shall wilfully, negligently, or carelessly do or cause to be done, any damage to any vessel in any dock, or on the water of the river Mersey or elsewhere, within the port of Liverpool, the amount of such damage, where the claim shall not exceed the sum of 50*l.*, may be ascertained, sued for and recovered from the master or owner of such first-mentioned vessel in a summary way before any justice in the same manner as any penalty is made recoverable. By sect. 335 it is enacted that "if any person shall think himself aggrieved by the order or judgment of any justice under the provisions of this Act, such person may, within four months next after the cause of complaint shall have arisen, appeal to the general quarter sessions for the county or place in which the cause of appeal shall have arisen, such app. first giving ten days' notice in writing of his intention to bring such appeal, and of the cause thereof, to the person who is intended to be or may be affected by such appeal, and within three days after such notice given, entering into a recognisance before some justices with two sufficient sureties in the penalty of 5*l.* conditioned to try such appeal and abide the order of, and to pay such costs as shall be awarded by, the justices at such quarter sessions upon the hearing of such appeal," &c.

Lushington now showed cause and contended that under the appeal clause the recognisance ought to have been entered into within three days after the giving of the last notice of appeal; that, as the recognisance was, in fact, entered into on the 25th Sept., and some of the notices of appeal were not served until October, there was no recognisance within the meaning of the section, and especially as there is no time specified when the notice was served upon William Boylan, the master of the schooner, it could not be taken that there was any recognisance as to that notice, even supposing it should be held that service of notice of appeal upon him was good as to all the other resps. [CROMPTON, J.—The recorder decided that the recognisance must be entered into after all the notices of appeal have been served.] One notice was not sufficient, as there were many owners of the vessel, who were all interested in the appeal; there would have been no difficulty in the app. entering into several recognisances.

Aspinall and L. Temple, contra, were not called upon.

CROMPTON, J.—I think that service upon one part owner was legal service upon all. It is analogous to a service of a declaration in ejectment upon one of two joint tenants. It is certainly an objection not to be favoured. The question here is, really, whether service upon one joint owner was not a good service upon the whole? If it was, then the recognisance was well entered into after the first notice was served. If such a service is not good the greatest possible inconvenience may arise, for some of the part owners may be abroad. Upon Mr. Lushington's construction the right of appeal would in many cases be useless. As regards overersers, it is quite clear that a service upon one is a service upon all, and I really can't see that you need serve every one who has a community of interest. All the analogies are against you. I must suppose the Legislature meant to give a practical appeal, and they may very well have intended in this case that a service

upon one should be a service upon the whole. I should be very sorry to be obliged to put any other construction upon the statute. The appeal must go down again to be heard.

*Rule absolute.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Saturday, Nov. 16.*

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., CHANNELL, B. and KEATING, J.)

REG. V. HENRY WILKINS.

*Administering a noxious drug—Cantharides—Intent. The prisoner, unknown to the prosecutrix, put into her tea cantharides, with the intent, as found by the jury, to excite her sexual passion and desire, in order that he might have connection with her. She drank the tea, and suffered much pain and was very ill in consequence:*

*Held, that the prisoner might properly be convicted of a misdemeanor under the 23 Vict. c. 8, s. 2, which enacts that "whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor."*

Case reserved by Martin, B., at the Liverpool summer assizes 1861, for the opinion of this Court.

The indictment was tried before me at the last Liverpool assizes.

The prisoner lodged with the prosecutrix, and, unknown to her, put into a cup of tea which she was about to drink, a quantity of cantharides; she drank the contents of the cup and suffered much pain and was very ill in consequence.

Cantharides taken internally in large quantities is poisonous; but it is administered by medical men as a stimulant to the kidneys and bladder. It is also administered and taken to procure abortion and to excite the sexual passion and desire.

The jury found that the prisoner administered the cantharides to and caused it to be taken by the prosecutrix, with the intent to excite her sexual passion and desire, in order that he might obtain connection with her.

I postponed the judgment and offered to let the prisoner at liberty on bail, but I believe none was obtained, and that the prisoner is in custody.

I request the opinion of the Court of Criminal Appeal, whether the intent above stated was an intent to injure, or to aggrieve, or to annoy, within the meaning of the statute 23 Vict. c. 8.

SAMUEL MARTIN.

The 23 Vict. c. 8 (an Act to amend the law relating to the unlawful administering of poison), s. 2, enacts, that "whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be sentenced to imprisonment for any period not exceeding three years, with or without hard labour, at the discretion of the court, and the costs and the expenses of the prosecution of any such misdemeanor may be allowed by the court as in cases of felony.

No counsel appeared to argue on either side.

By the COURT: — Conviction affirmed.

*Thursday, Nov. 21.*

REG. V. WM. PROUD.

*Embezzlement—Secretary of a friendly society—*

*Felonious intent—Evidence.*

*Upon the trial of an indictment charging the prisoner*

*with embezzling three distinct sums of money, it appeared that on investigation of the books of a friendly society, kept by the secretary (the prisoner), it was discovered that he had not entered in the books subscriptions received by him in small sums of 1s., 2s. and 3s. at a time, amounting to more than 100l. The prisoner, on being called upon for an explanation, admitted that he had received the money, and was willing to repay the amount, and said that the law could not touch him. The books of the society kept by the prisoner were tendered generally in evidence on the part of the prosecution, whereupon it was objected on behalf of the prisoner, that the evidence should have been confined to the three particular entries referring to the three charges in the indictment. It was further contended for the prisoner that it was a breach of trust only, and that the prisoner on these facts could not be convicted of embezzlement. The objections were overruled, and the jury found the prisoner guilty:*

*Held, that upon these facts the jury might properly convict.*

Case reserved for the opinion of this Court by the chairman at a court of quarter sessions, held at Hexham.

On the 3rd July 1861 William Proud was charged, as appears by the indictment, with embezzlement, of which indictment the following is a copy:—

"Northumberland to wit.—The jurors for our Lady the Queen, upon their oath present, that William Proud, on the eighteenth day of August, in the year of our Lord one thousand eight hundred and sixty, being then employed as clerk and servant to William Civil, John Armstrong and Francis Armstrong, did by virtue of his said employment then, and whilst he was so employed as aforesaid, receive and take into his possession certain money to a large amount, to wit, to the amount of ninepence, for and in the name and on the account of the said William Civil, John Armstrong and Francis Armstrong, his masters, and the said money then fraudulently and feloniously did embezzle, and so the jurors aforesaid upon their oath aforesaid, do say that the said William Proud, in manner and form aforesaid, the said money, the property of the said William Civil, John Armstrong and Francis Armstrong, his masters, from the said William Civil, John Armstrong and Francis Armstrong, did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

"Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Proud afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the 1st day of September in the year aforesaid, being then still employed as such clerk aforesaid by the said William Civil, John Armstrong and Francis Armstrong, did by virtue of such last-mentioned employment then, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ninepence, for and in the name and on account of his said last-mentioned masters, and the said last-mentioned money then and within the said six calendar months aforesaid fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say that the said William Proud, in manner and form aforesaid, the said last-mentioned money, the property of his said masters, from the said William Civil, John Armstrong and Francis Armstrong feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

C. CAS. R.]

REG. v. JANIE ROBSON.

[C. CAS. R.]

"Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Proud afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the 1st day of September in the year aforesaid, being then still employed as such servant as aforesaid to the said William Civil, John Armstrong, and Francis Armstrong, did by virtue of such last-mentioned employment then, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of ninepence, for and in the name and on account of the said William Civil, John Armstrong and Francis Armstrong, and the said last-mentioned money then and within the said six calendar months last aforesaid fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say that the said William Proud, in manner and form aforesaid, the said money, the property of the said William Civil, John Armstrong and Francis Armstrong, his masters, from the said William Civil, John Armstrong and Francis Armstrong, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity."

The prisoner for fifteen years had been a member of and secretary to a properly certified Friendly Society at Hexham, the rules of which, as far as they are material to the present case, were as follows:—

*"Appointment of Treasurer and Trustees.*

"At the first meeting of this lodge after these rules are registered, there shall be elected by a majority of the members then present, three trustees and a treasurer, who shall continue in office during the pleasure of the lodge.

*"Board of Management.*

"That this lodge shall consist of an unlimited number of members. The business thereof shall be conducted by a board of management, consisting of the following, viz., Noble Grand, or N. G., Vice-Grand, or V. G., Grand Master, or G. M., Secretary, Warden, right and left supporters to N. G. and V. G., guardian and treasurer; that five shall form a quorum, and the meetings shall be held every other Saturday, at eight in the evening, and continue open until ten, when it shall be closed for the evening; that every member of the lodge shall have an equal voice in all the property and concerns thereof; and when at any time or in any case the votes may be equal, the president at the time shall have the casting vote.

*"Duty of Treasurer.*

"The treasurer shall take charge of the funds of the lodge, and pay all demands when ordered to do so by the lodge, or by the N. G., V. G., and secretary for the time being; he shall balance his accounts at each auditing of the lodge books, or when required by the board of management, and supply the lodge officers with a duplicate thereof, he shall also give up all books, documents, moneys and property of the lodge in his possession when required so to do by a resolution of the lodge, and he shall, before taking upon himself the duties of his office, give security to the trustees, by himself and two bondsmen, pursuant to the Friendly Societies Act, 13 & 14 Vict. c. 115, s. 11, the amount to be determined on at a summoned meeting of the members, and bound to be in the form set forth, at the end of the Friendly Societies Act.

*"Duty of Secretary.*

"He shall attend all meetings of the lodge, take minutes of the proceedings thereof, and keep a correct account of the receipts and expenditure of the lodge, prepare all summonses in due time, attend the auditors

to point out and explain anything they may require respecting the accounts when required by the officers, or a majority of the lodge. He shall prepare all documents for the district and board of directors, and make the annual and other returns to the registrar, as required by the Friendly Societies Act, 13 & 14 Vict. c. 115, and for his services he shall receive from the incidental expense funds of the lodge such sum as may be agreed upon on his acceptance of office."

The prisoner was appointed secretary by the society, and, as such, received a salary of 1*l.* per annum. No treasurer had ever been appointed, and the prisoner for the whole fifteen years had always at the weekly meetings of the society received all moneys due from the members, giving receipts for the same, and punctually made all payments due from the society, placing the balance in the society's box with the books at the lodge room. The prisoner always gave correct receipts to the members for their weekly payments, but made false entries in the contribution and cash-book kept by him as secretary.

In the course of last spring, suspicions having arisen, the prisoner was called upon to deliver up his books and the balance in hand; and it was then discovered, by comparing the receipts received by the members from the prisoner with the books kept by him, that he had not entered in the books a large number of subscriptions received by him in small sums of one, two, and three shillings at a time, amounting in the whole to more than 100*l.*

The prisoner was called upon for an explanation, and at once admitted he had received the money, and was willing to repay the amount by instalments, and said that the law could not touch him.

The counsel for the defence contended that it no doubt was a breach of trust, but that upon these facts the prisoner could not be convicted of embezzlement.

In the course of the case the books of the society, kept by the prisoner, were tendered generally in evidence by the prosecution; and, on behalf of the prisoner, it was objected that the evidence must be confined to the three particular entries referring to the three charges in the indictment.

The Court, however, overruled the objection, and left the case to the jury, who found the prisoner guilty.

The Court thereupon passed sentence, but respited execution of the judgment on such conviction until the objection was considered and decided, and took a recognisance of bail from the prisoner to render himself in execution, pursuant to the statute 11 & 12 Vict. c. 78.

The opinion of the Court of Criminal Appeal is asked whether, on the above facts, the conviction can be sustained.

(Signed) THOS. ANDERSON,

Chairman of the said Court of Quarter Sessions.

No counsel appeared on behalf either of the prosecution or the prisoner.

By the COURT: Conviction affirmed.

Saturday, Nov. 16.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., MARTIN and BRAMWELL, BB.)

REG. v. JANIE ROBSON.

Bailees—Larceny—Married woman—20 & 21 Vict. c. 54, s. 4.

The prisoner, a married woman, living with her husband, at the request of a lodger in her husband's house, took charge of his box containing, as the prisoner knew, money. She afterwards broke open the box, and stole the money. The husband had nothing to do with the transaction:

Held, upon a case reserved on an indictment containing counts against the prisoner as a bailee, and for



larceny, that she was guilty either of one or the other.

Case reserved by Martin, B. for the opinion of this court:—

The indictment was tried before me at the last Durham assizes. It contained two counts: the first against the prisoner as bailee under the statute 20 & 21 Vict. c. 54, s. 4; the second, for larceny.

The prisoner was a married woman, living with her husband. They took in lodgers, but she exclusively attended to them, made the contracts with them and received the payments from them. Her husband did not in any way interfere in regard to them.

The prosecutor lodged with them; he had in his bedroom a box in which he kept his clothes; he kept in this box a smaller box, in which he had placed 45*l*. The smaller box was locked, and the key placed in a drawer within the larger one. He was about to go to another part of the country to work, he thereupon locked up the larger box, gave the key to the prisoner, who knew that the smaller box containing the 45*l*. was within it, and requested her to take care of all, that is to say, the larger box and the smaller one, and the money for him, which she promised to do, and took the whole under her charge, and into her possession, so far as she could by law.

Her husband had nothing whatever to do with the transaction. During the prosecutor's absence, and whilst she was in possession and charge of the property as above mentioned, she fraudulently stole the money, and took and converted it to her own use. Her husband did not know of her doing so, and was innocent in the matter.

I postponed the judgment, and permitted her to be discharged upon her husband's recognisance for her appearance when called upon:

I request the opinion of the Court of Criminal Appeal:

First, whether the prisoner, under the circumstances above mentioned, was a bailee within the meaning of the statute 20 & 21 Vict. c. 54, s. 4? and

Secondly, whether she was guilty of larceny?

SAMUEL MARTIN.

*T. Campbell Foster*, for the prisoner.—This conviction cannot be sustained. First, as to the count against the prisoner as bailee. No doubt, if the husband had committed the offence, he would have been criminally liable under the Fraudulent Trustees Act as a bailee.

MARTIN, B.—This would have amounted to a breaking of bulk.

*Foster*.—I am now upon the count treating the prisoner as bailee, and I contend the prisoner could not be convicted upon it, as a bailment is founded on a contract, and a married woman is unable to enter into a contract. In point of law the husband was the bailee.

WIGHTMAN, J.—That can hardly be so. He knew nothing about the transaction, and he could not be made a bailee against his will.

MARTIN, B.—It is only necessary that a person should have the care of a chattel to make him a bailee; a contract is not essential. There is a case in the C. P. where a master purchased a railway ticket for his servant, and it was held that the servant could not sue for the loss of his own luggage, the action being founded on a breach of duty and not of contract: (*Marshall v. The York, Newcastle and Berwick Railway Company*, 11 C. B. 655.)

*Foster*.—At all events the box was in the possession of the husband, and a wife cannot be convicted of stealing the property of her husband.

WIGHTMAN, J.—She broke the box open.

*Foster*.—What she did is not punishable as against her husband, who was the bailor. *Coggs v. Bernard*, 1 Smith L. C. 82, shows that there must be a contract to support a bailment.

MARTIN, B.—Can there not be a bailment by licence?

*Foster*.—I submit not.

WIGHTMAN, J.—If the husband, though a bailor, had broken bulk, would he not be liable? and if so, why is not the wife liable? Suppose a lodger had gone out leaving a gold watch upon his dressing-table, and the wife, without the knowledge of her husband, had taken it, would she not be liable?

*Foster*.—I submit she could not be indicted.

MARTIN, B.—You fail in showing any contract with the husband at all. If an action were brought against him for the loss, he would be entitled to the verdict on *non assumpsit*.

*Foster* then referred to the cases of *Marshall v. Rutton*, 8 T. R. 545; and *Reg. v. Cassall*, 30 L. J. 175, M. C.; 8 Cox C. C. 491. Secondly, as to the count for larceny. A breaking of bulk assumes a bailment.

WIGHTMAN, J.—You can break bulk without a bailment.

WILLIAMS, J.—The reason why a carrier's wife cannot be guilty of stealing part of the things to be carried is because a bailee cannot be guilty of a trespass but a stranger can, and if you add to the trespass a felonious intent, that will make it a larceny.

*Foster*.—In *Willis'* case, 1 Moo. C. C. 375, it was held, that the wife of a member of a friendly society, who stole money belonging to the society out of a box in her husband's custody, under the lock of the stewards of the society, was not guilty of larceny. A bailee is a person with whom a specific thing is deposited, and who is bound to return it in specie.

*Waddy* for the prosecution.

POLLOCK, C.B.—It is enough to say that one of the questions left to us is, whether the prisoner was guilty of larceny under the circumstances. I think she was.

WIGHTMAN, J.—Either the prisoner was a bailee, and guilty on the first count of the indictment, or she was not a bailee, and then she was guilty of larceny on the second count.

MARTIN, B.—My impression is, that she was a bailee by licence, and that there need not be a specific contract of bailment to make a person a bailee within the meaning of the 20 & 21 Vict. c. 54, s. 4.

WILLIAMS, J. and CHANNELL, B. concurred.

*Conviction affirmed.*

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. HARTLEY, Esqrs., Barristers-at-Law.

### REG. v. WRIGHT AND ANOTHER.

Burial board—18 & 19 Vict. c. 128, s. 11—20 & 21 Vict. c. 81, s. 9—Construction of statutes.

*The parish of Middlewich is divided into fourteen townships, each maintaining its own poor and raising its own poor-rate, though it has four churchwards for the whole parish, and has an ancient church and burial ground. In June 1858 a vestry of the entire parish resolved upon having a new burial-ground, and therefore a burial board was appointed. The sum of 3000*l*. having been borrowed for the purposes of the new burial-ground, it became necessary to call for 303*l*. 6*s*. 5*d*. out of the poor-rates, to pay the interest, &c., and the sum of 55*l*. 8*s*. 1*d*. was apportioned upon the township (one of the four*

Q. B.]

REG. v. THE BURIAL BOARD OF ST. JOHN, &amp;C., NEWCASTLE.

[Q. B.]

teen) of Minshull Vernon. The overseers of that township having refused to pay, a mandamus issued to compel payment, to which they made a return that the approval of the Secretary of State was not obtained, as required by sect. 9 of the 20 & 21 Vict. c. 81, and that the board was not therefore legally formed:

*Held, that the return was a good answer to the mandamus.*

This was a demurrer to a return to a mandamus. It appeared that the parish of Middlewich, in the county of Chester, consisted of fourteen townships, each having separate overseers, and each having its own poor-rate. The common law parish of Middlewich had four churchwardens for the whole parish, and had an ancient church and burial-ground situate at Middlewich. On the 22nd June 1858 a meeting of the vestry of the whole parish was held, when it was resolved that a new burial-ground should be provided, and a burial board appointed. The board subsequently borrowed 3000*l.* of the Public Works Commissioners, and this sum was expended, with the sanction of the vestry, in the purchase and laying out of a new burial-ground. To enable the board to make the first payment in respect of interest, and in discharge of the debt, it became necessary to call for 303*l.* 6*s.* 5*d.* out of the poor-rates, of which the sum of 55*l.* 8*s.* 7*d.* was apportioned to the township of Minshull Vernon, which the defts., as overseers, were required to pay to the board out of the poor-rates; and upon their refusal the present writ of mandamus was applied for and issued. The overseers returned that Minshull Vernon is a township separately maintaining its own poor, and that the said burial board was appointed after the passing of the 20 & 21 Vict. c. 81, without the approval of the Secretary of State as required by the 9th section; that Minshull Vernon had a separate and sufficient burial-ground under the Church Building Act, 1 & 2 Will. 4, c. 38, and that long before the Burial Act of the 15 & 16 Vict. c. 85, a new church had been erected in Minshull Vernon, and a churchyard surrounding it had been inclosed, and both church and churchyard had been consecrated, and a particular district had been assigned to the said church for the visitation of the sick and other pastoral and ecclesiastical duties.

By sect. 10 of the 15 & 16 Vict. c. 85, the inhabitants of any metropolitan parish may assemble in vestry and decide upon providing a burial-ground for the said parish; and by sect. 11, in the case of their resolving to have such burial-ground, a burial board is to be appointed. By sect. 20 powers are given to the board to borrow money to be paid out of the poor-rates.

By the 16 & 17 Vict. c. 134, the foregoing Act is extended to the whole country. By the 20 & 21 Vict. c. 81, s. 9, after reciting that by the 18 & 19 Vict. c. 128, it is enacted that where the inhabitants of several parishes or places have been accustomed to meet in one vestry for purposes common to such several parishes or places the vestry of any such several parishes or places might appoint a burial board, provides that "Where any of the several parishes or places, under the circumstances provided for in the said enactment, separately maintains its own poor or has a separate burial board, it shall not be lawful for the vestry or meeting in the nature of a vestry of such several parishes or places to appoint a burial board under the said enactment without the approval of one of her Majesty's principal Secretaries of State."

Gray now appeared in support of the demurrer, and argued that, as the 10th section of the 15 & 16 Vict. c. 85 gave the parishioners an absolute right to appoint a burial board for the entire parish, there was nothing in any subsequent Act that took away that right, and that this right was not affected by the 9th section of the 20 & 21 Vict. c. 81, which has no repealing words, the

9th section referring to the places referred to in the 11th section of the 18 & 19 Vict. c. 128, of which there is not one. He referred to *Reg. v. Sudbury*, El. Bl. & El. 264; *Viner v. The Churchwardens of Tunbridge*, 28 L. J. 251, M.C.; and the following statutes: 18 & 19 Vict. c. 128, s. 11; 20 & 21 Vict. c. 81, s. 9; 23 & 24 Vict. c. 64, s. 4; 1 & 2 Will. 4, c. 38, ss. 10, 23.

*Welsby* (Bayliss with him) contended that, as the consent of the Secretary of State was not obtained, as provided for by the 9th section of the 20 & 21 Vict. c. 81, the burial board was illegally formed.

COCKBURN, C.J.—I don't see, Mr. Gray, how you can apportion any part of this sum upon this township, unless under the authority of the 11th section of the 18 & 19 Vict. c. 128, and in that case you come within the provisions of the 9th section of the 20 & 21 Vict. c. 81, and required the sanction of the Secretary of State. The ordinary mode of assessing the amount would be by an entire rate over the whole parish; but that you cannot do, for there are no overseers for the entire parish. You are driven then to your apportionment, and there is the difficulty. Either you are within the 9th section of the 20 & 21 Vict. c. 81, and so require the sanction of the Secretary of State, or you are not, and if not you have no power to apportion the amount. We do not say that a burial board for the entire parish may not be constituted in such a case as this, but that the objection taken is fatal to this mandamus.

WIGHTMAN and BLACKBURN, JJ. concurred.

*Judgment for the defts.*

REG. v. THE BURIAL BOARD FOR THE PARISHES OF ST. JOHN, WESTGATE, AND ELSWICK, NEWCASTLE.

*Burial board—Discontinued burial-ground—Repairs of—Who liable to repair.*

*The churchyard of St. John, Westgate, Newcastle, was the property of private persons, and burials therein being discontinued by an order in council, a joint burial board was constituted for the said parish of St. John, Westgate, and the parish of Elswick. The walls and fences of the said churchyard being out of repair, the burial board were required to repair them, under the provisions of sect. 18 of the 18 & 19 Vict. c. 128:*

*Held, that that section applies only to burial-grounds the property of the parish.*

This was a demurrer to a return to a mandamus.

It appeared that by an order in council of the 18th Feb. 1854, burials had been discontinued in the churchyard of St. John, Westgate, Newcastle, and that a joint burial board had been constituted for that parish and the parish of Elswick. It also appeared that the said churchyard of St. John, Westgate, was the property of private persons, and that the walls and fences were out of repair, whereupon the said burial board had been called upon to repair them, and had refused to do so, whereupon the present mandamus issued. The defts. returned that the said churchyard was not a churchyard or burial-ground of any parish or place having separate overseers and maintaining its own poor, but was and is the property of certain private persons; that separate burial boards had been constituted for the parish of St. John, the township of Westgate, and the township of Elswick, and that subsequently a joint burial board had been appointed for the said parish and two townships, for the purpose of providing and managing one burial-ground for the common use of such parish and township, and for such purposes only.

By sect. 18 of the 18 & 19 Vict. c. 128, it is

Q. B.] *Ex parte* INHABITANTS OF KIMBOLTON—COLE V. TERRY—WILTSHIRE V. BAKER. [C. B.

enacted that "In every case in which any order in council has been or shall hereafter be issued for the discontinuance of burials in any churchyard or burial-ground, the burial board or churchwardens, as the case may be, shall maintain such churchyard or burial-ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof, and the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial-ground is situate, unless there shall be some other fund legally chargeable with such costs and expenses."

Jones now appeared in support of the demurrer, and argued that the facts stated in the return were no answer to the *mandamus*. [COCKBURN, C.J.—The difficulty arises in consequence of the words "burial-ground of any parish." Can it be said that that is a burial-ground of a parish? The words are not "burial-ground in any parish."] To carry out the obvious intention of the Legislature the word "of" should be read as the word "in." The first part of the section speaks of churchyards and burial-grounds generally. After the ground is closed the private owner has no longer any profit in it, and so has no interest in keeping it in repair. [COCKBURN, C.J.—Where the Legislature uses plain language that language must be followed; here it says, "burial-ground of any parish," not "in any parish." I do not mean to say that the intention may not have been different. But if the Legislature uses language which has a plain meaning we must abide by it.] The intention of the Legislature is clear from the language it uses in sect. 21 of the 24 & 25 Vict. c. 61 (Local Government Amendment).

Mellish, Q.C. appeared in support of the return, and was arguing for its sufficiency, but was stopped by

The COURT, who thought, for the reasons given by them during the argument, that the return was good.

*Judgment for the debts.*

Thursday, Nov. 21.

*Ex parte* THE INHABITANTS OF KIMBOLTON.

Witness—Inability to travel—Appeal pending—Order to examine.

Where there are proceedings pending at sessions on a removal order, and a material witness is unable to travel, but in a fit state to be examined, this court has no power to make an order for his examination to be taken for the purpose of being used in such proceedings.

J. J. Powell, on a former day, having applied for an attachment against William Stanton for disobedience to a subpoena to attend at a petty sessions in a case of a pauper removal order, and been refused on the affidavits then before the court, but with liberty to renew his motion, now stated that it appeared from a medical certificate that Stanton was unable to travel to the sessions, but in a fit condition to be examined, and he therefore moved for an order for Stanton to be examined, with a view to his examination being used in the pending proceedings. He referred to 1 Will. 4, c. 22, s. 4, and *Reg. v. Upton St. Leonards*, 10 Q. B. 827.

BLACKBURN, J.—The statute 1 Will. c. 22, s. 4, gives us no power to make such an order with reference to proceedings pending in another court. Here the proceedings are at sessions.

By the COURT.—This court has no power either at common law or by statute to make the order asked for.

*Rule refused.*

COLE V. TERRY.

*Sheriff's officer—Right to recover charges—Ineffectual levy.*

*A sheriff's officer having made an ineffectual levy under a f. fa. upon the goods of a deft. by reason of a claim by an assignee, upon which the officer was obliged to abandon the possession, is not entitled to sue the attorneys for the plt. who sent the writ to the sheriff for execution, for his charges.*

This was an action by an officer of the sheriff of Devon for work done as a sheriff's officer in executing divers writs at the defts.' request, and upon their retainer.

The defts. Messrs. Terry and Watson are solicitors at Bradford, and in the usual way forwarded a *f. fa.* for 30*l.* 5*s.*, to be executed against the goods of one Walk at the suit of Gath, by the sheriff of Devon. The writ was placed in the hands of the plt., a bailiff of the sheriff, who sent his assistant to Newton, a distance of twenty-one miles, to execute it upon Walk's goods and chattels. The assistant made the levy, and while in possession received notice that the goods seized had been assigned to one Greatrex, and in consequence he abandoned the levy after four days' possession. The plt. now sought to make the defts. liable for his charges of the abortive levy. The claim was for 2*l.* 11*s.* made up of charges for levying, mileage and four days' possession. The case came on for trial before the under-sheriff of Devon, and the jury upon the ruling of the under-sheriff returned a verdict for the plt.

Milward on a former day obtained a rule nisi to set aside the verdict on the ground of misdirection.

Mellish appeared to show cause against the rule, but admitted that he could not distinguish an officer's right from that of the sheriff, and that the case of *Bilke v. Havelock*, 3 Camp. 374, was against the plt.' right to recover, where Lord Ellenborough said: "The law knows of no promise to pay the sheriff for executing the king's writ. Such an action as this was never heard of in Westminster-hall. It is the duty of the sheriff under a writ of *f. fa.* to seize the goods in his bailiwick belonging to the deft. If he is in doubt as to the property he may impanel a jury for his own protection. If the goods are sold he receives in poundage the specific recompence for his trouble which the law has provided. He is entitled to none for seizing and remaining in possession of goods belonging to a stranger. The office of sheriff would become a very lucrative one if he could maintain an action for every ineffectual attempt by his officers to execute a writ."

By the COURT:

*Rule absolute.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs.  
Barristers-at-Law.

Tuesday, Nov. 19.

WILTSHIRE (app.) v. BAKER (resp.)

Llandaff and Canton District Market Act, 21 & 22  
Vict. c. 105, s. 25.

*A person selling or exposing for sale an article subject to toll, in a ship or vessel within the limits of the above Act, is not exempted by sect. 25 of that Act.*

This was a case stated under the 20 & 21 Vict. c. 43, by the justices of the peace of the borough of Cardiff in the county of Glamorgan.

At a petty sessions held in and for the said borough, on the 12th July 1861, the resp. appeared before us in obedience to a summons charging him with having on the 5th July instant unlawfully exposed potatoes for sale at a certain place within the limits of the Llandaff and Canton District Market Act 1858, "to

C. B.]

WILTSHIRE v. WILLETT.

[C. B.]

wit, in a vessel in the old canal, within the said borough of Cardiff.

Sect. 25 of the said Act enacts as follows:—  
"Every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place, or the market-house or market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to, and being part of, any dwelling-house) any article in respect of which tolls are by this Act authorised to be taken, other than eggs, butter and fruit, shall forfeit and pay to the company any sum not exceeding 40s.

The town of Cardiff (including a portion of the "Old Canal") is within the limits of the Act.

The evidence produced at the hearing was as follows:—

Thomas Gould said: I was at the old canal on the morning of the 25th July. I remember seeing William Baker weighing up potatoes on the wharf, and I purchased from him half a ton. They were taken out and weighed on the wharf, and I took them away. I paid at the rate of 9l. 10s. per ton.

Cross-examined.—I saw Wiltshire there. This is the place where they are regularly sold.

Re-examined.—The potatoes were purchased in the vessel, and were landed and weighed on the wharf.

This was the case in support of the summons. We were of opinion that the place of sale here (the vessel) should, in a liberal interpretation of the exemption clause above recited, be considered a dwelling-house or shop, and we accordingly dismissed the information.

The app. being dissatisfied with our determination, as being erroneous in point of law, applied to us in writing within three days after such determination, to state and sign a case for the opinion of the Court of C. B., in compliance with which application we hereby state this case, and pray the opinion of the court thereon.

The question for the consideration of the court is, whether the sale or exposure for sale of an article subject to toll, in a ship or vessel within the limits of the Act, is protected by the exemption clause above referred to.

Giffard for the app.—This is a case of a vessel on a canal selling marketable articles within the limits prescribed, and contrary to the provisions of the Act, and the magistrates having found that the resp. came within the exemption given by sect. 25, but there is no evidence to justify such a decision.

The resp. was not represented.

ERLE, C. J.—I am of opinion that the decision of the magistrates ought to be reversed. I presume strongly in favour of the decision of those whose duty it is to adjudicate, as they can bring their local knowledge to bear on the case; but as I cannot put myself in their position, and am not in possession of the full particulars of the case, I must confine myself to the question whether a vessel in a canal is such a "dwelling-house or shop attached to and being part of any dwelling-house" within the meaning of the clause giving exemption; and I am of opinion that it is not.

The rest of the Court concurred.

*Decision of magistrates reversed.*

WILTSHIRE (app.) v. WILLETT (resp.)

*Construction of words in local Act (Llandaff and Canton District Market Act, 21 & 22 Vict. c. 105, s. 25)—Selling in a shop attached to and being part of a dwelling-house.*

*By sect. 25 of the above Act, it is enacted that every person who shall sell or expose for sale at any place within the limits of this Act (other than in any*

*existing market-place, or the market-house or market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by this Act authorised to be taken, other than eggs, butter and fruit, shall forfeit and pay, &c.*

*The resp. exposed for sale certain goods not excepted by the above section in an auction-room, which is attached to and part of a dwelling-house, but in which the owner of the goods did not live:*

*Held, that he came within the exception of the above section, as the place where the goods were exposed for sale was a shop within the meaning of the Act.*

This was a special case stated for the opinion of the court from justices, under 21 & 22 Vict. c. 43.

#### CASE.

At a petty session held in and for the said borough of Cardiff, in the county of Glamorgan, on the 23rd Aug., the resp. appeared before us in obedience to a summons charging him with having, on the 9th Aug. inst., unlawfully exposed for sale forty sacks of flour, one sack of toppings, a quantity of ham, a quantity of beef and pork, and a quantity of cheese, in certain auction-rooms in High-street, in the said borough, and within the limits of the Llandaff and Canton Markets Act 1858. Sect. 25 of the said Act enacts as follows: "Every person who shall sell or expose for sale at any place within the limits of this Act (other than in any existing market-place or the market-house and market-places to be established under this Act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by this Act authorised to be taken, other than eggs, butter and fruit, shall forfeit and pay to the company any sum not exceeding forty shillings."

The town of Cardiff is within the limits of the Act; the sale by auction by the resp. of the article, and at the place and time mentioned in the summons, was proved by James Holloway, who, in cross-examination, said, "Mr. Willett's auction-room is part of a house; a regular house; no one lives there now; it is a dwelling-house."

The resp. admitted that he only rented the shop, and no other part of the house.

The resp. called several witnesses, but the only one who gave evidence material to the grounds of our determination was his clerk Henry Jones, who, after making certain statements irrelevant to this case, said: "The premises which Mr. Willett occupies are part of No. 5, High-street, which is a dwelling-house with shop under it; the upper part is occupied by Mr. Evans, who has a communication with it; there is a communication down stairs; Mr. Willett occupies the shop." On cross-examination he added, "I don't go to any other part of the house for business."

We were of opinion, upon these facts, that the sale took place in a shop attached to and being part of a dwelling-house, and so was within the exception contained in the section of the company's Act above recited, and we accordingly dismissed the charge.

The app. being dissatisfied with our determination, as being erroneous in point of law, applied to us in writing within three days after such determination, to state and sign a case for the opinion of the Court of C. B., in compliance with which application we hereby state this case, and pray the opinion of the court thereon.

The question for consideration of the court is, whether the sale in question is within the exception above referred to.

Giffard for the app.—This is not within the meaning of the clause giving exemption. The dwelling-house to which the shop is attached must be a dwelling-

C. B.]

LEWIS v. ROBERTS.

[C. B.]

house at the time when the exemption was claimed. "Any dwelling-house," which are the words used in the statute, must mean the seller's dwelling-house. Here no one lived in the house. The sale intended to be within the exemption was a sale of a person's own goods, and a sale by an auctioneer was not contemplated by the statute.

*Waddy* for the resp.—The Act must have been framed to meet such a case as this. The Markets and Fairs Clauses Act, 10 & 11 Vict. c. 14, is incorporated in this Act, and applies except where it is expressly varied, as in the present instance, for by sect. 13 of the old Act, the words used are, "except in his own dwelling-place or shop," whereas in this Act they are, "or in his own dwelling-house or in any shop attached thereto, and being part of any dwelling-house."

ERLE, C.J.—I am of opinion that on the first point the magistrates were right in holding that this shop was within the meaning of the exception, whether the party selling lives in the house or not. The general Act of 10 & 11 Vict. c. 14, s. 13, says that a person selling, except in his own dwelling-house, is liable to a penalty. In the local Act, which is before us, he is liable to a penalty, "unless he sells in his own dwelling-house, or in any shop attached to and being part of any dwelling-house." It seems to me that the deviation from the general Act shows that the words were intentionally placed in this local Act; and it shows that a person who sells is not liable if he sells in any shop attached to and being part of any dwelling-house. Then, with regard to the question whether this was a shop, some of the witnesses speak of it as a shop, and there was no evidence to the contrary; and, taking that with the decision of the magistrate, we may take it to be a shop, and so to be protected. Then comes the question as to whether an auctioneer selling there is within the exception. I do not see why a person may not in his own shop dispose of his goods by auction, private contract, or on commission.

WILLIAMS, BYLES and KEATING, JJ. concurred.

*Appeal disallowed with costs.*

#### REGISTRATION APPEAL.

*Monday, Nov. 11.*

LEWIS (app.) v. ROBERTS (resp.)

*County vote—Service of notice of objection—Duplicate notice—Signature by objector—6 Vict. c. 18, ss. 7 and 100.*

*It is sufficient proof of the service of a notice of objection through the post, under sect. 100 of the Registration Act, 6 Vict. c. 18, to produce before the revising barrister a duplicate notice signed by the objector and stamped by the postmaster; and it is not necessary to show that the original notice, forwarded by the postmaster in compliance with his duty under that section, was signed by the objector.*

This was an appeal from the decision of the revising barrister for the western division of the county of Kent.

#### CASE.

At a court by me, the revising barrister duly appointed to revise the list of voters for the western division of the county of Kent, held on the 14th day of Oct. 1861, at Greenwich, in the said division, for revising the lists of the parishes in the polling district of Blackheath, John Innous (on the register of voters for the parish of Bromley, in the said division) objected to the name of Thomas Lovitt Howard being retained on the list of voters for the parish of Plumstead, in the said western division of the county of Kent.

A paper writing (which is annexed to, and forms part of, this case), purporting to be a duplicate of the notice of objection, stamped at a proper post-office on

the 24th day of August last, was produced before me, and it was proved that in due course of post the original notice would have reached the voter on or before the 25th day of August last. The signature to the said paper writing or duplicate was proved to be in the handwriting of the said John Innous, and the identity of the person signing the said duplicate notice with the person of that name on the said Bromley list of voters was proved, but no proof was given before me that the original notice of objection, of which such paper writing purported to be a duplicate, had been signed by the said John Innous, other than the production of such stamped duplicate so signed by him as aforesaid.

The notice of objection to the overseers in the same case was duly proved.

It was contended on behalf of the said Thomas Lovitt Howard that the notice was signed by the party objecting, as required by 6 Vict. c. 18, s. 7.

The original notice was not produced.

The said Thomas Lovitt Howard did not prove his qualification, and I held that the notice of objection to him was valid, and expunged his name from the list.

The name of James Jacobs was expunged from the same list of voters, under the same circumstances.

If the court should be of opinion that such notice of objection was invalid, the names of the said Thomas Lovitt Howard and James Jacobs are respectively to be restored to the list of voters for the said parish of Plumstead; and the register of voters is to be amended accordingly.

If the court should be of opinion that such a notice of objection was valid, the said register is to stand without amendment.

I declare that the appeals against such decisions ought to be consolidated, as they depend upon the same decision; and with his consent I name Mr. Charles Edward Lewis, of 6, Old Jewry, in the city of London, gentleman, a person interested for and on behalf of himself and all other persons in like manner interested in such appeals, to be the app. in such consolidated appeals, and to prosecute and answer the said appeal; and with his consent I name Mr. Thomas Nicholls Roberts, of 11, Coleman-street, in the city of London, gentleman, to be resp. in such consolidated appeal.

(Signed) J. H.

(Copy of Notice of Objection to Thomas Lovitt Howard.)

"Take notice, that I object to your name being retained in the Plumstead list of voters for the western division of the county of Kent.

"Dated this 20th day of August 1861.

(Signed)

"JOHN INNOUS,

(Place of abode) "High-street, Bromley, Kent.

"On the register of voters for the parish of Bromley."

*Macnamara* for the app.—The question here is whether in a case where the duplicate notice of objection, stamped by the postmaster and signed by the objector, is produced before the revising barrister, it is necessary to prove that the original notice was signed by him also. Sect. 7 of the Registration Act, 6 Vict. c. 78, directs that "the objector shall give or cause to be given to the person objected to, or leave or cause to be left at his place of abode, as described in the list of voters, a notice according to the form numbered 5 in schedule A, or to the like effect, and every such notice of objection shall be signed by the party so objecting as aforesaid." Then sect. 100 directs the proceedings as to the duplicate. It provides that whenever any person shall be desirous of sending a notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate, to the postmaster, &c., under such regulation with respect to registration, &c., and the fee to be paid for such registration, as shall from time to time be made; and in all

C. B.]

LEWIS v. ROBERTS.

[C. B.]

cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and on being satisfied that they are alike in their address and their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice shall in the ordinary course of post have been delivered to such place: (*Toms v. Cumming*, 7 M. & G. 88; *Allen v. Waterhouse*, 6 Scott, 88.)

*T. Atkinson* for the resp.—The court will take the stamped duplicate notice produced before the revising barrister as an original. It is not necessary to prove the signature of the original notice of objection: (*Birch*, app., v. *Edwards*, resp., 5 C. B. 45; *Bishop*, app., v. *Help*, resp., 2 C. B. 45.) The production of the stamped duplicate notice of objection is sufficient. [BYLES, J.—Does not the question turn upon the meaning of the word “duplicate?”] The stamped duplicate is a thing created by the statute, and is in reality an original document.

*Macnamara* in reply.—There is no duty on the postmaster to satisfy himself as to the signatures or the handwriting upon the original notice or duplicate being that of the objector. There may be a duplicate, though not written by the same person as the original. The courts have always enforced with much strictness the provisions of the sections relating to notices of objection.

ERLE, C.J.—I am of opinion that the revising barrister was right in this case. The evidence was, that duplicate notice of objection had been taken to the post-office, and all the requirements of sect. 100 had been complied with; that the two duplicates were signed by the objector, and the duplicate, which the postmaster returned to the party who posted them, was produced; and the question is, whether that is evidence that the notice of objection had reached the party objected to. The words of sect. 100 of the 6 Vict. c. 18, are “the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice shall in the ordinary course of post have been delivered to such place.” I am of opinion that that statute was passed to prevent the necessity of a specific witness going to the place of residence of the objector, and doing all that might be necessary in case of personal service; and I am of opinion that the statute has provided abundantly for all the Legislature intended to be secured by the provision here mentioned. Then it enacted, in terms, that the production of the duplicate shall be evidence of the notice having been received by the party—not conclusive proof, but evidence; and I think I give effect to the enactment by holding that there was evidence in this case that the notice of objection had reached the party objected to. It is said that the Legislature intended that the objector should be identified by his personal signature. That is one point of the judgment in the case of *Toms v. Cumming*, that the objector must be identified by his personal signature; and a further point in the case was, that each of the documents taken to the postmaster as duplicates must be signed by the objector, and more than one judge in the course of giving judgment in that case, says, that the meaning of the word “duplicate” is “identical” in all essential respects, and that actual signature by his own hand on the part of the objector is an essential of the notice of objection. In that case the party sent a notice signed by himself, and kept what he called the duplicate not signed by himself, but in reality a copy,

[MAG. CAS.]

and it was held that the requirements of the Act of Parliament were not complied with, and the copy kept was not a duplicate, because not signed by the objector. All duplicates must be signed by the objector, and then their production will be evidence. The statute provides against the possibility of a man of straw being put forward different from the party that was expected to come forward, because his own handwriting is to the duplicate to be kept, and that estops him from saying that it was not in his own writing; he has brought the duplicate forward which he has marked; he has sent the duplicate of the one he has kept signed by himself; the statute has provided that the postmaster shall compare the notice and the duplicate, and on being satisfied that they are alike in their address and contents, shall forward one and return the other. The postmaster is to look to the contents, and part of the contents must be the signature of the objector; both must be signed by the same person, and in all essentials the same. And the statute has further provided that this precaution shall be taken, because the production of the duplicate kept by the objector is evidence of the other having been sent to the person objected to, and it is for the purpose of giving an opportunity to examine whether the two documents were two duplicates in the sense I have mentioned, that is, identical in all essential points—identical, therefore, in both being the genuine signature of the party objecting; he must know that, and he is the only party that is capable of giving this statutory proof by producing the duplicate that was kept. I am of opinion that the words of the statute are complied with, and the decision, it seems to me, is in entire accordance with the case of *Toms v. Cumming*, which altogether turned on the difference between “copy” and the “duplicate”: they cannot be duplicates unless identical in all essential respects, both being equally signed. I think we shall entirely defeat the intention of the statute, which meant to give a short and easy, and as the Legislature thought, as it seems to me, a safe mode of proof that the notice had been sent, if we said this was not sufficient. The words of the 100th section dispense with any further proof than the production of the stamped duplicate. For these reasons I am of opinion that the revising barrister was right.

WILLIAMS, J.—Not, I must say, without some hesitation and difficulty, I concur in the opinion expressed by my Lord, and those formed by my learned brothers, not only from a sincere deference to their opinion, but because I am desirous to give the Act of Parliament a construction that would render it both useful and sensible. I will just state, in a few words, the grounds on which I entertain some doubt. The section in question, the 100th, after enacting that “whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same duly directed, open, and in duplicate, to the postmaster,” then goes on to define what the postmaster is to do, and it says that “in all cases in which such fee shall have been duly paid, the postmaster shall compare the said notice and the duplicate, and on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post.” If the Act of Parliament had said, on being satisfied that they are “duplicates,” I should have thought it was stronger—indeed that the word “duplicate” was used in the sense of their being wholly similar, and to purport to be by the same person; but it does not say that the postmaster is to find they are duplicates; all it says is, “on being satisfied that they are alike in their address and in their contents.” As to the contents and address there may be some doubt, the signature being the same. Then comes the rest of the enactment, as to what is to be the effect of the production by the party of the stamped duplicate; it says it shall be

evidence, not of the duplicate having been given to the person at the place mentioned, but of the notice having been given—that means the notice the postmaster sends, whatever it may be.

BYLES, J.—I am of opinion that the production of this duplicate was evidence of the due service of the notice of objection. The statute uses the word "duplicate," as contradistinguished from "draft" made before the original document, or from "copy" made after it; and when it says "duplicate" or "duplicates," it means two originals; and two originals there cannot be unless they are both signed. Now just consider the position of the barrister when this question is before him. The statute says, "the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given;" that means the duplicate produced before the postmaster. Then that is not to come from any quarter. There is a particular party appointed; that is the party who posted it. He shows it as the duplicate of which the statute speaks. When that is proved, what says this statute? It says, "the production by the party who posted such notice shall be evidence of the notice having been given to the person at the place mentioned." The notice refers to the notice mentioned in the 7th section, and the notice mentioned in the 7th section is and must be a notice duly signed. It seems to me, therefore, that the revising barrister has rightly decided that this is all that is necessary. Indeed, if it were not so, I conceive that the beneficial effect of this clause of the Act of Parliament, in making proof simple and compendious, would be, to some extent at all events, lost.

KEATING, J.—It appears to me that the revising barrister was right, and that he had evidence before him that the objector had sent to the party objected to a notice signed by him. It appears to be not unworthy of observation that the section with reference to the question whether these papers are to be duplicates, has said that the party is to take two papers to the postmaster, and the postmaster is to send one of them and return the other. That being the state of the law, that which is produced before the revising barrister must be proved as signed by the objector. It seems to me there is here satisfactory evidence that the one sent was signed by the objector. The case which has been referred to of *Toms v. Cuning* would scarcely have been decided in any other way, because in *Toms v. Cuning* they decided that that which is retained must be signed by the objector. If they were not duplicates in the sense of being signed by the same parties, surely proof that that which was sent was signed by the objector would have been amply sufficient to satisfy the provisions of the 7th section. It appears to me that the revising barrister was right, and the decision ought to be affirmed.

*Judgment for resp.*

*Harrison and Lewis, app.'s attorneys.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THORNTON, T. W. SANDERS, and C. J. B. HENTLETT, Esqrs., Barristers-at-Law.

Wednesday, Nov. 20.

REG. on the prosecution of CHURCHWARDENS OF BURNINGTON v. THE REV. G. WHEELER.

Poor-rate—Tithe rentcharge—Curate's salary—When not to be deducted.

*Merton College, Oxford, were the patrons of the vicarage of Welford, and they were also the lay impropriators of the tithe rentcharge of the adjoining chapelry of Burnington. In*

*1843 they presented the Rev. G. D. Wheeler to the vicarage of Welford, and in 1847 they granted him a lease of the tithe rentcharge of Burnington upon his covenanting to do the spiritual duty for that chapelry. His bishop having required that two full services should be performed in each church on Sundays, Mr. Wheeler appointed a curate, at a salary of 80l. per annum, to do the duty in Burnington. Being assessed on his tithe rentcharge for Burnington to its full amount, he claimed to have his curate's salary deducted:*

*Held, that he was not entitled to claim such deduction.*

This was a case stated for the opinion of this court under the 11 & 12 Vict. c. 45, s. 11, as to whether or not a deduction should be made from the tithe rentcharge of the vicar of Welford, in respect of the salary of a curate employed by him in the chapelry of Burnington. It appeared that the Rev. George Domville Wheeler was the vicar of Welford, and that he was also the lessee of the impropriate tithe rentcharge of the adjoining chapelry of Burnington. In the year 1843 he was appointed by Merton College, Oxford, to the said vicarage of Welford, and in the year 1847 the college granted him a lease of the impropriate tithe commutation rentcharge of Burnington, upon his covenanting to do the spiritual duty for that chapelry. The Bishop of Worcester having required that two full services should be performed in each church on Sundays, it became necessary for Mr. Wheeler to appoint a curate to do duty at Burnington, and this he did, giving his curate a salary of 80l. a-year. The parish officers of Burnington assessed Mr. Wheeler's tithe rentcharge for Burnington to the full amount, not allowing anything for the curate's salary, and this deduction having been claimed by Mr. Wheeler, and refused by the parish officers, the present case was stated.

The Attorney-General (*Mellish*, Q. C. with him) contended that it was optional with Mr. Wheeler to have accepted the lease of the impropriate tithe rentcharge of Burnington; it was not for him to say that he could not himself perform the duties, since such an argument would be available for any pluralist; that his being vicar of Welford did not necessarily entail upon him the duty of performing divine service at Burnington: (*Reg. v. Goodchild*, 11, Bl. & El. 1.)

*F. M. White*, contra, argued that originally the two livings had been united, and that the impropriate tithe rentcharge of Burnington had been leased to the vicar of Welford, by a resolution of Merton College, in augmentation of the said vicarage of Welford, Burnington being in fact a chapelry of Welford; and that, had the lease not been granted, still, as Merton College must have employed a curate for Burnington they would have been entitled to have had his stipend deducted: (*Hitchcock v. Thornborough*, 2 Roll. Ab. 337; *Reg. v. Adams*, 4 B. & Ad. 61; *Reg. v. Sumedaine*, 10 A. & L. 157.)

The Attorney-General replied.

COCKBURN, C.J.—I am of opinion that the rate was a good rate, and that the tithe rentcharge was properly assessed. The objections taken rest upon two grounds: first, that the chapelry of Burnington was to be taken as one with Welford, and that the two together formed but one benefice, and that, as Mr. Wheeler was unable to discharge his spiritual duties in both without the assistance of a curate, he is entitled to have the salary of such curate deducted in ascertaining the rateable value of such rentcharge. This proceeds upon the assumption that the two parishes are necessarily connected. Possibly at some remote period the chapelry of Burnington may have been a dependency of the parish of Welford; but it is quite clear that for a long

Q. B.]

REG. v. JOSHUA YEADON AND JAMES BIRCH.

[C. CAS. R.]

series of years, perhaps for centuries, they have been disassociated so as to form two distinct parishes. It appears that for many years the authorities of Merton College have been in the habit of dealing with the rentcharge as of a distinct pariah, sometimes appointing one of their own body, sometimes another, and even the present app. was appointed to Welford, and held it four years before the college thought proper to grant him the lease of the tithe rentcharge of Burmington, with the obligation of providing for the performance of spiritual duties. It is, therefore, impossible to conclude that the two are so indissolubly connected as to form one benefice. Mr. Wheeler then stands in the position of a clergyman holding two livings, and *Reg. v. Goodchild* is an authority for saying that the rector was not warranted in deducting the stipend of the curate. It was quite optional with him whether or not he would accept the lease of the tithe rentcharge of Burmington. But then, secondly, it is said that, inasmuch as Merton College are the improprators of the tithe rentcharge of Burmington, with the obligation of employing a minister to perform the spiritual duties, the salary of a curate is a necessary outgoing, and ought to be deducted. Now it is not necessary for the present purpose to consider what might be our decision if Merton College took the tithe rentcharge themselves, and employed a curate to perform the duties and paid him a salary, for that is not the present case; for here the whole of the tithe rentcharge is placed at the disposal of the vicar of Welford, who discharged the duties at Burmington as any ordinary rector, and in whose hands the whole of the rentcharge would be rateable. I confess I cannot see the difference between a rector who takes the whole tithe rentcharge and one situated like the app., and I see no reason why he should be placed in a better situation. But, without giving an express opinion, I am strongly inclined to think that if the college themselves employed a curate they would be liable to be assessed to the whole amount of the tithe rentcharge. I can see no reason why they should not be liable, or be in a better situation than a spiritual rector who takes the tithe rentcharge. In ancient times the tithes were annexed for the purpose of providing for the performance of the spiritual duties of the parish; why, therefore, when there is a lay improprator instead of a spiritual one, should there be any difference? I quite agree with my brother Blackburn that the principle laid down in *Reg. v. Goodchild* should not be extended.

BLACKBURN, J. concurred.

*Judgment for the resp.*

[*Note.*—This case will doubtless cause a considerable amount of perplexity to parish officers, as well as to the clergy, and probably give rise to a good deal of litigation. In the preceding case on the same point (*ante*, p. 462) the court held that, under the circumstances, the curate's salary might be deducted. Here the deduction was not permitted. As no principle was laid down for guidance it will be very difficult for the overseers to determine in such case whether the circumstances justify a deduction. Perhaps the nearest test will be the question, "Is a curate requisite for the needs of the parish (not for the convenience of the incumbent)?"—ED.]

## CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 16.

REG. v. JOSHUA YEADON AND JAMES BIRCH.

*Indictment*—Counts for grievous bodily harm, cutting, stabbing and wounding, and occasioning actual bodily harm—*Verdict of common assault*—*Refusal to take such verdict*—*Miscarriage*.

*Upon an indictment charging the defts. in the first count with inflicting grievous bodily harm; in the second count with unlawfully and maliciously cutting, stabbing and wounding; and in the third count with assaulting and occasioning actual bodily harm; the jury returned a verdict of guilty of a common assault. The chairman declined to take that verdict, on the ground that a common assault was not included in the indictment, and told the jury to reconsider their verdict. The jury then found the defts. guilty, and a verdict was entered of guilty of an assault occasioning bodily harm, whereupon the chairman sentenced the prisoners:*

*Held, that the first verdict ought to have been taken, and that the second ought not, and that the prisoners ought not to undergo the sentence; that there had been a mistrial, and that a venire de novo should issue.*

Case reserved for the opinion of this court by the chairman of the West Riding of Yorkshire sessions.

Joshua Yeadon and James Birch were indicted at the quarter sessions for the West Riding of Yorkshire, held at Bradford on the 2nd July 1861, under 14 & 15 Vict. c. 100, s. 29, and 14 & 15 Vict. c. 19, s. 4, as follows:—

"West Riding of Yorkshire to wit.—The jurors of our Lady the Queen, upon their oath present, that Joseph Yeadon, late of Otley, in the West Riding in the county of York, labourer, and James Birch, late of the same place, labourer, on the 23rd May in the 24th year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, with force and arms, at the parish of Guiseley in the said West Riding of the county of York, unlawfully and maliciously did assault one Hiram Roberts, and did then and there unlawfully and maliciously kick and wound him the said Hiram Roberts in and upon the face, mouth and neck of him the said H. Roberts, and thereby then and there did unlawfully and maliciously inflict on the said H. Roberts grievous bodily harm, to the great damage of the said H. Roberts, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

"Second count.—And the jurors aforesaid, on their oath aforesaid, do further present, that the said J. Yeadon and J. Birch afterwards, to wit on the said 23rd May, in the year aforesaid, with force and arms, at the parish of Guiseley aforesaid, in the said West Riding of the county of York, unlawfully and maliciously did cut, stab and wound the said H. Roberts, to the great damage of the said H. Roberts, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

"Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Yeadon and J. Birch, afterwards, to wit on the said 23rd May in the year aforesaid, with force and arms at the parish of Guiseley aforesaid, in the said West Riding of the county of York, in and upon the said H. Roberts, in the peace of God and our said Lady the Queen, then being unlawfully, did make an assault,



and him, the said H. Roberts, then and there unlawfully did beat, wound and ill-treat, and did thereby then and there occasion actual bodily harm to the said H. Roberts, so that his life was greatly despaired of, and other wrongs to the said H. Roberts then and there did, to the great damage of him, the said H. Roberts, and against the peace of our said Lady the Queen, her crown and dignity and against the form of the statute, in such case made and provided."

The indictment did not contain any count for a common assault merely.

On behalf of the prosecution it was proved that Yeadon and Birch, on the 23rd May, about a quarter past eleven at night, burst open the house-door of one Sarah Clayton, where H. Roberts was sitting with her and her son, a lad aged sixteen, on entering they both attacked Roberts; he was twice knocked down and was kicked about the face and body, had his chin cut open and his lip cut through, two teeth knocked out, and was saved from further injury by the entrance of neighbours. A surgeon attended him all the next day and the following morning.

On behalf of the defence it was alleged by way of justification, that Yeadon and Birch did not burst open the door, but that Roberts opened it from the inside and struck the first blow with a fire poker.

The amount of injury sustained by Roberts, and the fact that it was done by the defts., was never denied.

The jury were told by the chairman in his summing up, that the defts. were charged with an aggravated assault under a statute specially framed to meet such cases as are not sufficiently punishable under the Common Assault Act.

They retired and found a verdict of "guilty of a common assault."

Before the verdict was entered the chairman told the jury that they had found the defts. guilty of an offence with which they were not charged in the indictment, and that they must reconsider their verdict: that if they thought the defts. had unlawfully assaulted Roberts, and thereby occasioned him actual bodily harm, they must find the defts. guilty, but must acquit them if there was any doubt.

They then found the defts. guilty, and a verdict was entered of "guilty of an assault occasioning bodily harm."

On this it was contended for the defence, that the first verdict, "guilty of a common assault," was really an acquittal, and ought to have been taken as such.

The chairman doubted, but sentenced the defts. each of them to hard labour for four calendar months, and discharged them on their finding bail, to appear and render themselves in execution of judgment.

The opinion of the court is asked whether the verdict of guilty of a common assault ought to have been taken, and was tantamount to an acquittal, or should the second verdict stand, and the defts. undergo the sentence.

FRANK WORMALD, Chairman.

No counsel appeared for the prisoners.

*T. Campbell Foster* for the prosecution.—No doubt the first verdict of guilty of a common assault was one which ought to have been taken, and it has been so held upon this form of indictment: (*Reg. v. Oliver*, Bell's C. C. 287, and 8 Cox C. C. 384.) The substance of the offence charged and proved was a battery, which includes an assault. It is submitted that the latter part of the second verdict, "occasioning bodily harm," is merely matter of aggravation, and may be struck out, and that that verdict may be treated as one of assault only, and therefore in substance the same as the first verdict.

By the COURT.—We are of opinion that the first

verdict of "guilty of a common assault" ought to have been taken, as it might have been, upon this indictment, and that the second verdict ought not, and that the defts. ought not to undergo the sentence.

*Cur. adv. rult.*

Nov. 27.—By the COURT.—In this case there has been a mistrial, and a *venire de novo* must be awarded.

[*Note*.—It is settled law, that on an indictment for wounding a verdict for a common assault may be found. The only question in this case was, whether the verdict might be accepted as a verdict for a common assault, by treating as surplusage the three last words "occasioning bodily harm." The decision is, that this could not be done, but that the verdict must be taken as it was given. However, the only result is a new trial, not an acquittal.—ED.]

Saturday, Nov. 9.

(Before POLLOCK, C.B., WIGHTMAN and WILLIAMS, JJ., and MARTIN and CHANNELL, BB.)

REG. v. DONALD M'DONALD.

*Embezzlement—Servant or partner—Share of profits.*

*Previous to 1855 the prisoner was in the prosecutors' service as cashier and collector, and another person W. as salesman. In that year the prisoner and W. applied each for an increase of salary, and in the end the prosecutors agreed to allow each of them 12½ per cent. on the profits in addition to their salaries, and if there was no profit in any year, neither the prisoner nor W. were to contribute anything towards the loss, but were to receive their salaries only. The prisoner and W. from time to time, instead of receiving their shares of the profits at the end of the year, allowed portions of them to remain in the hands of the prosecutors at 7 per cent.*

*Held, that the prisoner was a servant of the prosecutors within the meaning of the 7 & 8 Geo. 4, c. 29, s. 47, and liable to be convicted of embezzlement.*

Case reserved for the opinion of this Court by the Recorder of the borough of Manchester.

At the quarter sessions for the city of Manchester, holden before me, on Monday, the 24th June 1861, Donald M'Donald was tried and convicted on an indictment for embezzling three several sums of 663*l.* 3*s.*, 449*l.* 5*s.* 6*d.*, and 182*l.* 6*s.*, the property of Joshua Lord and another, his masters.

The prosecutors, Joshua Lord and Richard Smith, carried on business as manufacturers at Bacup, under the style of James Smith and Sons, but there were no other partners than the two above named; they also carried on business in Birch-in-lane, Manchester, as commission agents in cotton cloth and yarn. At their establishment in Birch-in-lane they sold their own goods manufactured at Bacup, and other persons also consigned goods to them to sell, and they themselves bought goods to sell again there.

The prisoner was in their service in the Manchester business as cashier and collector, and a person of the name of Edward Williamson was their salesman.

In 1855, the prisoner and Williamson having held their respective situations in the service of the prosecutors for about seven years, applied to have their salaries, which were 150*l.* a-year each, increased. This was not at once acceded to, but in the end the prosecutors agreed to allow the prisoner and Williamson each

C. CAS. R.]

SMITH v. HUGGETT—SMITH v. JAMES.

[C. B.]

12½ per cent. on the profits, in addition to their salaries; and it was stipulated that if the concern should be a losing one in any year, neither the prisoner nor Williamson were to contribute anything towards the loss, but that in that event they would have to be content with their salaries.

None of these parties intended to alter, nor up to the time of the prisoner's apprehension on this charge, did any of them suppose that they had altered by this arrangement the relation of master and servant which had previously existed between the prosecutors and the prisoner and Williamson.

After this arrangement the prisoner and Williamson continued to discharge the same duties, and to hold the same positions they had respectively done before, and neither of them had any control over the management of the business.

Amongst the payments which the prisoner as such cashier had to make, were the wages and salaries of servants (the weekly payments were called wages, monthly payments salaries), and in his account he credited himself every month with the payment of his own salary amongst the rest as he had done before.

At the end of the first year after the arrangement, prosecutors proposed to prisoner and Williamson to leave with them a portion of the profits they had then to receive, and that the prosecutors would allow them 7 per cent. upon it. This was as an inducement to them to save their money, but they both then declined doing so at that time. At the end of the next year, they each left 70*l*. with the prosecutors, they agreeing to pay them 7 per cent. for it, the men being at liberty to draw it out any time if they thought they could lay it out to more advantage. It was afterwards increased, and at the time of this trial the prisoner and Williamson had each 120*l*. in the hands of the prosecutors, for which they were entitled to receive 7 per cent. as long as it remained there. Seven per cent. was the interest with which the prosecutors debited the concern on the capital employed by them in it.

There never was in any one year an actual loss to the concern. But in 1860 a great many bad debts were made; and at the stock-taking at the end of that year the profits were very trifling indeed; and the prosecutors, in consideration of that, made to each of their men, the prisoner and Williamson, a present in addition to their salaries.

On these facts the jury were of opinion that the prisoner was a servant within the meaning of the statute, and found him guilty, and I sentenced him to be imprisoned and kept to hard labour in the gaol of the city of Manchester for eighteen months.

The question for the opinion of the court is, whether the jury were warranted, on the above-stated facts, in finding that the prisoner was a servant within the meaning of the statute.

If the court should be of opinion that they were, the verdict and sentence to stand; if otherwise, both to be set aside.

RO. B. ARMSTRONG, Recorder of Manchester.

No counsel appeared for the prisoner.

*Hopwood*, for the prosecution, referred to *Harrington v. Churchward*, 29 L. J. Ch. 521, to show that the arrangement was a contract of hiring and service, and not a partnership.

By the COURT.—The prisoner was not a partner with the prosecutors, and was properly convicted.

*Conviction affirmed.*

[*Note.*—To share profits constitutes a partnership, but only as regards the claims of creditors, not in the relationship of the parties *inter se*. To pay a servant by a percentage on the profits does not change

the character of the service; if in other respects he is in fact a servant. It is the nature of the engagement, and of the duties performed, that determines the relationship, and not the mode of payment.—ED.]

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAID, Esqrs.  
Barristers-at-Law.

#### REGISTRATION APPEALS.

Friday, Nov. 15.

SMITH (app.) v. HUGGETT (resp.)

SMITH (app.) v. JAMES (resp.)

*Election law*—Notice of objection—Service on overseer through post—6 Vict. c. 18, ss. 7, 17, 100, and 101—County vote—Borough vote.

*In serving notices of objection through the post on overseers, it is not necessary that the formalities required by sect. 100 of stat. 6 Vict. c. 18, should be observed; it is enough to post them properly addressed, so that they reach the overseers in due time; therefore,*

*Where the objector inclosed a number of notices of objection in one and the same envelope addressed to the overseer, and there was evidence that they reached him in due time, and were published by him,*

*The Court held, that service through the post was the same as service by an agent, and was therefore good.*

This was an appeal from the decision of the revising barrister for Westminster.

#### CASE.

At a court held before me, the barrister duly appointed to revise the list of voters for the city of Westminster, Henry Smith objected to the name of John Michael Allen being retained on the list of voters for the parish of St. Anne's, Westminster. The name of John Michael Allen appeared on the list of persons claiming to vote in the snbjoined form:

Allen, John Michael	37, Wardour-street	House	37, Wardour-street
---------------------	--------------------	-------	--------------------

The facts of the case were as follows:—On my calling on the objector, in conformity with the 40th section of stat. 6 Vict. c. 18, to prove the service of his notice of objection on the overseers of the parish of St. Anne, it appeared that this notice was inclosed in the same cover with several others intended to be served by the objector in the same parish, the cover addressed "To the Overseers of the parish of Saint Anne in the city of Westminster," and a parcel of notices thus made up was dispatched by post, but the regulations prescribed by the 100th section of the above-mentioned statute for the posting notices of objection were not followed, and no duplicate stamped by any postmaster, according to the provisions of that section, was produced before me. The notice of objection reached the overseers of the parish of St. Anne on or before the 25th Aug., and was by them included in their published list of objections.

It was contended that service of a notice of objection on overseers by post in the manner described was sufficient to satisfy the provisions of the statute, and that if it were not sufficient, the effects of the irregularity were removed by the publication of the objection in the overseers' list.

On the first point I was of opinion that if notices of objections were served on overseers by post at all, the mode of posting prescribed by the 100th section of the

C. B.]

SMITH v. JAMES.

[C. B.]

statute 6 Vict. c. 18, must be adopted. This mode of posting being, by the 107th section, made applicable to the service of notice on overseers, could only be proved before the revising barrister by production of a duplicate stamped by a postmaster in conformity with the regulations provided by the 100th section of the statute.

On the second point I was of opinion that it was not in the power of the overseers by the publication of the objection to remove the effects of any irregularity committed by the objector in the performance of any of the acts required from him by the statute.

My conclusion on the case before me was, that there had not been such a service of the notice of objection on the overseers as the Act of Parliament demanded. Consequently I retained the name of John Michael Allen on the list of voters for the city of Westminster; but, in view of the appeal to be brought before the Superior Court, I called upon the said John Michael Allen to prove his qualification, which he failed through non-appearance to do.

Other appeals in the cases of persons named in the list subjoined depend on the same decision and ought to be consolidated with it.

If my decision in the case was wrong, the name of the said John Michael Allen, and also of the other persons named in the list subjoined, according to their respective descriptions therein, ought to be expunged from the register of voters for the city of Westminster. If my decision was right such names should be retained upon the register.

(Signed) T. H. T.

*Macnamara (Bourke with him)* for the app.—It is submitted that the services of the notices of objection was sufficient, especially so as they reached the overseer in due time, and were published by them. It is immaterial how the notice reaches the overseer; if it be shown that it actually reached him in time, the mode of service is of no consequence. Sect. 7 is of the same effect as sect. 17, with this difference only, that the former applies to the case of county votes, the latter to borough votes. Both enact that any person may object to the name of another person appearing on the list of voters, and every person so objecting shall, on or before, &c., give or cause to be given to the overseers of, &c., a notice of objection, &c., and every such notice of objection shall be signed by the party objecting. Then sect. 100 prescribes the mode of sending objections by post, and of proving before the revising barrister, by means of the production of a duplicate notice stamped by the postmaster, that the notice of objection has been duly served on the person objected to. Sect. 101 enacts, that whenever any notice is required to be sent to the overseers, it shall be sufficient if such notice be delivered to any one of such overseers, or shall be left at his place of abode, or at his office or other place of transacting parochial business, or shall be sent by the post free of postage, addressed to the overseers of the township or parish, naming it, and the county, city, or borough, &c., to which the notice so sent may relate, &c. From this it would appear that the mode of service is immaterial, so that service actually is effected within the prescribed time: (*Bishop v. Helps*, 2 C. B. 45; *Jones v. Innous*, 17 C. B. 290, 295; *Phillips v. Ensoll*, 1 C. M. & E. 374.)

*D. Keane contra.*—The statute by sect. 100 describes the process and mode of service, and it must be observed. Here a number of notices were inclosed in one envelope and sent to the overseers, which is clearly not enough: (*Dunlop v. Higgins*, 1 Cl. & Fin. 381.)

[The Court now took the next case, to which the judgment will apply.]

SMITH (app.) v. JAMES (resp.)

This was an appeal from the decision of the revising barristers for the county of Middlesex.

At a court held before the barristers duly appointed to revise the list of voters for the county of Middlesex, on Oct. 28, 1861, at Brentford,

John Antony Coates objected to the name of George Henry Hayward being retained on the list of voters for Brentford. The name of George Henry Hayward appeared on the list of persons claiming to vote in the subjoined form:

Hayward, George	Acton	Copyhold Lands	Church Field
Henry		and Buildings	Acton.

The facts of the case were as follows:—

On our calling upon the objector, in conformity with the 40th section of statute 6 Vict. c. 18, to prove the service of his notice of objection on the overseers of the parish of Acton, in the county of Middlesex, it appeared that this notice was inclosed in the same cover with several others intended to be served by the objector in the same parish. The cover had been addressed "To the Overseers of the parish of Acton, in the county of Middlesex." and the parcel of notices thus made up was dispatched by post; but the regulations prescribed by the 100th section of the above-mentioned statute for the posting of notices of objection were not followed, and no duplicate stamped by any postmaster according to the provisions of that section was produced before us. The notice of objection reached the overseers of the parish of Acton on or before the 25th Ang., and was by them included in their published list of objections.

It was contended that service of a notice of objection on overseers by post in the manner described was sufficient to satisfy the 101st section of the statute, and that if it were not sufficient the effects of the irregularity were removed by the publication of the objection in the overseers' list.

On the first point we were of opinion that, if notices of objection were served on overseers by post at all, the mode of posting prescribed by the 100th section of the statute 6 Vict. c. 18, must be adopted, this mode of posting being, by the 101st section, made applicable to the service of notices on overseers; and that, consequently, service by post of a notice of objection on overseers could only be proved before the revising barrister by production of a duplicate stamped by a postmaster, in conformity with the regulations provided by the 100th section of the statute.

On the second point, we were of opinion that it was not in the power of the overseers, by the publication of the objection, to remove the effects of irregularity committed by the objector in the performance of any of the acts required from him by the statute.

Our conclusion on the case before us was, that there had not been such a service of the notice of objection on the overseers as the Act of Parliament demanded. Consequently we retained the name of George Henry Hayward on the list of voters for the county of Middlesex; but, in view of the appeal to be brought before the Superior Court, we called upon the said George Henry Hayward to prove his qualification, which he failed, through non-appearance, to do.

Other appeals in the cases of the persons named in the list subjoined depend on the same decision, and ought to be consolidated with it.

If our decision in the case was wrong, the name of the said George Henry Hayward, and also of the other persons named in the list subjoined, according to their respective descriptions therein, ought to be expunged from the register of voters for the county of Middlesex. If our decision was right, then such names should be retained upon the register. (Signed)

H. S. M.

C. B.]

COURTIS v. BLIGHT AND OTHERS.

[C. B.]

*Bridge*, for the app., offered no argument.

*Welsby* for resp.—The service of the notice of objection must be in the mode prescribed by sect. 100 of the statute—that is to say, by the production of a duplicate, signed by the objector, and stamped by the postmaster, and nothing less will suffice. Here then the proof failed. The 17th section says that the objector shall “give or cause to be given” a notice to the overseers. Now this may be effected in various ways. You may serve the notice personally; you may serve it by an agent, or you may send it by the post; but if you adopt the latter course, it must be sent in observance of the formalities prescribed by sect. 100.

Counsel were not heard in reply.

ERLE, C. J.—I am of opinion that the revising barrister was wrong in this case, and that the evidence was sufficient to show that the statute had been complied with in respect of sending notice of objection to the overseers. The statute requires that the objector should deliver, or cause to be delivered, notice of objection to the overseers, and the evidence here is that he put the notice into the post, and the further evidence is that the notice of objection reached the overseers in due time. If he had delivered the notices with his own hand there would have been no question, and so if he had sent them by a private messenger there would have been no question. He did send them by post, and the post is now for many purposes of law an agent between the parties who are to send and receive letters. In this case the post would be agent for the sender of the notice, and he therefore sent the notice by his agent. He was bound to go on and prove that his agent delivered the notice, and that he delivered it in time. The objection is, that by sect. 100 a special mode is provided for proving the service of notices. A statutable mode is given for proving that the notices to which that section applies had been sent, and it is an enabling statute to facilitate the proof, and it relieves the party on whom the obligation is cast of sending notice—it relieves him from being bound to produce evidence to show that his notice reached its destination, provided he dispatched it according to the formalities mentioned in sect. 100, such as sending it to the post-office, having a duplicate, and keeping one duplicate and getting it stamped. Then the party who delivers these two duplicates to the postmaster, who sends one of them, is enabled by the statute to prove that all that the statute requires was done in respect to that notice. It is an entirely enabling and facilitating provision, and it takes away none of the modes of proving that the notice reached its destination that are consistent with the law as it stood before; and that being so, the argument entirely fails in calling upon us to construe the statute as if it said, “You must send by post, and nothing is sufficient to show that the notice reached its destination except the statutable mode of proving it.” The section has no such words, and it is very clear to my mind that there was no such intention. It gives facility if the party chooses to adopt it. Where the section does apply is this—that it gives a facility, but all other facilities are still allowed by law. I am of opinion that all that the statute required has been done by showing that the notice was delivered to the post in time, and by proving that the notice reached its destination in time.

WILLIAMS, J.—I am entirely of the same opinion. It is quite unnecessary for the court to say what would have been their decision if in this case the notices had not reached the overseers. If the post-office had made default, the question might have arisen whether there had been a sufficient compliance with the Act to enable the objector to stand on his objection; but the notice has reached the overseers

here, and therefore it is sufficiently demonstrated that the objector has complied with the Act. The question is whether the objector delivered, or caused to be delivered, his notice in proper time; and I am of opinion that he did.

BYLES, J.—I also agree with what has fallen from my Lord and my brother Williams. The only question arises on the 7th and 17th sections of the statute—one section applying to the case of county, and the other to that of borough voters, which provide that a party objecting shall give, or cause to be given—that means give by yourself or your agents—notice within proper time. In this case he did not give the notice by himself, but by his agent, and why that party is the less his agent because he is a public officer I do not see.

KEATING, J.—I also agree.

*Judgment for app.*

*Henry Smith*, Norfolk-street, attorney for app.

#### REGISTRATION APPEAL.

Nov. 19 and 22.

COURTIS (app.) v. BLIGHT AND OTHERS (resps.)

*Election law—Notices of objection—Objector's place of abode—6 Vict. c. 18, s. 7.*

*The true place of his abode at the time of signing the notice of objection must be stated by the objector pursuant to 6 Vict. c. 18, s. 7, on the notice sent to the person objected to; and if he has bona fide two places of abode, it is enough if he state either.*

*The question as to what is the true place of abode of the objector is rather one of fact than of law.*

At a court held before the revising barrister duly appointed to revise the lists of voters for the borough of Devonport, for the revision of the list of voters for the parish of Stoke Damerel, James Webb Courtis objected to the name of Walter Seymour Blight and the other persons whose names are set forth in the schedule hereto, and to divers other persons (whose names it is not material to mention), being retained on the list of persons entitled to vote in the election of members of Parliament for the borough of Devonport.

The notices of objection both to the overseers and to the party purported to be signed thus, “James Webb Courtis, of 25, Clowance-street, on the list of voters for the parish of Stoke Damerel.” The total number of cases affected by these notices was 202.

The notices, which were in all other respects good, were impeached on two grounds:

1. That the place of abode of the objector had been inserted after the objector had signed the notices.
2. That the objector's place of abode was not properly stated in the notices.

The facts were as follows:—

It is the practice of the overseers of the parish of Stoke Damerel, in making out the list of voters, to divide it into six wards, being the wards into which the parish is divided for municipal purposes.

The name of the objector (the app.) appeared twice on the list.

First, in St. Anbyn ward (which is the second ward in order) his name stood thus:

Courtis, James Webb,	94, Fore-street	house	25, Clowance-street.
		house	94, Fore street.

Secondly, in Clowance Ward (which is the fourth ward in order) his name stood thus:

Curtis, James Webb,	25, Clowance-street,	house	25, Clowance-street.

Throughout this list, whenever the voter's qualifica-

tion is supposed to consist of two houses occupied in succession, the words "in succession" are not inserted, but the word "house" is inserted in the third column, and the description of the two houses is inserted in the fourth column in the order of their occupation.

The notices, which were in the ordinary printed form, were prepared in the office of a solicitor, and were properly filled in with the name of the person objected to, the date, and the like before the objector signed them, but a blank was left for the objector's signature and place of abode. The app. signed all the notices with his own hand on the 23rd Aug. 1861, but he did not add any place of abode; but immediately after he had signed them the words "25, Clowance-street," were written after his signature by the clerks who had previously filled in the other written parts. In some cases this was done in his presence, in all cases on the same day.

The app. gave no directions for the insertion of any particular place of abode; but he knew that, as first as he signed, the clerks added the description, "25, Clowance-street," as his place of abode.

It was contended that the notices were bad, because the place of abode was added after the app. had signed, and without any express direction from him.

I was of opinion that this did not invalidate the notices, and I decided that (inasmuch as the addition was known to and sanctioned by him) the notices were in this respect good.

It was then contended that the notices were bad, because 25, Clowance-street, was not the app.'s place of abode. Upon this point the facts were as follows:—For about two years before Feb. 1861 the app. occupied and lived in 25, Clowance-street. The house belonged to his mother, but much of the furniture belonged to him, and it had been verbally agreed between the app. and his mother that he should occupy the house as her tenant at will, paying no rent; and that she should live with him. In Feb. 1861 the app. (who until Christmas 1860 had been in a solicitor's office) removed with his wife to 94, Fore-street, and there the app. carried on the business of a licensed victualler until the time of holding this court, the 12th Oct. 1861. During all this time the app. had no other occupation, and it was necessary for the conduct of the business that he and his wife should live and sleep at 94, Fore-street.

They did live and sleep there from Feb. 1861 until the 12th Oct. 1861 without any interruption save this, that the app. and his wife slept at 25, Clowance-street one night, and that the app. himself slept there ten nights. The app. and his wife were living and slept at 94, Fore-street, on the 23rd Aug. 1861. The app., however, continued the occupation of 25, Clowance-street, and he did nothing to prevent him from returning to live there, and he intended to return to live there whenever it should suit his convenience; and about the 1st Oct. 1861 he entered into an arrangement (which has not been yet carried into effect) to discontinue the business carried on at 94, Fore-street, and give up the occupation of the premises.

After the app. removed to 94, Fore-street, his mother had no other permanent home than 25, Clowance-street, and she occasionally resided there, and whilst she so resided the app. kept a woman servant to attend on her; but between February and October the mother frequently lived elsewhere, sometimes with the app. at 94, Fore-street, sometimes with a daughter at Kingsbridge, which is fifteen miles from Devonport, and during the mother's absence from 25, Clowance-street, no servant was kept, so that it frequently happened that the house 25, Clowance-street, was left for two or three weeks at a time without any one living in it, and no servant was kept there during the months of July, August and September.

Upon these facts it was contended by the respa. that

94, Fore-street, and not 25, Clowance-street, was, on the 23rd Aug. 1861, the app.'s true place of abode; that he could not, for this purpose, have two places of abode, and that the notices were therefore bad.

It was contended by the app.—1. That the place of abode was rightly stated, inasmuch as 25, Clowance-street, was the place of abode, stated on the list of voters for Clowance ward. 2. That the app. had two places of abode; that is to say, 25, Clowance-street, his permanent home, and 94, Fore-street, his temporary residence.

I was of opinion that the app. was required to state his true place of abode at the time when he signed the notices; that, if he really had two *bona fide* places of abode, he might state either; but I thought that it was not sufficient to prove a mere legal residence at 25, Clowance-street, and I was of opinion that, under the circumstances above stated, 25, Clowance-street had for the time ceased to be the app.'s place of abode, and that 94, Fore-street was for the time his only true place of abode. I therefore decided that the notices were bad, and retained on the list the names of the persons objected to; but I offered to allow them to prove their respective qualifications, which some of them did, but the respa. whose names are set forth in the schedule hereto failed or declined to do so.

The appeals in all these cases depend upon the same decision, and ought to be consolidated.

If the Court of C. B. shall be of opinion that the notices of objection were invalid for either of the reasons insisted on by the respa., the register will remain without amendment; but if the court shall be of opinion that app. was properly described as of 25, Clowance-street, and that the notices were not invalid by reason of the addition of the place of abode after the app. had signed, then the names of the persons set forth in the schedule hereto are to be expunged from the register. (Signed) H. T. E

*Lush* (E. N. Bullen with him) for the app.

*Karslake* (Lopez with him) for the respa.

*Cur. adv. vult.*

Nov. 22.—ERLE, C. J. now delivered the judgment of the court. In this case we think that the revising barrister was right in requiring that the objector should state his true place of abode, and that if he had *bona fide* two places of abode, he might state either. We also agree with him in thinking that the objector actually resided with his family, and carried on a business in 24, Fore-street at the time of the objection; and that if Fore-street, had been stated, it could not have been objected to with success. But the question before us is, whether Clowance-street is not shown to be also his true place of abode by reason of the fact that he continued tenant at will to his mother of the house there, and had the intention of returning, and had left some furniture, and had slept there at a stated time. We consider that to be rather a question of fact than law. The state of his tenancy at will to the mother with the intention to return, is in close analogy with the liberty to stay at his mother's house when he should choose. He was personally absent from Fore-street at the time when the party objected to might require information, and during a great part of the time between the objection and revising the house appears to have been empty. We think the revising barrister was not bound in law to hold Clowance-street the true place of abode by reason of the tenancy at will under the circumstances stated, and we therefore affirm his decision.

*Judgment for respa.*

Attorneys for respa., *Clowes, Hickley and Cleary*, agents for *Edmonds and Son*, Plymouth.

Q. B.]

NICHOLL AND OTHERS v. ALLEN.

[Q. B.]

## COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and C. J. B. BERTALOT, Esqrs., Barristers-at-Law.

Wednesday, Jan. 15.

NICHOLL AND OTHERS v. ALLEN.

*Bridge—Liability to repair—Receipt of toll—Private Acts.*

*A private Act, 20 Geo. 2, recited that it was convenient that a bridge should be built across the Thames from W. to S., and that D. had proposed to build it, and then enacted that D., his heirs and assigns, were thereby authorised and empowered to build the same, and gave all necessary powers for that purpose; and sect. 10 recited that for and in consideration of the great charges and expenses which D., his heirs and assigns would be at, not only in building, but also in repairing, maintaining and keeping up the same, it should be lawful for them to take and receive certain specified tolls; and by sect. 13, that when, from accidents, tempests, or otherwise, the passage of the bridge should become dangerous or impracticable, they might set up a convenient ferry as near as might be to the said bridge, and receive the said tolls for crossing the river by means of such ferry, provided that such ferry should not continue for a longer time than necessary for repairing or rebuilding the said bridge, or than the passage over the same might be dangerous or impracticable. The bridge was to be deemed extra-parochial, and the adjoining parishes were exempted from liability to repair. The 20 Geo. 3, c. xxxiii, recited that the bridge was in a ruinous condition, and that S. had proposed to repair it conformable to the previous Act, but the tolls were inadequate to the expense thereof, and gave to S., his heirs and assigns, power to take increased tolls.*

*The bridge was built and repaired, and the tolls taken by the successive proprietors thereof down to 1829, when the deft. became proprietor, since which time he has received the tolls and exercised the powers of the Acts. In 1859 the principal arch of the bridge fell in, and the damage has not in any way been repaired, but the deft. has set up a ferry and received tolls thereat under the Act:*

*Held, that the deft. was bound to reinstate the bridge, and maintain the same in a state practicable for passage.*

This was an action brought by the plts. against the deft. for the recovery of damages sustained by them by reason of the passage of the bridge hereafter mentioned being impracticable, and for a *mandamus* commanding the deft. to repair and reinstate the said bridge, and maintain the same in a fit state for passage, and by consent the following case was stated for the opinion of the court:—

## CASE.

In the 20th year of the reign of King George II., an Act of Parliament was passed intitled "An Act for building a bridge across the river Thames, from the parish of Walton-on-Thames to Shepperton, in the county of Middlesex."

Shortly after the passing of this Act the bridge thereby authorised to be built was, under and by virtue of the powers therein contained, built by Samuel Dicker, Esq., in the said Act mentioned.

In the 20th year of the reign of King George III. another Act was passed for enlarging the powers of the said first-mentioned Act. Both Acts are to be referred to as part of this case.

From the time of the said bridge being built until it became impassable as hereinafter mentioned, no repairs were required, nor were any done to the structure of the said bridge, save those contemplated by the said Act of the 20th George III., but all other repairs

required for the maintenance of the said bridge and the roadway thereof were from time to time done by the successive proprietors thereof, and during all the time aforesaid the said bridge was used by the public for the purpose of passage on the payment of the tolls by the said Act authorised to be demanded and taken. These tolls, and other the powers, privileges, and immunities by the said Act given and granted, have been received, exercised and enjoyed by the successive proprietors of the said bridge from the time of the same having been built as aforesaid.

In or about the year 1829 the deft. was, and from thence hitherto has been and still is, the proprietor of the said bridge, and as such proprietor has received, exercised and enjoyed the said tolls, powers, privileges and immunities.

On the 11th Aug. 1859 the principal arch of the said bridge fell in, but whether in consequence of some original defect in the structure or foundations of the bridge, or for want of needful and necessary maintenance and repairs, has not been ascertained, and by reason thereof and of the said damage or injury not having been in any way repaired or made good, the passage of the said bridge became and was, and from thence has been, and still is, wholly impracticable.

On the passage of the bridge so becoming impracticable, the deft., under and by virtue of powers in that behalf vested in him as the proprietor of the said bridge by the said Acts, provided and set up, and from thence hitherto has maintained, a ferry across the Thames, near to the said bridge, and for passage over the river by the ferry he has demanded and taken, and still continues to demand and take, the tolls in that behalf authorised by the said Acts. A reasonable time for repairing and reinstating the said bridge and rendering the passage thereof practicable elapsed before the commencement of this suit, and before the incurring of the damages by the plts. for which the action is brought.

The plts. are the owners of a considerable estate near to and on the Middlesex side of the bridge, and also of another considerable estate near to and on the Surrey side of the bridge, and have sustained damage by reason of the passage of the bridge being impracticable, and are personally interested in the said bridge being repaired and reinstated and maintained in a state practicable for passage.

The question for the opinion of the court is, whether the deft., as the proprietor of the said bridge, is, under or by virtue of the said Acts, bound to reinstate the bridge and maintain the same in a state practicable for passage.

The following are the material parts of the Acts referred to:—The 20 Geo. 2, recites, that "Whereas it is convenient that a bridge should be built across the river of Thames from the parish of Walton-upon-Thames, in the county of Surrey, to the opposite shore in the parish of Shepperton, in the county of Middlesex, for the better ease and commerce of the inhabitants of the said counties respectively, and the parts adjacent; and whereas Samuel Dicker, of Walton-upon-Thames, in the said county of Surrey, Esquire, hath proposed to build the said bridge across the said river for the purpose aforesaid, whereby many mischiefs and inconveniences will be remedied, and great advantages accrue to the public. Be it therefore enacted, that it shall and may be lawful to and for the said S. Dicker, his heirs and assigns, and he and they are hereby authorised and empowered, and shall have full power and authority by virtue of this present Act, at his and their own proper costs and charges, by himself and themselves, his and their deputies, agents, officers, workmen, servants and others, to build the said bridge from Walton-upon-Thames to Shepperton aforesaid, and that for the purposes aforesaid he and they shall have full power and authority by himself and them--

Q. B.]

NICHOLL AND OTHERS v. ALLAN.

[Q. B.]

selves, his and their servants, agents, workmen, and others, to remove any shelf or shelves, or to deepen or widen the said river of Thames, or any ays or stops in the same between the parishes of Walton-upon-Thames and Shepperton aforesaid, and to dig or cut the banks of the said river Thames in such manner as shall be necessary and proper for building the said bridge and the navigation and passage of boats, barges, lighters and other vessels, and for the more convenient and the better carrying on and effecting the said undertaking, and making the navigation of the said Thames more easy for the boats, barges, lighters and other vessels as aforesaid, under, or to and from such bridge when built (be it the soil or ground of the King's most excellent Majesty, his heirs or successors, or of any other person or persons, bodies politic or corporate whatsoever), and also to cut, remove, and take away all trees, roots of trees, beds of gravel, sand, or mud, or any other impediment whatsoever, which may anyways hinder the said navigation, either by obstructing the sailing, haling, towing, or drawing boats and vessels, with men or horses, or otherwise, upon the said river Thames, between the said parishes of Walton and Shepperton, and to build, erect and set up, and to make in, over, or on the said river and lands adjoining or near to the same, any camp-shot trenches and landing-places, and to amend, alter, remove, or heighten any foot-bridge foot-paths, or horse-paths, or to turn or alter any highways in, upon, or near unto the said river, leading to the said new intended bridge, within the parishes of Walton and Shepperton, so as not to stop any common highway leading to, from, or through either of the townships of Shepperton or Walton, and to appoint, set out, and make any towing paths, banks and ways for towing, haling and drawing of boats, barges, lighters, and other vessels passing in, through and upon the said river, under the intended bridge between the parishes of Walton and Shepperton, or any part thereof, and from time to time and at all times hereafter, to do all other matters and things necessary or convenient for making, maintaining, continuing and perfecting the said bridge, and the navigable passages under or near the same, or for the improvement or prosecution thereof, the said S. Dicker, his heirs and assigns, doing as little damage as may be, and first giving satisfaction to the respective owners and proprietors of such trees, ground, land, tenements, or hereditaments as shall be pulled down, demolished, altered, dug up, cut, removed, or otherwise made use of for every or any of the purposes aforesaid, or that in anywise shall be prejudiced or damaged by or for the carrying on the building, effecting, preserving and continuing or maintaining the said bridge, or the navigation near thereunto; and also giving satisfaction for all damages that shall be done, such damages to be ascertained in the manner hereinafter directed, according to the true intent and meaning of this Act."

Sect. 10. That for and in consideration of the great charges and expenses that the said S. Dicker, his heirs or assigns, shall be at, not only in building the said bridge, but also in making, erecting, repairing, cleaning, maintaining, keeping up, and continuing other matters necessary to be made and erected as aforesaid, it shall and may be lawful to and for the said S. Dicker, his heirs or assigns, and no other person whatever, from time to time, and at all times hereafter, to ask, demand, receive, recover, and take to and for his and their own proper use and behoof in respect of his charges and expenses aforesaid for pontage, or in the name of a toll or duty for any passage over the said bridge, or any part thereof, the sums hereafter mentioned, before any person or any coach, berlin, landau, chariot, calash, chaise, chair, hearse, waggon, wain, cart, dray, carriage, horse, mare, gelding, mule, or ass, oxen, sheep, lambs, hogs, or other cattle or carriage whatsoever shall be permitted to pass over the said bridge to be

erected by virtue of this Act, the several sums following, that is to say: (the section then specified the several tolls that were to be taken.)

Sect. 13. And whereas it may so happen that the said bridge may in times to come receive such damage by unforeseen accidents, or by tempests or otherwise, that the passage thereof may for some time become dangerous or impracticable; be it further enacted that in all such cases it shall and may be lawful to and for the said S. Dicker, his heirs and assigns, from time to time, as often as occasion shall require, to provide, maintain and set up a proper and convenient ferry or ferries across the said river of Thames, at such place or places as he or they shall judge to be most proper and convenient, and as near to the said bridge as conveniently may be, and there to take for passage over the said river, by such ferry or ferries, such rates and duties as are granted by this Act for the toll or pontage aforesaid.

Sect. 14. Provided always, that such ferry or ferries shall not continue for any longer times than shall be necessary for repairing or rebuilding the said bridge, or longer than the passage over the same shall or may be dangerous or impracticable as aforesaid.

Sect. 19. That the said bridge shall not be rated or assessed for or towards the land-tax, the repairs of highways, poors-rate, churchwardens, or any other parish rate whatsoever, nor shall the said bridge or any part thereof be deemed or looked upon to belong to or to be within any parish, but be extra-parochial to all intents and purposes whatsoever.

Sect. 20. Provided always, and it is hereby further enacted and declared, that the said bridge, when built, shall not be deemed or taken to be a county bridge, so as to subject the counties of Middlesex and Surrey, or either of them, to the repairing or supporting the same.

The 20 Geo. 3, c. xxxii. (an Act for enlarging the powers of an Act made in the 20th year of Geo. II., for building a bridge cross the river Thames, from the parish of Walton-upon-Thames, in the county of Surrey, to Shepperton, in the county of Middlesex), recites that "Whereas by an Act made in the 20th year of the reign of his late Majesty king George the Second, intituled, 'An Act for building a bridge cross the river Thames, from Walton-upon-Thames, in the county of Surrey, to Shepperton, in the county of Middlesex,' several tolls, duties and powers were given and granted to S. Dicker, Esq., of the parish of Walton, in the county of Surrey, to build a bridge cross the river Thames from the said parish of Walton to Shepperton, in the county of Middlesex, and a bridge was accordingly built, and passable for many years. And whereas the said bridge is now in a ruinous condition, and if not effectually repaired or rebuilt will be manifestly to the inconvenience of the public. Whereas Michael Dicker Sanders, of the city of Exeter, is now sole proprietor of the said bridge cross the said river, and hath proposed effectually to repair or rebuild the said bridge cross the said river, conformable to the powers and subject to the provisos in the above recited Act, but it having been found from experience that the pontage toll or duty for passage over the said bridge, or any part thereof, is greatly inadequate to the expense of building and keeping in repair the same; be it therefore enacted, that from and after the passing this Act it shall and may be lawful to and for the said M. D. Sanders, his heirs and assigns, or such person or person authorised and empowered by the said M. D. Sanders, his heirs and assigns, and no other person whatsoever, and he and they is and are hereby authorised and empowered, and shall have full power and authority, by virtue of the present Act, from time to time and at all times thereafter, to ask, demand, receive, recover and take to and for his and their own proper use the tolls following: " (the Act then specifies the increased tolls to be taken.)

Q. B.]

Ex parte WATKINS.

[Q. B.]

Sect. 8 enacts that the powers of the former Act shall be extended to this Act.

*Kemplog*, for the pte., contended that there was an obligation on the deft. to restore the bridge, he having received the tolls and having erected a ferry near to the bridge since its partial destruction, and taken tolls in respect thereof which he would have no right to have done but for the purpose of repairing the bridge.

*Lush* (T. J. Clark with him), for the deft., argued that the Acts did not impose any obligation to rebuild the bridge on the deft.; that the language of the Acts was permissive and empowering only; that although it was a public bridge, it did not follow that some one was bound to repair it. In the Acts it was put as a matter of convenience, not of obligation.

Cases cited:—*R. v. York and North Midland Railway Company*, 1 El. & Bl. 178, 860; *R. v. Kent*, 13 East, 220; *R. v. Lindsey*, 14 East, 317; *R. v. Kerrison*, 3 M. & S. 526; *R. v. Severn and Wye Railway Company*, 2 B. & Ald. 646; *R. v. Isle of Ely*, 15 Q. B. 827; *R. v. Yorkshire*, 2 W. Bl. 685-708; *R. v. Llandilo*, 2 T. R. 232.

WIGHTMAN, J.—I am of opinion that the pte. are entitled to judgment, and that the duty was cast on the deft. to keep up the bridge as long as he received the tolls given under the Acts. There is no question that after the building of the bridge it became a public bridge, and by the Acts for the building and keeping the bridge in repair the builder is entitled to receive certain tolls by the name of pontage. And the Act says, that whenever it happens that the bridge may receive such damage by unforeseen accidents or tempest, or otherwise, that the passage thereof may for some time become dangerous or impracticable, it shall be lawful for the said S. Dicker, his heirs and assigns, from time to time to provide, maintain and set up a proper and convenient ferry, and to take for passage over the said river by such ferry such rates and duties as are granted by this Act for the toll or pontage aforesaid, provided that such ferry shall not continue for any longer times than shall be necessary for repairing or rebuilding the said bridge, or longer than the passage over the same shall or may be dangerous or impracticable, as aforesaid. Now it seems to me, that the Act contemplated that the payment of the toll during the time the bridge may be under repair, and the passage over the river is by ferry, was to be in lieu of the pontage which the owner was entitled to receive if the bridge had still been passable. The toll to be received by authority of the Act is for the purpose not only of building, but of maintaining, keeping up, and continuing the bridge. It is said that, though the public are to be chargeable with toll, no correlative duty is cast on the proprietor to keep up and maintain the bridge. But the Act says that, in consideration of building and keeping up the bridge, the proprietor shall be entitled to demand the toll. It then gives certain tolls. And, in my opinion, therefore the deft. is liable to keep up and maintain the bridge, he down to the present time having received the tolls which have been payable for the last 130 years; otherwise he might not spend one farthing on the repair of the bridge, and take the pontage as a mere annuity.

CROMPTON, J.—I also think that the deft. is liable to repair the bridge as long as it may be liable to repair and he may be the proprietor of it. It is an unusual mode to attach a liability to repair a bridge to a man and his heirs and assigns; in general such a liability is attached to the land adjoining the spot over which the bridge may happen to pass. In reference to the bridge itself, it may be that the builder may have bought land for the abutments, and the people who take the land by inheritance or assignment may be liable to repair and maintain it; and that if the proprietor were to assign it to a beggar, he would get rid

of his obligation. If the bridge were wholly destroyed and the proprietor gave up taking the tolls, there might be some difference as to his obligation. But the intention of the Act was, that Mr. Dicker should take the tolls and build the bridge in the first instance, and afterwards that he should maintain and keep up the bridge as long as he used his rights as the proprietor, and took the tolls, and with them to repair the bridge. If this were not so, it would be the only case where the obligation to repair a public bridge is not thrown on some one.

MELLOR, J.—I am of the same opinion. At the time the bridge was originally built it was contemplated by the Legislature and the undertakers of the project, that the tolls would abundantly compensate him for the expense of erecting and maintaining the bridge; and anything so absurd cannot be imagined as that the bridge should be built and no one be bound to repair it. The Act, in consideration of the great charges and expenses Mr. Dicker, his heirs and assigns, would be at, not only in building the bridge, but also in keeping up, maintaining and continuing it, gives them a right to take tolls. From the recitals in the second Act, it appears that the expectation that the tolls would always be sufficient for those purposes had not turned out to be correct, and that by that Act the proprietor asked for increased tolls, which were expressly given to him under the name of pontage, on the ground that by experience the original toll had been found inadequate for the purpose of keeping and maintaining the bridge in repair, and he receives the tolls on that ground. He would have no right to them for any other purpose under the Act of Parliament.

*Judgment for the pte.*

Ex parte WATKINS.

*Quarter sessions—Order for costs—Taxation after sessions over—Jurisdiction.*

Where a party objects to an order of quarter sessions, on the ground that the amount of costs inserted in the order was ascertained by taxation after the sessions had expired, he should protest against the taxation before the taxing officer; otherwise, if he attends and proceeds with the taxation without protesting, he waives the objection.

J. A. Russell moved for a *certiorari* to bring up an order made at the Buckinghamshire quarter sessions, holden on the 14th Oct. 1861, affirming an order of affiliation with costs: (7 & 8 Vict. c. 101, s. 4.) The ground of the motion was, that the taxation of costs took place after the sessions were over, and that the order, as drawn up by the clerk of the peace, with the amount of taxed costs inserted, was his act, and not the act of the court. The rule is, that not only must the costs be ordered to be paid by the court, but the amount must also be ascertained by the court: (*Reg. v. Long*, 1 Q. B. 740.)

COCKBURN, C. J.—Did the party now objecting attend the taxation? Because, if he did so without protest, he has waived the irregularity.

Russell.—He attended the taxation, and the affidavit does not say that he protested against the taxation.

COCKBURN, C. J.—The case of *Reg. v. The Shrewsbury and Hereford Railway Company*, 25 L. T. Rep. 65, is precisely in point: "Where the parties attend and proceed with the taxation of costs by the clerk of the peace under an order of sessions, without making objection to his jurisdiction, they are estopped from moving to quash the order drawn up by the clerk of the peace after such taxation for payment of the amount taxed." On the authority of that case the irregularity is waived.

The rest of the Court concurring,

*Rule refused.*



Thursday, Jan. 16.

REG. v. THOMAS BIGGINS.

*Summary conviction—Master and servant—Adjournment to enable deft. to obtain legal assistance—Trying several defts. together—Abatement of wages—Jurisdiction.*

*Although a deft. has a right under the 11 & 12 Vict. c. 43, s. 12, to make his full defence by counsel or attorney, this does not give him a right to have a case adjourned in order to procure such assistance, even though he has had no opportunity of procuring it. Where there are several charges against several defts., but the evidence against them all is the same, and they are all tried at the same time, and each is separately convicted, no objection having been raised at the time by the defts. to this course of proceeding, such convictions cannot afterwards be objected to upon the ground that each deft. should have been tried separately.*

*Under the 4 Geo. 4, c. 34, s. 3, the justice may by his conviction order wages already due and unpaid to be abated.*

*A. B. and several others were apprehended under a warrant at nine o'clock in the evening of the 19th June, for an offence under sect. 3 of the 4 Geo. 4, c. 34, and were locked up all night, having no means of communicating with any legal adviser. At half-past seven the next morning they were taken before a justice, when, before the case was gone into, they requested an adjournment to enable them to procure legal assistance; this was refused by the justice, who proceeded to hear the charge, which, as it was the same against all the defts., was heard against all at the same time, no objection having been raised to such a course of proceeding. The justice convicted each deft., and ordered 10s. of the wages due to each to be abated:*

*Held, that the foregoing facts did not show a want of jurisdiction, and that the conviction was good.*

This was a motion for a rule to quash a conviction turned into this court by certiorari.

It appeared that on the 20th June last the deft. was convicted before the Rev. H. C. Lipcombe, a justice of the county of Durham, under the 4 Geo. 4, c. 34, for absenting himself from his service before the term of his contract was complete, without the consent of his master.

The affidavit of Thomas Biggins, upon which the rule was moved, stated that before and up to and inclusive of the 18th June last, he was employed by one Henry Weaver as a stonemason at Cockfield, about four miles from the village of Staindrop, in the county of Durham, in and about the erection of a certain viaduct, for the erection of which the said Henry Weaver was the contractor; that on the morning of the 19th June last, before commencing the day's work, he (in exercise as he then believed of his legal right to do so) put an end to his said employment, and thereupon went to the office of the said Henry Weaver to obtain payment of the wages then due to him, which payment he refused to make; that in the evening of the same day a message, purporting to be from the said Henry Weaver, was delivered to him and to several other persons who had in like manner left the service, that if they would go to a certain public-house they should be paid the wages then due to them respectively; that in consequence of the said message he went to the said public-house, as did also the others; that on his and the other persons arriving at the public-house the said Henry Weaver was waiting there, and shortly after several policemen came from another room and produced warrants for their apprehension upon a charge of having illegally left their said employment, which warrants were signed by the said Rev. H. C. Lipcombe; that immediately after the production of the warrants the policemen

handcuffed them and took them into custody, and on foot, to the village of Staindrop (three miles from the said public-house) and that they arrived there about half-past nine that night; that they were put together in cells in the lock-up house, and were kept there all the night, and up to the time of their being taken before the said Rev. H. C. Lipcombe the following morning; that from the time of his being taken into custody until the time of his being taken before the said Rev. H. C. Lipcombe, he was not allowed to communicate, nor did he in fact communicate, with any person except his fellow-prisoners, nor had he any means or opportunity of preparing his defence, or of instructing any attorney to appear on his behalf, although he believed that he had a defence to the said charge on the merits, and although he was anxious to instruct, and should have instructed if there had been time or opportunity afforded to him to do so, an attorney to appear and defend him against the said charge; that before half-past seven o'clock in the morning of the 20th June he and the other persons were taken together from the said lock-up house into the office of the clerk of the magistrates at Staindrop aforesaid, and were then charged before the said Rev. H. C. Lipcombe, by the said Henry Weaver, with unlawfully leaving their employment on the previous day; that immediately upon their being so brought before the said magistrate, and before the hearing of the charge was entered upon, he and the other persons applied to the said magistrate to have the hearing adjourned to enable him, and the said other persons to obtain legal assistance, and it was distinctly stated to the said magistrate at what hour of the previous night they had arrived at the said lock-up house, and that they had no opportunity of communicating with, or of obtaining, and had been unable to obtain, any attorney to act on their behalf; but the said magistrate refused to grant any adjournment, and proceeded, in the absence of any legal assistance on their behalf, to hear and adjudicate upon the said charge; that no separate charge was gone into or made against him, or against any or either of the said other persons, nor was either of them tried separately or singly, but they were all tried together, in the lump; and the said magistrate, after hearing the said Henry Weaver and his son, stated that he (the said magistrate) should fine each of them 10s., and the magistrate, addressing him and the other persons, asked whether they were prepared to pay such fines, to which they replied that they were not, and that they would rather go to gaol than pay, whereupon the said Henry Weaver, stated to the magistrate that he had wages in his hands due to each of them, and the magistrate thereupon stated that the fines might be stopped out of such wages.

The conviction stated "that on the 20th day of June, A. D. 1861, at Staindrop, in the said county of Durham, Thomas Biggins, of Cockfield in the said county of Durham, is convicted before the undersigned, one of her Majesty's justices of the peace in and for the said county of Durham, for that he the said Thomas Biggins on the 27th day of March last, at the parish of Cockfield, in the said county of Durham, being then and there a handicraftsman, did contract with Henry Weaver, of Staindrop, in the same county, contractor, to serve him for an indefinite period, determinable nevertheless by either of the contracting parties at the end of any day by either of them giving to the other of them verbal notice to that effect, and for the daily wages of five shillings payable at the end of each fortnight, with a weekly allowance for subsistence in the mean time; and that the said Thomas Biggins having entered into such service accordingly, did afterwards, to wit, on the 19th day of June instant, at the said parish of Cockfield, absent himself the said Thomas Biggins from his said service before the term of his

Q. B.] THE VESTRY OF ST. LUKE, MIDDLESEX (apps.) AND THOMAS LEWIS (resp.) [Q. B.]

said contract was completed, without the consent of the said Henry Weaver, and without just cause or excuse, and hath from thence neglected to fulfil his said contract, contrary to the form of the statute in such case made and provided. I do therefore adjudge the said Thomas Biggins for his said offence to be punished by abating the sum of 10s., being a part of the wages due to the said Thomas Biggins for and in respect of his said service and employment, according to the form of the statute in such case made and provided," &c.

By the 4 Geo. 4, c. 34, s. 3, it is enacted, "That if any servant in husbandry, calico-printer, handicraftsman, &c., shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, &c., or having entered into such service, shall abate himself, &c., before the term of his or her contract, &c. shall be completed, &c., it shall be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour, for a reasonable time not exceeding three months, and to abate a proportionable part of his or her wages for and during such period as he or she shall be so confined in the house of correction, or in lieu thereof to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant, &c., from his or her contract," &c.

By sect. 12 of the 11 & 12 Vict. c. 43, it is enacted that "the party against whom such complaint is made, or information laid, shall be admitted to make his full defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf."

*Wheeler*, Serjt. (*Holl* with him) now moved to quash the conviction, and he contended, first, that the conviction is bad, because it does not show that the deft. contracted to serve in any one of the capacities mentioned in the statute. [BLACKBURN, J.—Must it not be taken that he was to serve as a handicraftsman?] He may have been a handicraftsman without serving as such. *Rez v. Lewis*, 1 Dowl. & Low. 822, and *Re Copestick*, 1 New Sess. Cas. 181, are decisively in point. Secondly, the magistrate had no jurisdiction to hear the complaint, as the men had no opportunity of having the assistance of an attorney, and as they required an adjournment for the purpose of having legal assistance. Being arrested late in the evening, locked up all night, and taken before the magistrates between seven and eight the next morning, they had no opportunity of having legal assistance, and when therefore, before the case was entered into, they required an adjournment for the purpose of having the assistance of an attorney, the magistrate ought not to have proceeded, but should have granted an adjournment, otherwise the provision of the 12th section of the 11 & 12 Vict. c. 43 is a nullity. [BLACKBURN, J.—I do not see how his proceeding is without jurisdiction.] It is the same as though he had refused to allow him the assistance of an attorney. [BLACKBURN, J.—He may have exercised an improper discretion, but I cannot see the want of jurisdiction. COCKBURN, C.J.—If the justice had heard the case at that early hour to prevent the deft. from having legal assistance, that might be a ground for a criminal information against him.] Under the circumstances it was utterly impossible that the deft. could have legal assistance. [COCKBURN, C.J.—The magistrate must have a discretion as to adjourning. This act does not put the right in such a case higher than that of a prisoner tried for a felony. Suppose a prisoner in the dock says he wants counsel and attorney. It may be very proper to postpone his trial, but you cannot say that if the judge chooses to try him at once he has no jurisdiction.] The Act says, "shall be admitted to make his full answer and defence by counsel or

attorney." [COCKBURN, C. J.—Under the old law parties were not entitled to the assistance of counsel or attorney, but the present Act alters that, but only says that he shall be entitled to have such assistance. It does not give him an absolute right to an adjournment for the purpose of obtaining such assistance; he has an absolute right if he can obtain such assistance.] To prevent a man from getting an attorney is the same thing as refusing to hear an attorney. Thirdly, the justice had no jurisdiction to try all the parties together in a lump, for he thereby deprived each of the evidence of the others. [CROMPTON, J.—I suppose there were several convictions.] Yes; but all the defts. were taken together. [BLACKBURN, J.—I suppose it was precisely the same case against each one?] Yes; but each had a right to be tried separately. [BLACKBURN, J.—No objection seems to have been raised at the time to such a proceeding.] Fourthly, the adjudication is bad, as it abates wages already due, whereas the justice had a right to order the abatement only of wages to become due.

COCKBURN, C.J.—I think you are entitled to a rule upon the first point. As regards the second point, with reference to the refusal to adjourn, I think there should be no rule upon that. The intention of the statute was, that it should not be in the power of the justices to refuse a party legal assistance upon a summary hearing when he desired it; but when the matter resolves itself into a question of adjournment, I think that, though it would have been proper for the justice to have adjourned under the circumstances, yet the statute does not touch his discretionary power upon the subject. I think, also, that there should be no rule upon the ground of all the parties being tried at once. That proceeding was not intended to deprive each of the testimony of the others, but was thought to be a convenient method of disposing of the whole matter; and it does not appear that it was objected to. Then as to the adjudication of the justice with regard to the abatement of the wages. I think the statute applies equally to wages already due as to wages to become due.

CROMPTON, J.—I am of the same opinion. This court does not interfere with every irregularity of justices. We quash their proceedings when they have acted without jurisdiction, but we do not interfere where they have exercised a discretion. As regards the trying of all these people together, that does not show a want of jurisdiction. It was thought to be more convenient to do so, and there was no application that each should be taken separately. I think also there is nothing in the objection as to the abatement of the wages. The rule will go, therefore, only on the first ground.

BLACKBURN, J.—I am of the same opinion. As regards the second ground, it is impossible to say that in every case in which an adjournment is required on account of the party desiring the assistance of an attorney it should be granted; many cases may arise in which it would be very proper for the justice to refuse it. In the present case, it seems to me that the justice refused an adjournment when he should have granted it, but that does not go to his jurisdiction.

*Rule nisi upon the first ground only. Refused as to others.*

Saturday, Jan. 18.

THE VESTRY OF ST. LUKE, MIDDLESEX (apps.) and THOMAS LEWIS (resp.)

*Metropolis Local Management Act 1854—Authority of local board to require a water-closet to be provided in lieu of a privy.*

By sect. 81 of the 18 & 19 Vict. c. 120 (*Metropolis Local Management Act 1854*), it is enacted that if it appears to the vestry or district board that any house is without a sufficient water-closet or privy

Q. B.] THE VESTRY OF ST. LUKE, MIDDLESEX (app.) AND THOMAS LEWIS (resp.) [Q. R.]

and ashpit, they may require the owner or occupier to provide a sufficient water-closet or privy and ashpit, or either of them, as the case may require: Held, that the vestry or district board were authorised under the foregoing section to require a water-closet to be provided in lieu of a privy.

This was a case stated under the 20 & 21 Vict. c. 43.

It appeared that the resp. is the owner of four houses in John's-place, Great Arthur-street, which is a court in the parish of St. Luke, and which was erected before the passing of the Metropolis Local Management Act 1854 (18 & 19 Vict. c. 120). These houses have attached to them two privies. Early in the spring of 1860 the vestry, in consequence of some complaints respecting the condition of these privies, served upon Mr. Lewis a notice to do certain works, which he complied with so far as to fix pans to the closets, but not in providing water supply. On the 14th July 1860 a notice was served upon him by the surveyor of the parish that he intended to inspect the drains, water-closet, privies, cesspools and water supply apparatus, and to cause the ground to be opened in such place or manner as might be necessary, &c. Accordingly he attended and opened the drains passing under the footway pavement, and connecting the privies with the sewer, which were found to be choked and blocked up; these drains he cleansed and put in order at the expense of the vestry. The vestry then served a further notice upon the resp. requiring him to provide water supply to the two closets in John's-place, Arthur-street, within twenty-eight days from the date thereof, to the satisfaction of the vestry, and that if he refused or neglected the vestry would, at the expiration of the said period, cause the same to be constructed, &c. No attention having been paid to this notice, a further notice was served upon him, that at the expiration of twenty-four hours the vestry would, by their surveyor, agents and workmen, enter the said premises and proceed to amend and reinstate the drainage of the privies there, to clean, empty and destroy the cesspools, and provide all such pans and traps, water supply, and water supply apparatus, pipes and cisterns, as to the said vestry or their surveyor might appear proper and requisite, &c. In pursuance of this notice the vestry, on the 1st Dec. 1860, entered upon the premises and fixed a cistern upon the roof of the privies, removing the roof and also three courses of brickwork of the upper side or pitch thereof, for the purpose of procuring a level base for the cistern; the roof was not replaced, but the lower part of the cistern formed a new roof. They also fitted the necessary plumbers' work for connecting the cistern with the pipes of the water company, and also the pipes connecting the cistern with the pans of the closets, and they also fixed new seats in the privies at an expense to the vestry of 12*l.* 10*s.* The surveyor to the vestry and the sewers' contractor likewise proved that, at the time of their entering upon the premises to do the works, the pans of both the privies were filled and choked up with filth, and that the seats and floor were covered with filth in consequence of the want of water supply. The works having been completed, the vestry took out a summons against the resp. to appear before one of the metropolitan police magistrates at Clerkenwell, to show cause why an order should not be made under the provisions of the Metropolis Local Management Act 1854, requiring him to pay to the vestry of the said parish of St. Luke, Middlesex, the sum of 12*l.* 10*s.*, being the expenses above referred to. At the hearing the magistrate was of opinion that the above-mentioned statute contains no power to the vestry to convert a privy into a water-closet by providing water supply thereto, as had been done in this instance, but that if the privy already established was not sufficient, the vestry should have required the resp. to have made it so, and on his default the vestry were

empowered to make it sufficient under the authority of the 81st section by doing such works as the case required, and then to have recovered from the resp. the expenses incurred by them in so doing.

By sect. 81 of the 18 & 19 Vict. c. 120 (Metropolis Local Management Act 1854), after providing for houses to be built after the passing of the Act, it is enacted that "if at any time it appear to the vestry or district board of such parish or district, that any house in any such parish or district, whether built before or after the commencement of this Act is without a sufficient water-closet or privy and ashpit furnished with proper doors and coverings, and with other apparatus and works as aforesaid, the vestry or district board shall, in case the same can be provided without disturbing any building, give notice in writing to the owner or occupier of such house requiring him forthwith, or within such reasonable time as shall be specified in such notice, to provide a sufficient water-closet or privy and ashpit as furnished as aforesaid, or either of them as the case may require, and if such notice be not complied with it shall be lawful for the vestry or district board to cause to be constructed a sufficient water-closet or privy and ashpit, or either of them, or do such other works as the case may require, and to recover the expenses incurred by them in so doing from the owner of such house in manner hereinafter provided. Provided always, that where a water-closet or privy has been and is used in common by the inmates of two or more houses, or if, in the opinion of the vestry or district board, a water-closet or privy may be so used, they need not require the same to be provided for each house."

Boydell, Q.C. appeared for the apprs., and contended that the magistrate ought to have made an order, for that the vestry were right in requiring the privy to be converted into a water-closet.

The Court called upon Beasley to support the decision of the magistrate, and he contended that, there having been a privy, the vestry could not require a water-closet to be constructed, their powers under the second branch of the 81st section not extending to converting the one into the other, and that they could only have required in the present case a proper privy to have been constructed: (*Tinker v. The Board of Works of Wandsworth*, 27 L. J. 342, Ch. [WIGHTMAN, J.—In that case there was a general order.] There is nothing to show that this privy might not, by a proper cleansing, have been made sufficient. The section also only gives them power to make an alteration "without disturbing any building." Here there was a considerable disturbance. [CROMPTON, J.—There must always to some extent be a disturbance. The works cannot be done without.]

COCKBURN, C.J.—I am of opinion that the decision was erroneous. The question is, whether the 81st section authorises the vestry or district board, when there is an insufficient privy, to order that a water-closet shall be constructed in its stead? It has been argued that, where there is a privy, the local authority can only order that privy to be made effective, and that they have no power to order a water-closet to be substituted; but I do not think that that is the meaning of the section. The power is given in the alternative to order a sufficient water-closet or privy to be provided as the case may require. And this seems to be a very necessary authority, because it may be that a privy could not be so altered as to meet the necessities of the case; it may be impossible to keep it free from an accumulation of filth, and the only remedy might be the having of a flow of water so as to get rid of the nuisance. They certainly ought to have such power, and I am of opinion that the 81st section has given it to them.

WIGHTMAN and CROMPTON, JJ. concurred.

*Judgment for the apprs.; case to go back with the opinion of the court.*

Q. B.]

REG. v. ALLEN.

[Q. B.]

Monday, Jan. 20.

REG. v. ALLEN.

*Criminal prosecution—Entering a nolle prosequi on the part of the Crown—Jurisdiction.*

*Where, in an indictment for perjury, the Attorney-General enters a nolle prosequi on the part of the Crown, he does so on his own responsibility, and this court will not interfere.*

J. J. Powell moved for a rule calling on the deft. in this case, William Allen, to show cause why the prosecutor, Francis James Gregory, should not be at liberty to proceed to the trial of two indictments for perjury which had been found against the deft. at the Central Criminal Court, and had since removed into this court by *certiorari*.

It appeared that Gregory, the prosecutor, had formerly been an out-door officer of the Customs, and in the month of Sept. 1860 a charge was brought against him by Allen, the deft., for stealing spirits in conjunction with him (Allen) the informer. The case was fully investigated before Mr. Gray, a commissioner of Customs, and upon that occasion Allen stated that the offence was committed on the 11th Nov. 1859. On Gregory being called on for his defence, he requested that time might be allowed him to produce his witnesses, and the case was thereupon adjourned for that purpose until the 13th Sept. A book was kept at the Custom-house, in which was entered the manner in which the out-door officers were employed, with the statement of the time and the duties in which they were occupied, and Gregory applied for permission to inspect this book, to trace his occupation on the day and at the time alleged, but he was refused, though he now stated in his affidavit that he had been informed that Allen had in the interval between the hearings before the commissioner applied for and been permitted to inspect the book. When the inquiry was resumed before the commissioner on the 13th Sept. Allen repeated his previous statement, and swore that what he had then deposed was correct, except as to the date on which the alleged offence was committed, which he said ought to have been the 18th April 1860, instead of the 11th Nov. 1859.

Witnesses were then examined on both sides, and in the end the deft. and ten others were dismissed from their employment by the Commissioner of Customs.

Gregory and the ten others had who been so dismissed then memorialised the Board of Customs, and prayed that they might be indicted, and so have the charge tried before a jury, but that application was refused.

On the 18th Sept. the parties went before the Lord Mayor at Guildhall, and made a charge of perjury against Allen. The Solicitor of the Customs appeared, and defended Allen, and in consequence of some discrepancy in the evidence of a boy called as one of the witnesses for the prosecution, the Lord Mayor said he thought it very improbable that a jury would convict, and refused to commit the accused. Gregory and the other ten men then proceeded to prefer an indictment against Allen, and eventually true bills were found on two indictments at the Central Criminal Court, and the deft. Allen was taken into custody and brought before the Lord Mayor; he was again represented by the Solicitor for the Customs, and ultimately was discharged on his own recognisances. The indictments were then moved into this court by *certiorari*; but when a rule was applied for the deft. to come in and plead, it was discovered he had not entered into any recognisances, but that the Attorney-General had entered a *nolle prosequi*. [COCKBURN, C. J.—Upon what ground do you ask us to interfere with the undoubted right of the Attorney-

General to enter a *nolle prosequi*?] Upon the ground that the Attorney-General had acted on an *ex parte* application. The Attorney-General has no power to enter a *nolle prosequi* without calling before him and hearing all the parties. [COCKBURN, C. J.—If it be shown to the Attorney-General that he has been misled, no doubt he will set the matter right. BLACKBURN, J.—It will be difficult to show that this court has power to interfere with the prerogative power of the Crown as exercised by the Attorney-General.] The course adopted in this case is contrary to the ordinary practice: (Crown Circuit Companion, 22; 2 Gude's Crown Practice, 550.) [CROMPTON, J.—Do you say that the Crown could not pardon without an inquiry? The authorities you refer to mean to say that the prosecutor cannot enter a *nolle prosequi* without the Attorney-General, for fear of collusion and the compounding of felony. COCKBURN, C. J.—There is nothing to prevent the Attorney-General entering a *nolle prosequi toties quoties*. The Attorney-General is the great public prosecutor for the State, who ought to be at liberty to act upon his own sense of public duty. Do you find any case in which the court interfered after the Attorney-General had entered a *nolle prosequi*?] There is no direct authority; but it is contended that this *nolle prosequi* has been entered irregularly: (*R. v. Evelyn*, Trin. Vac. 1820.) Then, assuming that the Attorney-General has such a power, still a *nolle prosequi* is only a temporary proceeding, and this court may order the proceedings to continue without a fresh indictment; although it is a stay, the indictment is not quashed, and a prosecution may be continued on it: (*Goddard v. Smith*, 6 Mod. Rep. 262; *Stretton and Tayler's case*, Leonard's Rep. 119; *R. v. Kidpath* 10 Mod. Rep. 152.)

COCKBURN, C. J.—I am of opinion that in this case there should be no rule. It is the undoubted right and power of the Attorney-General, as the representative of the Crown in matters of criminal law, to enter a *nolle prosequi*, and thereby at once to stay proceedings in a criminal suit or information; and no instance has been cited, nor can any be found, in which the court, after a *nolle prosequi* had been entered by the Attorney-General, has taken upon itself to direct such proceedings to be prosecuted. Even if this court should do so, there is nothing to prevent the Attorney-General from entering a *nolle prosequi toties quoties*. It is not for this court to create a precedent of this sort where none before existed—a precedent contrary to the understanding of the profession, and one that would be fraught with public mischief. Under ordinary circumstances, no doubt, the Attorney-General would act wisely in calling the prosecutors before him before he proceeded to enter a *nolle prosequi*; but there may be particular circumstances in which, from the knowledge of the facts, or the particular nature of the charge, the Attorney-General might think it necessary to enter a *nolle prosequi* without adopting that course. It cannot be contended for one moment that there can have been any abuse exercised by one whose functions are of so highly a responsible character; but if there had been—and I only put it hypothetically—the remedy is not by an application to this court to interfere by the exercise of its undoubted power and prerogative, but to hold him responsible before the High Court of Parliament. I am not at all disposed to establish a precedent in such a case, and I think therefore there should be no rule.

CROMPTON, J.—I am of the same opinion. I think we have no power to do what is now asked of us, and I think we ought not to interfere with the undoubted power of the Crown vested in the Attorney-General. There is nothing in the present case to take it out of the general rule. I think the Attorney-General can interfere in any public prosecution when-

Q. B.] REG. v. THE CHURCHWARDENS AND OVERSEERS OF ST. MARY ARCHES, EXETER. [Q. B.]

over he pleases, and all the cases referred to are clearly distinguishable from such an one as this.

BLACKBURN, J.—I am of the same opinion. This particular branch of the prerogative is entrusted to the Attorney-General, who, on his own responsibility, determines whether the prosecution shall go on or not.

MELLOR, J. concurred. *Application refused.*

*Ex parte* THE LOCAL BOARD OF LEAMINGTON.  
*Information before justices by local board of health—*  
*Attendance of clerk to local board at hearing.*

H. Lloyd moved for a rule to show cause why the justices of Leamington should not hear certain informations which had been laid by the Leamington Local Board of Health without requiring the attendance of the clerk to the board. It appeared that the justices were of opinion that the clerk of the board of health was the real informant, and they therefore refused to hear any information unless he were present. Many of these informations, it was alleged, involved only matters of administration and police, and the local board had intrusted all such to the inspector of police, who fully understood all about them. In many of such cases the clerk had personally no knowledge, the board was the real informant, and their clerk only represented them for certain purposes: (11 & 12 Vict. c. 63, s. 133.) [COCKBURN, C. J.—He must either go himself or send some one properly qualified. CROMPTON, J.—I don't know that there is anything that actually requires it, but it is very reasonable to require the attendance either of the informant or of his attorney or counsel to assist the justices in the construction of these very difficult Acts of Parliament. COCKBURN, C. J.—I see no objection to the police superintendent attending if the justices think fit to hear him, but you ask us to compel the justices to hear him.] If such an opinion of the court could be conveyed to them it might be sufficient, but they seem to have assumed that they had no option, that there was a general enactment which bound them to require the attendance of the informant; frequently the cases come more particularly under the cognisance of the police, and in the instance in question the clerk was performing other duties in connection with the board elsewhere.

By the COURT: *Rule refused.*

*Ex parte* WOOLRICH.

*Friendly society—Dispute not provided for by rules—*  
*Expulsion—Jurisdiction—18 & 19 Vict. c. 63.*

Where a member of a friendly society was expelled for an offence not within its rules, this court refused to interfere by mandamus, being of opinion that the County Court had jurisdiction to hear and determine the case.

J. E. Davis moved for a rule to show cause why a mandamus should not issue, calling on the trustees of the Loyal Nelson Lodge, a friendly society, held at Woodside, Worcestershire, to show cause why one Woolrich should not be reinstated a member of the society. It appeared that the applicant had been a member of the society for twenty years; that in 1860 he became blind and entitled to full pay for six months, and after that period to half-pay. The half-pay continued till August last, and on his making an application subsequently for a payment of his half-pay then due, he was told that his daughter had received one week's payment too much, and that he had been struck off the books as a member and would receive no more.

The rules of the society were enrolled in 1857, subsequent to the stat. 18 & 19 Vict. c. 63. By rule 16 disputes were to be referred to a committee, and afterwards, in case of the dispute continuing, to a special committee, and he was told that this had been done, and that the committees had decided that his name would be erased from the list; but there was no rule applicable to the present case. An application

had been made to the registrar of the County Court to issue a summons, and he had expressed an opinion that the County Court had no jurisdiction, and that the 18 & 19 Vict. c. 63, had failed to vest in the judges of the County Court the jurisdiction formerly vested in justices of the peace. It is said that the County Court has no jurisdiction, because rule 16 provides another tribunal—first, a private committee, and then another and more formal committee; and the society say they have referred the case to these committees, who have heard the case and determined it against the applicant, and expelled him; but he has never had an opportunity of defending himself, and none of the rules refer to a case like the present. [BLACKBURN, J.—In any case you must go to some other tribunal than this. Sect. 40 of 18 & 19 Vict. c. 63, provides for the determination of disputes according to the rules of the society, and sect. 41, for such cases as are to be determined by the County Court.] But if this be such a dispute as is neither within the rules, or within those cases cognisable by the County Court, the court can interfere. Sect. 42 directs how the orders of a County Court are to be enforced, and provides for the removal of orders by *certiorari*. [CROMPTON, J.—Is not the expelling a man pointed to by that section?] It would be sufficient for the applicant that the County Court should act, and the expression of opinion by this court that it should do so would probably be sufficient? [COCKBURN, C. J.—You must not take such an expression as my opinion. I doubt very much whether the County Court has jurisdiction; if the man is no longer a member it is a great question whether the case is one for them to try.] Under one of the old Acts of Geo. 3, members excluded might apply to the County Court.

COCKBURN, C. J. (a)—It may be a question whether this expulsion is not altogether idle and vain, and whether under rule 16 there has been any expulsion. My learned brothers think an application might be made to the County Court, and that therefore we have no jurisdiction. *Rule refused.*

Jan. 18 and 22.

REG. v. THE CHURCHWARDENS AND OVERSEERS OF ST. MARY ARCHES, EXETER.

*Poor-law—Unemancipated child—Settlement of parents—*  
*Status of irremovability.*

An unemancipated child has the settlement of its parents, and as that settlement changes so does the settlement of such child.

The father of a pauper lunatic, whose parish of settlement was A., acquired the status of irremovability by a residence in B., and died leaving a widow and a daughter (the said pauper), who, though more than thirty years of age, was unemancipated by reason of continued ill-health. After his death in 1858, the said daughter was received into the workhouse of B., and whilst there her mother lost the status of irremovability from B., which she had acquired through her husband, by removing to C. After such removal of the pauper's mother, the said pauper was sent to the county lunatic asylum as a lunatic pauper, and an order of maintenance was made upon the parish of A., being her father's parish of settlement, her mother having acquired no other settlement than that obtained through her husband: Held, that the mother of the pauper having lost her status of irremovability from B., the pauper lunatic lost it also, and that the order of maintenance was properly made upon A.

This was a case stated by the Lancashire quarter sessions, upon an appeal by the parish officers of St.

(a) Before Cockburn, C. J., Crompton, Blackburn and Mellor, JJ.

Q. B.]

WHITTLE V. FRANKLAND.

[Q. B.]

Mary Arches, Exeter, against an order made upon them at the instance of the guardians of the poor of the township of Manchester, adjudging the last place of settlement of Ann Cambridge, a lunatic pauper, to be in the said parish of St. Mary Arches, Exeter, and ordering the parish officers of such parish to pay certain sums of money for the lodging, maintenance, &c. of such lunatic pauper. It appeared that the place of settlement of David Cambridge, the father of the pauper lunatic, was in the appellat parish of St. Mary Arches, Exeter, and that on the 3rd Oct. 1827 he was married to one Elizabeth Trapnell; that the pauper lunatic is the legitimate unmarried daughter of the said David Cambridge and his said wife, and was born on the 16th Aug. 1829, and that she has never been emancipated, not having been able at any time, owing to ill-health, to provide for or take care of herself; that for twenty-four years, namely, from July 1832 to July 1856, the pauper lunatic and her parents resided together continually in the respondent township (Manchester); that upon the 23rd July 1856 the said David Cambridge died; that after his death the pauper lunatic and her mother continued to reside together in the respondent township until the month of Oct. 1858, when the pauper lunatic was sent from her said place of abode by the guardians of the poor into the Cheetham-hill workhouse, the said workhouse being a workhouse of and for and situate within the said township of Manchester; that she remained there until the 24th Jan. 1860; that in the month of Dec. 1859, and whilst the pauper lunatic was in the said workhouse, her mother (who continued to be the widow of the said David Cambridge) removed from the said township of Manchester to and went to reside in the township of Chorlton-upon-Medlock, in the said county, in which latter township she has ever since continued to reside, not having during her widowhood acquired any settlement in her own right; that from the 24th Jan. 1860 the said Ann Cambridge was a pauper lunatic, and was, pursuant to the statutes in that behalf, sent from the said workhouse where she was then residing, to the county lunatic asylum, situate at Prestwich, in the said county, and being a lunatic asylum for the said county, where she remained until the 25th April 1860, when she was discharged, and sent to reside with her mother in the said township of Chorlton-upon-Medlock. At the hearing of the appeal, it was contended, on the part of the appa., that, under the circumstances, the said order ought not to have been made, inasmuch as the pauper lunatic was, at the time of being conveyed to the said county lunatic asylum at Prestwich, exempt from removal to the parish of her settlement by reason of some provision in the 9 & 10 Vict. c. 66, and the 11 & 12 Vict. c. 111. It was contended, on the part of the respa., that the said order was rightly made, inasmuch as the pauper lunatic, when conveyed to the said county asylum, was not exempt from removal to the parish of her settlement under the said statutes. The question for this court was, whether the pauper lunatic was or was not, at the time of her being conveyed to the said county lunatic asylum, exempt from removal to the parish of her settlement. If the question be answered in the affirmative, the order is to be quashed; if in the negative the order is to be confirmed.

The 11 & 12 Vict. c. 111, s. 1, repeals the proviso of the 9 & 10 Vict. c. 66, and enacts the following one instead:—"Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act."

*Wheeler*, Serjt. and *West* appeared in support of the order of sessions, and contended that, as the pauper lunatic was unemancipated, she would follow the settlement of her surviving parent (her mother), who having lost her *status* of irremovability in Manchester, would have been liable to have been removed to the app. parish, which was her husband's parish of settlement, and so the pauper lunatic was rightly adjudged to be liable to support from that parish: (*Reg. v. Cudham*, 28 L. J. 105, M. C.; *Reg. v. St. Giles*, 30 L. J. 12, M. C.; *Reg. v. Elvet*, 29 L. J. 17, M. C.; s. c. 5 Jur. N. S. 1350; *Rez v. Much Cowarne*, 2 B. & Ad. 861.)

*Kaye* and *Hopwood*, contra, argued that the pauper lunatic was exempt from being removed at the time the order was made; that at the time she was sent to the asylum she had obtained the *status* of irremovability, and was not affected by the break in the residence of her mother: (*Reg. v. Elvet*, *Reg. v. St. Giles*, *Reg. v. Hartfield*, 17 Q. B. 746; *Reg. v. West Ward Union*, 7 El. & Bl.; 26 L. J. 29, M. C.; *Reg. v. St. Leonard's, Shoreditch*, 22 L. J. 51, M. C.; 24 & 25 Vict. c. 25, s. 2.)

COCKBURN, C. J.—I think that the judgment in this case should be for the respa. The case turns upon whether or not, at the time the pauper lunatic was taken from the workhouse to the asylum, she was irremovable. The father, it appeared, had at the time of his death acquired the *status* of irremovability in Manchester, and at his death his widow, the pauper's mother, retained his settlement. The pauper being a lunatic was placed in the workhouse, and down to the time when this question arose none of the exceptions existed to interfere with her irremovability. The mother, however, removed from Manchester, and so she lost her *status* of irremovability, and now the question which arises is, whether the pauper, being unemancipated, continues a member of her mother's family so as to partake of her removability. I think she does, and that the residence of a child while unemancipated will not give a *status* of irremovability. Here the mother, who is the head of the family, is still living; would she, if she were in Manchester, be removable? She clearly would be. Then the pauper, being unemancipated, could she be removed? I think she could, and that the effect of the statutes is this, that as long as the child remains a member of the family he shall not acquire the *status* of irremovability until the death of the parent, the object being to keep members of the family together. If the child is removable, the object of the statute would be defeated. There is certainly some apparent absurdity in saying that a person thirty years of age, as in this case, is to be treated as a child; but it is well-established law that an unemancipated person is to be considered for all purposes as a part of the parent's family. We must come then to the conclusion that the pauper followed the settlement of her mother, and as she had lost her *status* of irremovability, the order was properly made upon the parish of settlement.

CROMPTON, J.—I am of the same opinion. We shall best carry out the intention of the Legislature by holding that it makes the removability of an unemancipated child to depend upon the settlement of the parent. It has been said that the settlement was not that of the mother, but that of the father, and so it was in some sense; but as the mother gained it, it became the settlement of the child, and then being unemancipated, it followed that of the mother. The child has in the words of the Act no other settlement than that of the mother. Therefore her removability depends upon her mother's removability.

MELLOR, J. concurred. Judgment for respa.

Saturday, Jan. 25.

WHITTLE V. FRANKLAND.

Master and servant—Contract of service—4 Geo. 4, c. 34, s. 3.

*A contract to serve is not void because the master does not in terms agree to give any specific amount of wages.*

*Where, therefore, A. B. contracted to serve C. D. as a collier, and neither party was to put an end to the service before the expiration on twenty-eight days' notice; but C. D. did not bind himself to the payment of any specific amount of wages, but agreed to pay wages fortnightly according to piece-work, and A. B. left his service before giving such twenty-eight days' notice, and was thereupon convicted under the 4 Geo. 4, c. 34, s. 3:*

*Held, that the conviction was good.*

This was a case stated under the 20 & 21 Vict. c. 43, upon a conviction of justices under the 4 Geo. 4, c. 34, s. 3 (Masters and Servants Act). The case stated that at a petty sessions, holden at Rotherham on the 25th Feb. 1861, an information (preferred by Richard John Frankland, as agent to Thomas Bolland and his partners, hereinafter called the resps.) against John Whittle (hereinafter called the app.), under the 4 Geo. 4, c. 34, s. 3, charging for that the said app., on the 1st Dec. 1860, at the Holmes Colliery, did contract with the said resps. to serve them in the capacity and employment of a miner, until he should have given to or received from the said resps. one month's notice to leave the said service, and until such notice should have fully expired, at and for certain wages, and that the said app. did afterwards duly enter into his said service according to the said contract, and that the said app. afterwards and before the term of his said contract was completed, to wit, on the 13th of February 1861, at the Holmes Colliery, was, in the execution of his said contract, and otherwise respecting the same, guilty of a certain misconduct and misdemeanor, in this, to wit, that the said app. did then and there, and before the term of his said contract was completed, unlawfully absent himself from his said service without leave or lawful excuse, contrary to the statute, was duly heard and determined by us, and we duly convicted the said app. of the said offence, and adjudged him to be committed to the house of correction at Wakefield, in the said West Riding, to remain and be kept to hard labour for the term of one month. And it was proved before us, and we did so adjudge, that no wages were then due to the said app. from his said masters (the resps.), as he had been duly paid his wages for all work done by him up to that time, and that the contract was proved on oath before us, being that he was to be paid by piece-work; no wages could be earned by him, or would be payable to him during the time he would be in prison under the said sentence.

At the hearing of the information it was proved by the resps. that app. had entered into an agreement with Thomas Bolland, on behalf of himself and partners, constituting "The Rotherham, Masbrough and Holmes Coal Company (Limited)," the resps. in this appeal. The agreement stated that the said John Whittle, in consideration of wages to be paid to him fortnightly by the said Rotherham, Masbrough and Holmes Coal Company (Limited), doth contract and agree with the said company to work for and serve the said company faithfully, diligently and exclusively, as their servant, in the capacity of a collier at their collieries in the township of Bruisworth and Kimberworth, from the date thereof until the expiration of such notice, as is after mentioned. The agreement then contains a provision for either party determining the same by giving twenty-eight days' notice. There was also a provision that, in consideration of such faithful service, he the said Thomas Bolland, on behalf of himself and partners, agreed that the said John Whittle should not be discharged by the said company without twenty-eight days' notice being given for that purpose.

The case further stated, that it was proved on behalf of the resps. that the app. entered into their service under the said contract, and afterwards, and while it was subsisting, absented himself from the service without leave or lawful excuse; that it was also proved that all wages then due to app. for all work done by him had been paid to him, and that he was paid by piece-work, and not by time; that evidence was also given on behalf of the app. that there had been a dispute about wages. It was contended on the part of the app., first, that the agreement did not bind the resps. to find work, or pay wages, and was therefore bad for want of mutuality; secondly, that the information was bad for proceeding in the name of Thomas Bolland and his partners, and not in the name of the company; thirdly, that there were no wages due at the time the alleged offence was committed, and therefore no wages could be abated; fourthly, that there was a *bond fide* dispute as to the amount that should be paid for certain work required to be done under the said contract, and the said contract not providing for any such dispute or difference, the said justices had no jurisdiction under the statute, and that such dispute or difference constituted a lawful excuse, and was a reasonable cause for such absenting.

The justices, however, were of opinion, first, that, by reasonable implication, the agreement bound the resps. to find work and pay wages, and was a valid agreement; secondly, that, under the 11 & 12 Vict. c. 43, s. 1, the objection to the information could not be allowed, and they were of opinion that the variance, if any, between the information and the evidence adduced in support of it had not in any way deceived or misled the app.; thirdly, they were also of opinion that the statute authorised them to convict the app. and commit him to prison, although there were no wages due or becoming due to him, which they could abate; fourthly, they were also of opinion, from the evidence, that there was no dispute or difference as to the amount to be paid for work under the said contract which amounted to a lawful excuse or justification for app. refusing to work for the resps. under the said contract, or for absenting himself from the service before the term of his contract was completed, and that app. was aware that he had no lawful excuse for absenting himself.

Quain now appeared for the resps., and contended that upon all the grounds the justices were right, and the conviction good: (*Reg. v. Webb*, 2 Ell. & Bl. 357; *Pillington v. Scott*, 15 M. & W. 657; *Valpy v. Gibson*, 4 C. B. 887.)

Mellish, Q.C., for the app., contended that the contract was void for want of mutuality, for that whilst the app. was bound to remain in the service, the resps. were not bound to find him work or to pay him any certain wages: (*Williamson v. Taylor*, 5 Q. B. 175; *Asplin v. Austin*, 5 Q. B. 671; *Elderton v. Emma*, 4 H. of L. Cas. 624.) [CROMPTON, J.—When there is a term in the contract that the party is not to be discharged under twenty-eight days, and that he is to be paid fortnightly, is it not illusory to say that they are not to find work?] They are not bound to find it; supposing the colliery to be stopped up, the masters could not find work, and yet it would be said that the men were bound to remain, yet receiving no wages, as they are to be paid by piece-work: (*Sylvas v. Dixon*, 9 A. & E. 693; *Re Baker*, 2 H. & N. 219.)

COCKBURN, C.J.—The objection upon the ground of variance between the proof and the information is cured by the 11 & 12 Vict. c. 43, s. 1. Then, with regard to the main objection that the agreement is not a binding one upon the app., I think that the decision of the justices was right. The principle of the agreement is this, that the man shall serve, and that the employers shall find work at fortnightly wages;

Q. B.]

HARRISON v. LEAPER—FREEMAN v. GAINSFORD.

[C. B.]

the man not to be discharged under a twenty-eight days' notice. It is quite clear that it would be perfectly illusory if, though the masters did not discharge him, they could starve him by not giving him work. By implication the masters are bound to find work whilst he continues in their service.

CROMPTON and MELLOR, JJ. concurred.

*Conviction affirmed.*

HARRISON (app.) v. LEAPER (resp.)

Highway—Nuisance—5 & 6 Will. 4, c. 50, s. 70—*Conviction.*

By sect. 70 of the 5 & 6 Will. 4, c. 50 (*Highway Act*) a penalty is imposed upon any person who shall sink any pit or shaft, or erect or cause to be erected any steam-engine, &c. within the distance of twenty-five yards from any part of any carriage way or cart way, &c.

The deft. was the owner of a steam-threshing machine, which he lent to a farmer, and sent his man with it, who superintended it. The machine was erected within a distance of twenty-five yards from the highway, but there was no evidence to show that the deft. directed it to be so erected, and he was himself not present at the time. Being convicted under sect. 70 of the 5 & 6 Will. 4, c. 50:

Held, that the conviction was bad.

This was a case stated under the 20 & 21 Vict. c. 45, against a conviction of the deft. for having committed an offence against sect. 70 of the 5 & 6 Will. 4, c. 50 (*General Highway Act*).

The case stated as follows:—

This was an information preferred by John Leaper, of Spalding, in the parts of Holland, Lincolnshire, against Thomas Harrison, "for that the said Thomas Harrison, on Saturday, the 3rd day of February 1861, at the parish of Gedney, did erect, or cause to be erected, a certain steam engine and thrashing machine within the distance of twenty-five yards (to wit) twelve yards from a certain public carriage way there situate, leading through Gedney Dyke, the said engine and strap passed over the driving wheel of each; that deft. lets his said steam-engine and machine out for hire, sometimes by the day, but more frequently by a remuneration according to the quantity of corn thrashed, and that on such occasions the same are sent out and set to work under the immediate charge and control of the deft.'s own man or servant; that on the 23rd Feb. last the said machine was set up in the manner above described, and was thrashing corn on the premises of a Mr. Daniel Butters, in the parish of Gedney, aforesaid, in the open air, and unprotected by any building, screen, or other cover, at a distance of only twelve yards from the centre of a public highway, which passes by Mr. Butters' yard and premises, and that, whilst the machine was so at work, two horses, drawing a cart on the said highway, took fright and knocked down and seriously injured the man driving them. On the part of the deft. it was proved by his aforesaid servant that the machine on the day in question was let to hire to Mr. Butters to thrash his corn; that he (deft.'s servant) accordingly took and fixed same in Mr. Butters' yard in the situation above described by direction of Mr. Butters' son; that deft. himself did not come nigh at the time of fixing the machine, and that it is usual to place the machine where ordered by the party whose corn is about to be thrashed, or by some one representing him; and on cross-examination of this witness it was elicited that, during the whole time the steam-engine and thrashing machine were at work they were in charge of the engine-driver (deft.'s man), and that his wages were paid to him by his master (the deft.), and not by the party whose corn was being thrashed. The deft.'s attorney thereupon objected—first, that the said engine and machine are not such

steam-machinery, &c. as are contemplated by the 70th section of the Highway Act, 5 & 6 Will. 4, c. 50, and do not therefore come within the provisions thereof, for that at the time of passing the said statute these portable steam-engines and thrashing machines were not in existence, so that the statute, being a penal one, could not be held to refer to them; secondly, that the engine and machine, being merely drawn by horses to the place where they work, could not be said to be erected, and therefore are not within the jurisdiction of the Act, which clearly has reference to a permanent nuisance; thirdly, that as it was proved that the deft. let out the engine and machine for hire (though sent in charge of and worked by his own man), he thereby for the time being lost or gave up the control thereof; and that, as it was further proved that the deft. himself was not present on the occasion in question, he could not be convicted of the offence imputed to him of erecting, or causing to be erected, &c. Whereupon we, the undersigned, did adjudge and determine that all such objections were untenable, and that the deft. was guilty of the offence charged against him, and we did accordingly convict him as before mentioned."

By the 5 & 6 Will. 4, c. 50, s. 70, it is enacted that "it shall not be lawful for any person to sink any pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards . . . from any part of any carriage way or cart way, unless such pit or shaft or steam-engine, gin, or other like engine or machinery, shall be within some house or other building, or behind some wall or fence, sufficient to conceal or screen the same from the said carriage way or cart way, so that the same may not be dangerous to passengers, horses, or cattle," &c.

*Fitzjames Stephen* appeared in support of the conviction, and argued that the justices were right upon all the points taken. As to the third objection, that the deft. was not present, and so could not be made liable for the acts of others, he contended that, as the steam-engine was under the care of the deft.'s servant, and was placed in position by him, he, the master, was liable. [CROMPTON, J.—The placing of the machine may have been the act of Butters; he directed where it was to be placed.] It was the duty of Harrison to have given his man orders not to place it in an improper position: (*Rea v. Fisher*, 1 Moo. & Mal. 437; *Rea v. Dixon*, 3 M. & Sel. 11; *Attorney-General v. Siddon*, 1 Cro. & Jer. 220.)

COCKBURN, C. J.—It strikes me in this way: if a servant in the care of such an engine negligently were to run up against another with it, his master would be liable. If, however, he wilfully does so, his master would not be liable. So here, if he wilfully erected this machine in an improper place, without his master's orders to do so, the master could not be made liable under this Act of Parliament. Upon that ground I think the conviction cannot be supported. The master was not present, and there is nothing to show that the engine was placed in that particular spot by his directions.

CROMPTON and MELLOR, JJ. concurred.

*Conviction quashed.*

## COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYN, Esqrs., Barristers-at-Law.

### REGISTRATION APPEAL.

Friday, Nov. 15.

FREEMAN (app.) v. GAINSFORD (resp.)

Election law—County vote—Qualification—Inmate of hospital—Charity.

App. claimed to vote in respect of a freehold



C. B.]

FREEMAN v. GAINSFORD.

[C. B.]

house. He was the inmate of a hospital founded in pursuance of the will of a former Earl of Shrewsbury, and the constitutions framed for it provide that in the hospital there should be one governor and twenty poor persons who should perform certain specified religious acts, and should enjoy such chambers, rooms and accommodation therein from time to time, for their lives, together with such stipend and allowances as were therein-after, to every of them, limited and appointed; and the said persons were required to dispose themselves to some work and labour, according to their several abilities, that they might get somewhat towards their better maintenance, and in some measure eat their own bread, and have therewithal to help themselves in time of sickness. The constitutions then indicate the persons who are to elect the candidates for admission, and the mode of election. They then declare that the persons to be elected are poor indigent people, well esteemed of for godly life and conversation, of good condition, peaceable and quiet among their neighbours, and such as by persons of honest repute shall be judged fit objects for the charity; and if it so happen that, by misinformation or mistake, any person or persons shall be elected wanting such qualifications, or in any wise behave themselves contrary to these rules and constitutions, he shall then be removed and expelled by the governor and his assistants, and another chosen in his place and room:

*Held*, that the app. had not an equitable freehold in the chambers of the hospital in which he resided; that his holding was of an eleemosynary nature, and therefore he was not entitled to vote for the election of knights of the shire.

This was an appeal from the decision of the revising barrister in a case held at his court for revising the list of voters for the West Riding of the county of York.

At a court held before the barrister appointed to revise the list of voters for the West Riding of the county of York, Jonathan Buxton objected to Thomas Betts as not having been entitled, on the last day of July 1861, to have his name inserted in the list of voters in the township of Sheffield for the said West Riding. The name stood in the copy of the register to the said township as follows:—

Christian and Surname.	Places of Abode.	Nature of Qualification.	Place in Township.
Betts, Thomas	Shrewsbury Hospital, Sheffield.	Freehold house	Shrewsbury Hospital, self occupied.

Thomas Betts was an inmate of the hospital in the township of Sheffield, founded by Gilbert Earl of Shrewsbury, and was duly elected and appointed, and as such resided in separate chambers and rooms of the building of the hospital, pursuant to his appointment under the trusts and constitutions of the hospital hereinafter set forth, which chambers and rooms are of the annual value of 40s. and upwards, and were in his *bond fide* occupation, and had been in his possession for six calendar months next previous to the last day of July 1861.

By virtue of this the said Thomas Betts claimed to have his name inserted and retained on the list of voters, as entitled to vote for the knights of the West Riding in respect of an equitable freehold estate in a house, whereof he was seised for his own life pursuant to the 2 Will. 4, c. 46, s. 18.

The Hospital of Gilbert Earl of Shrewsbury, situate in the said township, was founded under the following circumstances, and governed by the trustees and constitutions following:—

Gilbert Earl of Shrewsbury, by his will bearing date in the month of May, in the fourteenth year of the reign of King James I., devised to the executors thereof all his manors, lands, tenements and hereditaments whereof he was seised of any estate of inheritance in fee-simple in possession, remainder, or reversion (with certain exceptions), to pay funeral expenses, debts and legacies, and the residue and surplussage to his executors, their heirs and assigns. And he thereby willed and appointed an hospital, to be founded at Sheffield, for perpetual maintenance of twenty poor persons, and to be called the hospital of Gilbert Earl of Shrewsbury, and the same to be endowed with such revenues and possessions as his executors should think fit, not being under 200l. a-year.

This will was proved at London on the 14th May 1616. In the year 1625 the great-grandson of the above testator, whose name was Henry Earl of Norwich, and afterwards Duke of Norfolk, for performing the will erected a building as a hospital in Sheffield, and placed in it twenty poor persons—ten men and ten women; and in the year 1673 made certain constitutions in writing for the government of the said hospital.

By these constitutions it was established that, in the said hospital there should be for ever one governor and twenty poor persons—ten men and ten women—who should give themselves to the service of God and to pray for the prosperity of the noble family of the founder and his posterity, and that the governor and every of them should enjoy such chambers, rooms and accommodations from time to time for their lives, together with such stipend and all other allowances as were thereafter to every of them limited and appointed, every one of them well and honestly behaving him or herself according to those statutes, constitutions and ordinances, and for the better preventing of idleness it was ordained that all such persons as were or should be placed in the said hospital, as well men as women, should dispose themselves to some work and labour, according to their abilities and health, that they might get somewhat towards their better maintenance, and might in some measure eat their own bread and have therewithal to help themselves in times of weakness or sickness.

The men were also required to be widowers or bachelors, and the women widows or maids, and both to be threescore years of age or upwards, unless dispensed with by the authority of the Earl Marshal of England.

Their mode of election to be, if the number be thereby (*sic*) also to be by the governor and three assistants named in the constitutions, or the major part of them, presenting the names of two persons for every void place to the Earl Marshal or his heirs, together with a certificate of their place, condition and behaviour, and to that end the said earl or his heirs might elect and appoint out of them one or more persons in the then vacant place or places, and in the event of his neglecting to do so for six weeks after due notice, then the governor and his assistants should fill up the vacancies; and it was also provided that the Earl Marshal or his heirs might make choice of a person without certificate. The persons to be elected are to be poor indigent people, well esteemed of for godly life and conversation, of good conditions, peaceable and quiet amongst their neighbours, and such as by persons of honest repute shall be judged fit objects for this charity; and if it so happen, by misinformation or mistake, that any person or persons be elected wanting such qualifications, or shall marry afterwards, or in anywise behave themselves contrary to these rules and constitutions, he shall then be removed and expelled by the governor and his assistants for the time being, or the major part of them, and another chosen in his place and room.

C. B.]

FREEMAN v. GAINSFORD.

[C. B.]

If any of the said poor persons profanely or frequently curse or swear, or frequent any wine-tavern or alehouse, or remain there above one hour in a day, or be drunk, or any otherwise misbehave themselves, the governor and his assistants are empowered to deduct from the offender's next week's allowance one-half for the first offence, one whole week's allowance for the second offence, and two weeks' allowance for the third offence. If he be incorrigible, the governor shall take from him his gown and badge, and he shall be forever expelled and removed out of the said hospital, provided that the said Earl Marshal or his heirs may, according to their will and pleasure, by writing under his or their hand, restore any person so expelled.

It is also ordered that none shall lodge with any of the poor persons in their room or rooms, or be admitted to inhabit there upon any pretence whatsoever, unless licence be first obtained under the hands of the said Earl Marshal or his heirs, or under the hands of the governor and assistants or the major part of them, but they shall be helpful one to another, according to their strength and ability, as in charity they ought; provided that no person or persons be thereby hindered from helping any of the aforesaid poor persons in the daytime when occasion requires, or that none of the said poor persons shall lodge abroad, wander, nor beg alms upon any pretence whatsoever, upon pain of expulsion.

The constitutions having also pointed out the qualifications and duties of the governor of the hospital, and his salary having been named, and having pointed out the office of his assistants, provide then that one or more of them shall, monthly, meet with the governor to pay the governor and poor persons of the said hospital their allowances respectively, according to such proportion as thereafter limited and appointed: viz., to every man 2s. 6d. by the week, and to every woman the like sum of 2s. 6d., per week, and to every one in due season, two wain loads of pit coals for one year's firing. And the assistants and governor are likewise to buy clothing, to every man and to every woman one purple gown in seven years and a blue one every two years to be clothed withal, in each of which gowns shall be worn a silver badge with the arms and crest of the family of the founder, and the governor to have every year a scarlet gown.

The persons to be elected are to be taken or chosen out of the town or parish of Sheffield, if any persons can therein be found fit, the poor tenants thereabouts of the said Earl Marshal and his heirs to have the preference before any other in such election if duly qualified; if there be no persons then the said Earl Marshal is to make choice of any person qualified in any place and out of any other parish where the said earl has any lands descended from the said Gilbert Earl of Shrewsbury.

No member of the hospital has ever been expelled under the operation of the above conditions.

The said Henry Duke of Norfolk, by indenture dated the 23rd Nov. 1680, granted, released and conveyed certain lands and tenements in the counties of York and Derby to trustees and their heirs, in trust that the said trustees should by or out of the yearly rents and profits of the said lands and hereditaments maintain and keep the said house and building of the hospital and the gardens and yards thereunto belonging, from time to time for ever, as need or occasion should be, with all needful and requisite reparations, and should provide gowns and other provisions for the said governor and governess, and all members and officers of or belonging to the said hospital for the time being for ever according to the said constitutions.

Power to appoint new trustees was created by the above deed, which power was exercised in the year 1693, by indenture and by Act of Parliament passed

in the eleventh year of the reign of George I., the trustees then surviving were declared to be seised of the trust-lands to their use upon trust to apply the rents and profits and accumulations that had arisen, in enlarging the buildings for accommodating additional members to be added to the hospital, and also in maintaining and keeping the house and buildings of the hospital and the gardens and yard thereunto belonging with good and decent order and repair.

It was also enacted that the governor of the hospital was to be a clergyman of the Church of England, and elected and appointed and displaced for any misfeasance or neglect of duty in the same manner as the governors of the said hospital are elected and displaced according to the said constitution.

Under the powers of this Act of Parliament it was provided that the number of poor persons that should be added to the then existing number of poor persons, members of the hospital, should not be less than four poor men, besides the then present poor women, and that as many more should be added to the number from time to time as the revenues for the hospital for the time being would extend to make provision for according to the constitutions made for the then existing members, so that a surplus of revenue be left sufficient to bear the expenses of the repairs and other necessary expenses relating to the hospital; and by this Act it was further provided that nothing in it should extend to take away or invalidate any powers belonging to the Duke of Norfolk and his heirs as heirs of the founders of the hospital, which he might claim, use, or exercise, by virtue of the constitutions of the hospital, and that the said duke and his heirs should for ever thereafter exercise such power, so as the execution thereof did not lessen the revenues of the hospital, nor the number of poor persons therein, or to be therein.

The number of members of the hospital had become subsequently increased to thirty-six by the increase of the accumulated surplus revenues until the year 1767, when a flood destroyed part of the hospital, and from the destruction and expense attending its restoration the numbers were after that time reduced to twenty-seven, and the original constitutions were lost, in consequence of which circumstances another Act of Parliament was passed in the tenth year of George the Third's reign for explaining and amending the last Act, and for enlarging the powers contained in the said Act, and for other purposes, and for establishing the constitutions a copy of the original were declared to be such as bound the hospital, and were made a schedule to the Act.

The powers for applying the accumulated revenues to the restoration of the hospital, and for restoring the number of its members, were thereby granted, and increased allowances given to the members, amounting in the whole to a weekly sum of 3s. 6d. apiece for each poor member of the hospital.

It was also stated that the amending and explaining the former Act might, in many respects, be highly beneficial to the charity, and be conformable to the original intentions of the founder of the hospital. The reservation of the powers of the Duke of Norfolk is therein repeated, so that their exercise did not lessen the revenues of the hospital.

The trust-estates, including the land and hospital of Gilbert Earl of Shrewsbury, have, from time to time, been conveyed and transferred to new trustees in trust under powers of the Acts of Parliament in that behalf for the said hospital, and according to the original constitutions, and as the rents and revenues have increased in value, additions to the hospital, and to the number of its members elected under the constitutions have been sanctioned and made by the Duke of Norfolk for the time being.

For the resp. it was contended, on the authority

C. B.]

FREEMAN v. GAINSFORD.

[C. R.]

of the case of *Simpson v. Wilkinson*, that he had such an equitable estate of freehold for life in his chambers and rooms, the legal estate of which was vested in trustees of the hospital, as entitled him to vote and retain his name and qualification on the list of voters of the West Riding of Yorkshire; and for the app. that, on the authority of the case of *Heartley v. Banks*, the resp. was not the owner of an equitable freehold as to confer a qualification to vote as claimed, but that his interest in his chambers and rooms in the hospital building was that of an occupier of part of the benefits of the charity, and a residence in the hospital, which did not make him the equitable freehold owner of a house and chambers, or justify the conclusion that it gave him a right to vote. I retained the name of the resp. on the register on the ground contended for by him.

*Pickering*, for the app., referred to *stat. 8 Hen. 6, c. 7*; *Davis* (app.) v. *Waddington* (resp.) 7 M. & G. 37; *Heartley* (app.) v. *Banks* (resp.) 5 C. B., N. S., 40.

*Hansen*, for the resp., cited *Faulkner v. The Overseers of Boddington*, 27 L. J. 30, C. P.; 2 Will. 4, c. 45, ss. 18, 30; *Simpson v. Wilkinson*, 7 M. & G. 50; 2 Cruise's Digest, 7, "Estates for Life."

*Pickering* replied.

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case ought to be reversed, and that the claimant had not an equitable freehold in the chambers in the hospital wherein he resided. It appears by the statement that the hospital in question was founded in pursuance of the will of the Earl of Shrewsbury, and the constitutions are before us, and the first of them directs that the persons to be elected are to be poor indigent people, well esteemed for good lives and conversation, who shall be judged by honest people to be fit objects of the charity. The other constitutions are entirely consistent with that; that the governors are to elect to places in the hospital persons answering the description that I have read; and it appears that in practice each party elected is placed in a set of chambers, and, for aught that appears, he probably continues in the chambers wherein he is placed from the time he is elected until he dies or leaves the hospital; but the question for us is not the time that he occupies, or the accommodation given, but what are his rights when elected and placed there. I am of opinion that he is appointed as an object of charity, and that the governors in putting him there did not give him an estate that he could enforce by bill in equity in his own name. A legal estate it is not contended that he has, but only an equitable estate. It would be contrary to the spirit of the ordinances that he should have a right, or in other words that he should be able to file a bill; that each person elected should be able to file a bill against the governors in reference to the estate vested in them. It appears to me also, that it would be contrary to the intention of the statute prescribing a qualification for voting; and indeed the qualification is intended to secure more independence and freedom than would be probably incidental to poor indigent people elected to an eleemosynary establishment as fit objects of charity. These are the general observations that lead me to the conclusion that the case of *Heartley v. Banks* is distinctly in point. The reason assigned by the court is, that objects of charity holding chambers as part of the eleemosynary bounty from the hospital are not persons having an equitable freehold that would qualify them to vote, and I think that upon that judgment there is no distinction in this respect between a qualification to vote for a borough and for a county. No doubt there is a section in the Reform Act excluding from voting in boroughs all who are in receipt of alms, and though it does not expressly state that this should apply to counties, I should think that

the same principle would apply. But the whole of the reasoning in the case of *Heartley v. Banks* is as entirely applicable to votes for counties as to votes for boroughs. I rely upon that case, and I do not consider that the court is bound to elect between the two conflicting decisions in *Simpson v. Wilkinson* and *Heartley v. Banks*. No doubt in *Simpson v. Wilkinson* the claimants were objects of charity elected to a charity and having rooms in a charity building. They claimed to vote, and the circumstances might have authorised the same line of reasoning and the same judgment as was afterwards given in *Heartley v. Banks*, but that circumstance cannot be relied on. I think that the information we have, and the whole line of the report, satisfies me on this point, that whether the inmates of a hospital receiving rooms to be held for life have an equitable freehold in those rooms, was not the point for adjudication before the court. The court decided the point reserved by the barrister, "Is there evidence that authorises me to conclude that this hospital was founded under a licence from Queen Elizabeth, and whether it was not a corporation aggregate?" The judgment was confined to that point. There is upon the matter the judicial opinion of perhaps more than one judge; and if I am reported correctly, there is an intimation of something of that kind on my part. Many of the observations made by learned judges, if they chance to be reported hostilely, would misrepresent them, they being for the arguing counsel to address his attention to, and not observations that the judges mean to be bound by. In that case the only question was whether it was a corporation aggregate, and not the point involved in the present case. For these reasons I think that the judgment of the revising barrister should be reversed.

WILLIAMS, J.—I am entirely of the same opinion. I think that the occupier of rooms as part of the benefit of the charitable institution is not the owner of the freehold of the rooms in which he resides; at all events, unless the constitution of the charitable institution assigns a separate house as a separate residence to the object of the charity during the continuance of his life, directly or indirectly. It is contended that in the present case there is such an occupation under the constitution of the charitable foundation in question. I do not accept that view. The app. relies upon the language in the first constitution, in which it says (after saying that in the said hospital there shall be one governor and ten poor men and ten poor women, it goes on to say), "that they and every of them shall enjoy such chambers, rooms and accommodations, &c., for their lives, together with such stipend and all other allowance as was thereafter limited and appointed, every one of them well and honestly behaving himself or herself according to these statutes and ordinances." I conceive that there is quite sufficient in this case to show that the claimants would have a freehold if they had any property in their rooms. I do not mean to controvert that, or to express an opinion in the affirmative or the negative of that. The question is, whether they have any property, and I am of opinion that they have none. I think the meaning of this language simply is, that some provision is to be made thereafter to regulate the mode in which the recipients of the charity shall be accommodated with lodging, clothes and a stipend, and that they are to have these things for life. It does not follow that the particular rooms are to be assigned to their particular recipients to be enjoyed by them as owners for their lives. I think that they have not the right of an equitable owner at all. If a man had such a right, he could insist upon remaining there notwithstanding the purposes of the charity might call for his being removed to some other proper chamber, or for his own being demolished or devoted to some reasonable purpose connected with the charity. He could put those having the conduct of the institution at defiance.

C. B.]

BUSHELL v. EASTES.

[C. B.]

saying—"No; I have an equitable freehold in my room, and you shall not put a foot in it." No such thing as that was intended by these constitutions. This is plainly the case of a number of persons who are entitled to be properly and reasonably accommodated with chambers and other conveniences and allowances in the hospital provided by the bounty of the founder. Having a right to be so supplied, and having a right to go to equity to insist that such things shall be provided out of the funds, does not constitute them equitable owners of the rooms.

BYLES, J.—I am of the same opinion. This case really turns upon the construction of the 8 Hen. 6, because the provisions of the 2 Will. 4, c. 45, so far as relates to freeholds for life, cuts down the right, and does not extend it. The statute of Hen. 6 proceeds, "Whereas elections have now of late been made by excessive numbers of people dwelling within the same counties, &c., of which the most part was by people of small substance and of no value, whereof every of them pretended a voice equivalent as to such elections to be made with the most worthy knights and esquires," and then provides that elections shall be by people dwelling and resident in the same county, whereof every one of them shall have free land or tenement of the value of 40s. by the year at least, above all charges. The qualification is not badly expressed by the phrase "independent freeholders;" they are the parties invested with the right to vote, and first they must be freeholders. It seems to me, so far as I can make out, that this claimant has no one of the *indicia* of property. He has no right to say, "Give me a particular room," and I see nothing to prevent the managers of the hospital saying, "You have lived long enough in this room, go and live in another room." It is plain that, if he has a freehold interest, it is one of a very strange nature; he cannot assign it, he cannot underlet it, he cannot occupy jointly, and he cannot take in an inmate; and though an equitable estate as well as a legal estate now might be seized, and is extendable under an *elegit*, this particular estate cannot be applied to the payment of his debts. I very much doubt whether he could bring trespass for intruding into his room; so that the *indicia* of property are absent, and the very nature of his occupation is eleemosynary. My Lord has pointed out that the inmates are to be poor people, fit objects of this charity, and therefore we must approach this case with the consideration that the claimant is, I will not say an eleemosynary occupier—for I doubt whether he is an occupier at all—but an eleemosynary resident. These parties are clearly not within the statute of Hen. 6. With respect to *Simpson v. Wilkinson*, I do not repose on my recollection of the judgment, but it seems to me plain that, though Maule, J. expressed an opinion, yet the court thought that it was only entrusted by the Legislature with the very point left to them by the barrister, and that was not this point. Therefore *Simpson v. Wilkinson* is no authority, but I agree with my Lord and with my brother Williams, that *Heartley v. Banks* is a well-considered decision in complete accordance with the intention of the statute of Hen. 6 applicable to the case then before the court, and quite as applicable to the case now before the court.

KEATING, J.—I also think that the decision of the barrister should be reversed. It appears to me that we could not decide otherwise without interfering with the case of *Heartley v. Banks*, which was decided on by this court after great consideration. No doubt that the military knights in that case did not assume even so decided an eleemosynary character as the recipients of bounty here; but, looking through the constitutions as set out in this case, it is difficult to see how it was possible that the parties could be receiving charity under more stringent rules as to discipline and other conditions inconsistent with freehold property. I en-

tirely agree that there is nothing here which obliges the governor to assign to this claimant any particular set of chambers; and therefore there is nothing which he could say he has a freehold interest in. No doubt he has a right to the benefits of the charity, and they are conferred for life so long as he conducts himself in accordance with the rules of the charity; but though it may be an appointment for life, it is not an appointment in connection with any particular set of chambers. For these reasons, it appears to me that this decision cannot be maintained, and should be reversed.

*Judgment for the app.*

#### REGISTRATION APPEAL.

Tuesday, Nov. 19.

BUSHELL (app.) v. EASTES (resp.)

*Election law—County vote—Qualification—Parish clerk.*

*A person claimed to vote in respect of his office as parish clerk. Part of the emoluments attached to his said office consisted of the clerk's share of an ancient due, payable to the clerk and sexton on the opening of every grave in the churchyard of the said parish, which share amounted by the year to 40s. and upwards:*

*Held, that he was not entitled to vote in respect thereof, the ancient due being in the nature of a fee for his services at funerals, and not a payment or emolument issuing out of land.*

This was an appeal from the decision of the revising barrister on a claim to vote made at his court holden for the eastern division of the county of Kent.

#### CASE.

At a court held by me, the barrister duly appointed to revise the list of voters for the eastern division of the county of Kent, on the 25th day of September 1861, at Dover, in the said division, for revising the list of the parishes in the polling district of Dover, one Benjamin Richards Eastes duly objected to the name of William Minster Bushell being retained on the list of voters for the parish of St. James, Dover, in the said division of the county of Kent.

It was proved before me that the said William Minster Bushell was, in the year 1826, duly appointed parish clerk of the said parish of St. James, Dover, which he, the said William Minster Bushell, held, and which his predecessors had theretofore held, for life.

It was further proved that by licence under the seal of the Archbishop of Canterbury, dated the 23rd Aug. 1832, the said William Minster Bushell "was confirmed in his said office, together with all and singular the fees, salaries and profits either by law or ancient custom belonging to the same."

It was also proved that a part of the emoluments attached to the said office of parish clerk, actually received by the said William Minster Bushell during the period of his holding the said office, and by his predecessors therein, consisted of the clerk's share of an ancient due, payable to the clerk and sexton upon the opening of every grave in the churchyard of the said parish of St. James, Dover.

It was further proved that the clerk had not himself performed any of the work or labour incident to the opening of the graves, this being performed by the sexton.

It was further was proved that the sexton received a fee for the making of each grave, besides the fee he shared with the clerk on the opening of the grave.

The clerk's share of the fee paid on the opening of the grave was proved to amount annually to 40s. and upwards, and was described in the vestry book of the said parish as an ancient fee due to the clerk.

Upon this state of facts it appeared to me that the ancient due was in the nature of remuneration for services rendered in conducting the funeral rites, and that it was not a payment or emolument issuing out of

C. B.]

HALL v. LEWIS.

[C. B.]

land, or in anywise charged upon the soil of the churchyard, over which neither sexton, clerk, or vestry had any power or control. I therefore held that the said William Minster Bushell was not entitled to be retained upon the said list of voters, and expunged his name from the list of voters.

If my decision was correct, such list is to remain without alteration; if my decision was incorrect, the name of the said William Minster Bushell, with his address and particulars of his qualification, as stated below, is to be added to the revised list of voters for the said parish of St. James, in the said eastern division of the county of Kent.

William Minster Bushell	St. James-street, Dover.	Freehold office.	As parish clerk of St. James, Dover.
-------------------------	--------------------------	------------------	--------------------------------------

(Signed) C. G. A., Revising Barrister.

*Macnamara* for the app.—The claimant here has a freehold office of the clear annual value of 40s., and is entitled to vote in respect of it. The claim is based upon or connected with land, and the court should put a construction on the statute (8 Hen. 6, c. 7) favourable to the franchise. The Middlesex Committee of 1804 no doubt were of opinion that a parish clerk had no vote; but there is no decision of the courts upon the point. All that is required by the statute is, that the claimant shall reside and be able to expend 40s. by the year from land or office connected therewith: (Co. Litt. 6 A.; 2 Bl. Com. 17, 36, defining what is an office; Carthew, 478; Haywood on County Elections, 65; 2 Peckwith, 93.) The statutes on the subject are—8 Hen. 6, c. 7; 10 Hen. 6, c. 6; 7 & 8 Will. 3, c. 25, s. 3; 10 Anne, c. 23; 18 Geo. 2, c. 18; 20 Geo. 3, c. 17; 22 Geo. 3, c. 41; 28 Geo. 3, c. 36; 29 Geo. 3, c. 18; 2 Will. 4, c. 45.

*Welsby* (in answer to the court).—I shall contend that such a person as this never had a right to vote in respect of his office.

*Macnamara*.—There is nothing in the Act last cited (the Reform Act) inconsistent with the right now claimed. If the office is connected with or concerns realty, and (as the fees on burials were payable only in respect of the place, that is the churchyard), it clearly is, the court should give the vote: (2 Peckwith, 93; 4 Inst. c. 1, p. 46; 2 Halest's Precedents; Ellicott on Elections, 22, 38.)

*Welsby*, for the resp., was not called upon.

ERLE, C.J.—I am of opinion that the revising barrister in this case was right. I do not dwell upon the question whether a parish clerk holds an office. I am clearly of opinion, together with the Middlesex committee of 1804, that he is not qualified by reason of being a parish clerk to vote for the county. The resolution of that committee has been, if I may so say, recognised and acted upon ever since 1804—recognised and acted upon by those who have had to decide on the qualifications to vote for the county; and the whole frame of the Reform Act at the time when the constituency was to be settled and qualifications were to be recognised—the whole frame of it is consistent with the supposition that the Legislature coincided with the opinion of the Middlesex committee, and not consistent with the claim put forward on behalf of the parish clerk upon the present occasion. I am against Mr. Macnamara on the first point, by reason of the office being a profit. That alone would do, irrespective of any connection with land. I am of opinion also against him on the second point; and if it was necessary to show this was an office yielding 40s. from land, the fact of the clerk of the parish receiving from persons connected with the burials in the churchyard certain donations that amount to more than 40s. by the year, I think, does not amount to a deriving profit from the land; and he has no interest in the freehold of the churchyard,

taking a profit from the land thereby. I think the revising barrister put the right construction upon it; that it is a fee to the parish clerk by the persons connected with the burials, for the services he performs in attending and assisting at the funerals; and it is not at all analogous to those profits issuing from the land alluded to, where the parish clerk has a right to take so much of the actual profits of the land and other profits. The claim fails, and the revising barrister is right.

*Judgment for the resp.*

*Harrison and Lewis*, 6, Old Jewry, attorneys for app. *Burchell, Dalrymple and Drake* for resp.

Tuesday, Nov. 19.

HALL (app.) v. LEWIS (resp.)

*Election law—County Vote—Qualification—Preacher—Lay clerk—Bell-ringer.*

A "preacher," a "lay clerk" and a "bell-ringer" in a cathedral, who were respectively appointed, the first during good behaviour, and the two last for life, and were paid their several stipends by the treasurer of the dean and chapter out of the chapter revenues, "which are derived wholly or in part from certain lands and tenements vested in the dean and chapter," claimed to be upon the register of voters for the county in respect of their offices: Held, that they had no equitable interest in the lands from which the funds were derived, and therefore were not entitled to the franchise.

This was an appeal from the decision of the revising barrister for East Kent.

Case.—At a court holden at Canterbury, in the eastern division of the county of Kent, before me, the revising barrister appointed to revise the list of voters for the said eastern division of the said county, on the 22nd Oct. 1861, the Rev. Francis James Holland, Joseph Burn, and Thomas Parnell severally claimed to be placed on the list of voters for the said eastern division of the said county, in respect of property situate wholly or in part within the parish called the ville of Christ Church, in the said city of Canterbury, and were duly objected to by Benjamin Richard Eastes, a person on the said register of voters, on the ground that they did not possess the requisite qualification. The claims were set forth in the following form:—

Christian and Surname	Place of Abode.	Nature of Qualification.	Street, Lane, &c.
Holland, Francis James	14, St. Dunstan-terrace, Canterbury	Freehold Office	As one of the six preachers in the Cathedral Church, Canterbury.
Burn, Joseph	16, Orchard-street, St. Dunstan's, Canterbury	Freehold Office	Lay clerk, Canterbury Cathedral.
Parnell, Thomas	St. Radigund's, Canterbury	Freehold Office	Bell-ringer, Canterbury Cathedral.

As regards the claim of the Reverend Francis James Holland, the facts proved before me were, that the said Reverend Francis James Holland was appointed by the Archbishop of Canterbury one of the six preachers of Canterbury Cathedral; that he held his office during good behaviour, provided he remained in the diocese, and preached at least twice a year in the said cathedral; that he received an annual stipend of 32l. a-year as preacher from the treasurer of the dean and chapter, at the audit room in the cathedral precincts, situate within the said ville of Christ Church. It was further proved that each of the six preachers formerly received an annual stipend of 20l. a-year, and a house to live in, but that the stipend was afterwards increased and the house taken away.

As regards the claim of Joseph Burn, the facts

C. B.]

BRIDGEWATER v. DURANT.

[C. B.]

proved were, that at a chapter, held in July 1834, the said Joseph Burn was appointed by the said dean and chapter of Canterbury Cathedral one of the eight lay clerks of the said cathedral; that the appointment was for life, and was made by a resolution of the chapter, a minute of which resolution was recorded in the records of the chapter-house, and signed by the said Joseph Burn; that a salary of 80*l.* a-year was attached to the said office of lay clerk, and was paid annually to the said Joseph Burn by the treasurer of the said dean and chapter in the said audit-room of the said cathedral, situate within the said ville of Christ Church; that the duty of the said Joseph Burn as lay clerk was to attend and officiate as clerk a certain number of times in each year during the celebration of divine service in the said cathedral.

As regards the claim of Thomas Parnell, it was proved that in 1857 the said Thomas Parnell had been appointed by the said dean and chapter one of the eight bell-ringers in the said cathedral; that the appointment was for life, and that an annual stipend of 20*l.* a-year, payable out of the cathedral funds, was attached to the said office of bell-ringer, and was paid annually to the said Thomas Parnell by the said treasurer of the said dean and chapter, at the said audit-room in the said ville of Christ Church, and that it was the duty of the said Thomas Parnell to attend from time to time to assist in ringing the bells at the said cathedral prior to the celebration of divine service therein.

It further appeared that the appointment to these different offices, the duties incident to them, and the amount of salary payable to the holders or occupants of the said offices, were regulated by certain statutes of the metropolitan cathedral of Christ Church, Canterbury, which were produced in court, and read; and it was agreed that these statutes should form part of the present case, and, if necessary, should be referred to as evidence in support of the claims of the respective claimants. It was further proved that such salaries were paid out of the chapter revenues, which were derived either wholly or in part from certain lands and tenements situate in the said parish of Christ Church ville and other parishes in the said eastern division of the said county and elsewhere out of the said county, and which lands and tenements were vested in the dean and chapter of the said cathedral.

Upon this state of facts I retained the names of the said Francis James Holland, James Burn and Thomas Parnell on the list of voters.

The names of the several persons following appearing on the revised list of voters for the said parish of the villa of Christ Church, were allowed to remain upon such list, though duly objected to under circumstances similar to the cases of the said Joseph Burn and Thomas Parnell; that is to say, George Eastes, James Hurn Farrow, William Clife Gough, William Henry Longhurst, William Newsome, William Norman, William Pugh, Robert Rhodes and Mark Teal. I declare that the appeals against such decisions ought to be consolidated, as they depend upon the same decisions.

If the court, under the circumstances aforesaid, should be of opinion that my decision was incorrect, the names of the said Francis James Holland, Joseph Burn, Thomas Parnell, George Eastes, James Hurn Farrow, William Clife Gough, William Henry Longhurst, William Newsome, William Norman, William Pugh, Robert Rhodes and Mark Teal, are to be expunged from the said register of voters for the eastern division of the county of Kent for the said parish of Christ Church villa.

If the court be of opinion that my decision was correct, the said list will remain without amendment.

(Signed) C. G. A.

*Welby* for the app.—The question in this case is, whether these claimants have their stipend arising out

of land, for after the decision in *Bushe v. Eastes*, it may be assumed that unless their stipend arises from land, they are not entitled to the franchise. All these parties are paid at the audit-room from funds of the cathedral; but there is nothing in the case to show that either of them has a clear income of 40*s.* a-year arising from land. The statute says, the funds are to come out of the common goods of the cathedral. Now the said common goods do not arise wholly out of land. In the next place the case does not show that these claimants had severally 40*s.* a-year stipend arising out of lands in the parish of Christ Church.

*Macnamara* for the resp.—As to the last point, there is sufficient arising out of lands in the parish of Christ Church to satisfy the requirement of the statute; and if the court finds difficulty on this point, I shall pray that the case may be sent back to have this fact found. It is found in the case that the salaries are derived from land. These claimants are therefore entitled to vote; for the dean and chapter hold the lands out of which the funds arise, as trustees for them.

ERLE, C. J.—I think the decision of the revising barrister in this case ought to be reversed. It is not necessary to make the case turn upon the question whether this person held the office of bell-ringer for the district, because, as Mr. Macnamara truly contended, if he was appointed and had an equitable interest and right to the salary from freehold lands, that would be a freehold qualification within the district from which the qualification is to be derived. I cannot find myself that there is any equitable interest in any lands anywhere. I can find nothing more than an agreement that "out of our property we will pay you 20*l.* a-year." I cannot conceive any distinction between this functionary, as Lord Mansfield called the party who claimed to hold an office, and any other party hired to do service, as far as creating an equitable interest in any of the property of the party who hires him. There the parties hire him for 20*l.* per annum, which they must pay out of their funds. There is not the least sign of any equitable interest in him.

WILLIAMS, J.—I am of the same opinion. I think the claimants have, at all events, functions and emoluments for life, so as to give an equitable title to a certain quantity of the funds of the dean and chapter. There is no other enjoyment of the property, and I cannot see any equitable estate.

BYLES, J.—I quite agree. These seems to me to be no substantial difference between an officer of a corporation aggregate and of a man of property. I do not see anything to prevent the parties here from appointing these functionaries, and paying them out of real or personal property. It might be more convenient, and even if it could be done and was done, that they were paid out of real property, *non constat* the whole body had enough, and if they had, *non constat* the revenue of each of these functionaries comes out of so much of the property as is in the parish in question.

KEATING, J.—I am of the same opinion.

*Judgment for the app.*

#### REGISTRATION APPEALS.

Nov. 11 and 22.

BRIDGEWATER (app.) v. DURANT (resp.)

*Borough vote—Qualification—Lay clerk—Occupation as tenant—2 Will. 4. c. 45, s. 27.*

A lay clerk appointed to his office by a dean and chapter, and occupying a house assigned to him by them, above the value of 10*l.* a-year, the freehold of the house being in the dean and chapter, the said lay clerk not being bound to reside, and being able to perform the duties incident to his office without residing in the house, is not entitled to vote in respect of the said house, as having a legal or equitable interest therein.

*The question as to the nature of the holding in such a case is one of fact for the revising barrister.*

Case.—At a court held before me, the barrister duly appointed to revise the list of voters for the borough of New Windsor, Robert Bridgwater claimed to have his name inserted in the list.

The claimant has occupied a house in the Lower Ward, within the borough, about fourteen years. He occupies as a lay clerk, to which office he was appointed by the dean and canons of Windsor seventeen years ago.

The freehold of the house is in the dean and canons; its value is above 10*l.* a-year. It is extra-parochial.

A certain number of houses are occupied by lay clerks. There are more lay clerks than houses, and the juniors receive 20*l.* a-year more salary till a house becomes vacant. The salary is then reduced by 20*l.* The lay clerk may then take the house, but is not obliged to reside. He can perform all his duties without residing in the house, but cannot let without permission of the dean and canons.

The claimant on his appointment took the oath of allegiance and some other oath. He believes he holds his office for life, or so long as he does his duties. He has never seen the statutes of the dean and canons. He has no doubt that there are such statutes, but he has no right of access to them, and he has made no attempt to see them or procure any evidence from them. He knows no book relating to his office but the cheque-book in which his name is entered, and which he sees once a month.

I held that these facts did not show a sufficient occupation either as owner or tenant, and refused to insert the claimant on the list of voters.

If the court should be of opinion that my decision is erroneous, the claimant's name is to be inserted in the list of voters for the borough of New Windsor and will stand.

Christian and Surname.	Place of Abode.	Nature of Qualification.	Street, Lane, &c.
Robert Bridgwater	30, Lower Cloisters	House	30, Lower Cloisters

The names of the following claimants were rejected on the same grounds, and are to be inserted if the court decide in favour of Robert Bridgwater.

[Here followed the names of six other claimants.]

(Signed)

H. B. C.

Revising Barrister.

*Macnamara* for the app.—In this case the app. is a lay clerk under the dean and canons of Windsor, and he claims to vote under sect. 27 of 2 Will. 4, c. 45, in respect of his occupation of a house as tenant: (*Hughes v. The Overseers of Chatham*, 5 M. & G. 54.) The distinction drawn in that case was recognised and acted on in *Dobson v. Jones*, 5 M. & G. 112. It is not necessary to show the nature of the tenancy, all he has to do is to show that he occupies as tenant. [KEATING, J.—A tenancy at will would be enough.]

Yes: *Clarke v. The Overseers of Bury*, 1 C. B., N. S., 23. Those cases show the distinction between occupation as owner or tenant. The other cases raised questions as to the tenancy being of an eleemosynary nature: (*Heartley v. Banks*, 5 C. B. N. S. 40; *Heath v. Haynes*, 3 C. B. 389.)

*Griffiths* contra.—The decision of the revising barrister was correct. The statutes of the dean and chapter were not brought before the revising barrister, so he was left in doubt as to the nature of the tenancy. It did not appear what a lay clerk is or what are his duties. If the statutes were before the court it would be seen that the claimant stands in the same position as the Military Knights of Windsor, who the court has held are not entitled to vote.

*Macnamara* in reply.—So far as the case is con-

cerned there is no evidence that there are any statutes of the dean and chapter in existence.

*Curr. adv. vult.*

Nov. 22.—ERLE, C. J. now delivered the judgment of the court.—In this case the revising barrister states the facts which were proved relating to the occupation of a house by the claimant, and suggests other facts which were proved; and decided that he was not satisfied that the claimant, a lay clerk, occupied his house either as owner or tenant within the statute. Occupation, alone, of a house is not sufficient to qualify—that is, occupation as a member of a corporation aggregate, or as the receiver of charitable bounty (*Heartley v. Banks*, 5 C. B., N. S., 40); or for purposes connected with service to be performed (*Dobson v. Jones*, 5 M. & G. 112; *Clarke v. The Overseers of Bury*, 1 C. B., N. S., 23); or under the appointment from governors of a charity at their discretion: (*Davis v. Waddington*, 7 M. & G. 37.) In these cases the alleged holding has been held not to qualify. The question is one of fact, and it was for the revising barrister to draw his own conclusion from the premises before him. Upon the statement of the case we do not find any proof that the appointment of the lay clerk, together with the assignment of a house for his occupation, necessarily created any legal or equitable freehold interest in him. In this case, therefore, we see no reason why the decision of the revising barrister should be wrong; and his decision is confirmed.

*Judgment for the resp.*

Monday, Nov. 25.

WHITE V. STEEL AND OTHERS.

At a meeting of ratepayers it was proposed and agreed that a sum of money should be borrowed on the security of the rates for the purpose of purchasing land for a burial-ground. One of the ratepayers present demanded a poll, but his motion not being seconded it fell to the ground, and a rate was agreed to for paying off the loan. Application was then made to the Church Commissioners under sect. 26 of 3 Geo. 4, c. 72, and they confirmed the rate, and ordered the churchwardens to make and levy it. The defts. and others having refused to pay, recourse was had to the Ecclesiastical Court, when the defts. alleged that the rate was improperly made, inasmuch as a poll had been demanded and not granted. The learned judge of the Ecclesiastical Court ruled that he had no power to examine the validity of the order of the commissioners, whereupon the defts. moved for a prohibition to issue to restrain the Ecclesiastical Court from further proceeding in the matter:

Held, that, considering the extreme importance of the case, and the interests at stake, and the difficulty of construing these Acts of Parliament, the parties must declare in prohibition.

This was a rule calling on the plts, to show cause why a writ of prohibition should not issue against the Ecclesiastical Court to prohibit it from proceeding with a suit.

It appeared that in the parish of Plumstead the Home Secretary had ordered a churchyard to be closed, upon which it became necessary for the parishioners to consider what they should do to obtain a proper and sufficient burial-ground. A meeting of the parishioners was accordingly held, at which it was determined to have a burial board and a burial-ground, a part of which was to be consecrated and a part not, and an application was made to the Church Commissioners to authorise the purchase, but they replied that they had no power under the statutes relating to the subject to authorise the purchase of ground of which only a part was to be consecrated. Another meeting was then called, and in the notices it was stated.

C. B.]

SINGLETON v. WILLIAMSON.

[Ex.]

to be the intention to rescind the resolution of the former meeting, and to propose fresh resolutions. In consequence of this notice a large meeting of parishioners was held at the vestry, at which sixty-four ratepayers were present, and the resolutions of the former meeting were rescinded, and it was proposed and agreed to, that a sum of 1000*l.* should be borrowed on the security of the rates for the purpose of purchasing land for a burial-ground, to be duly consecrated, under the powers of the statute of 3 Geo. 4, c. 72, s. 26. A ratepayer demanded a poll, but not being seconded the motion fell to the ground, and a rate was agreed to for paying off the 1000*l.* by two instalments.

Application was then made to the Church Commissioners under the stat. 3 Geo. 4, c. 72, s. 26, and they confirmed the rate, and, under the powers given them, ordered the churchwardens to make and levy the rate. The rate was accordingly made, the money borrowed of the bank, and a piece of land purchased for the new burial-ground, and consecrated; and at the expiration of five months, when the rate was demanded and collected, certain persons objected to pay, and the churchwardens were driven to the Ecclesiastical Court to enforce payment of the rate. The usual libel and declaration setting forth the facts, and the names of the parties so refused, was filed, and to this these parties put forth a responsive allegation, which alleged that the rate was improperly made, inasmuch as a poll had been demanded, and not granted. To this there was a demurrer, the p<sup>ts.</sup> contending that it was not competent to the court to consider what had been done previous to the order of the Ecclesiastical Commissioners; and that the order of the commissioners, duly made under the powers given them by the statute, and sealed by their seal, was binding, like a judgment, on the court. The judge of the Ecclesiastical Court was of opinion that that court had not power to examine the validity of the order of the commissioners; and the question raised by the present motion for a prohibition to issue to restrain the Ecclesiastical Court from further proceedings in this suit was, whether the learned judge was right or not in deciding that he could not examine whether the decision of the commissioners was right or not.

A rule having been obtained on a former day, *Phillimore, Q.C.* (*F. M. White* with him) now showed cause, and contended that it was not competent for the Ecclesiastical Court to consider any of the preliminary proceedings, and that the order of the commissioners must be taken to have been rightly made and was conclusive. The statutes 58 Geo. 3, c. 45, ss. 59, 60, giving power to borrow money on the credit of parishes, and to make a rate to pay the cost of increasing the accommodation of existing churches; and 59 Geo. 3, c. 134, ss. 23 and 24, requiring the assent of the major part of a vestry to such a motion, and two-thirds of the parishioners, were referred to. They also contended that the proper remedy of parties objecting to the rate was by *mandamus*, and that to grant the prohibition would extinguish the suit; that the rate was not a common law rate, and governed by the requirements to make it valid at common law, but that it was made under 3 Geo. 4, c. 72; and that the existence of a desire among the parishioners for a burying-ground was a sufficient foundation for the order of the commissioners, as that under this statute they had jurisdiction to make their order, and there were no means pointed out how that desire should be expressed. They cited *Rez v. Inhabitants of Lambeth*, 3 B. & Ad. 657.

*A. Wills*, in support of the rule, contended that the statute 3 Geo. 4, c. 72, did not apply to this case, as that statute applied to the enlarging of churches and giving additional church accommodation, and this rate was for obtaining an additional burying-ground; that the consent of the parishioners to the rate had not been

obtained in the only legal way in which it could be obtained. A poll had been demanded and refused; it was therefore contended that the resolution of the meeting for making a rate was null and void, and the foundation of the jurisdiction of the Ecclesiastical Commissioners to make an order for the rate was gone, and that the order was therefore invalid; and that the responsive allegation which had been rejected by the judge of the Court of Arches was an answer to the suit. He cited *Reg. v. Dursley*, 5 A. & E. 10; *Reg. v. Willim*, 16 Q. B. 1; *Blunt v. Harwood*, 8 A. & E. 810; *Burder v. Veley*, 12 A. & E. 233; *Richards v. Dyke*, 3 Q. B. 256.

*ERLE, C. J.*—Having paid great attention to the arguments on both sides, and considering the extreme importance of the case and the interests at stake, not merely in this suit, but in a number of similar cases; and considering the difficulty in construing these Acts of Parliament, we think the matter ought to be put in a train in which the parties should have the power of taking the opinion of the proper tribunals; therefore the applicants had better declare in prohibition.

*Judgment accordingly.*

### COURT OF EXCHEQUER.

Reported by F. BAILEY and H. LING, Esqrs., Barristers-at-Law.

Thursday, Nov. 21.

SINGLETON v. WILLIAMSON (see next case).

*Distress damage feasant—First escape of cattle from defect of fences; afterwards, breaking down good fence into corn land—Who ultimately liable. The p<sup>lt.</sup> occupied land adjoining a river, and on the other side the def<sup>t.</sup> occupied land which he was bound properly to fence, but from his neglect to fence it the p<sup>lt.</sup>'s cattle escaped into the def<sup>t.</sup>'s close, and afterwards from that close, over a good and substantial fence, into an adjoining corn field of def<sup>t.</sup>'s. The def<sup>t.</sup> then distrained the p<sup>lt.</sup>'s cattle in the corn field as damage feasant:*

*Held, in an action of trover by the p<sup>lt.</sup>, that he was entitled to recover; that the cattle having first escaped in consequence of the def<sup>t.</sup>'s neglect to fence the first field, he could not distrain the cattle when they escaped over the sound fence into the second, or corn field.*

This was an action of trover and detinue for cattle.

P<sup>l.</sup>s:—1. Not guilty. 2. That the cattle were not the p<sup>lt.</sup>'s. 3. Non-detinet. 4. Justification by reason of distress damage feasant.

The p<sup>lt.</sup> was the occupier of land called "Hail Moor," which in the year 1813 was awarded by certain inclosure commissioners to the p<sup>lt.</sup> By this award the p<sup>lt.</sup> was bound to erect and keep in repair a fence to the south of this land, which land was bounded on the north by the river Irt. The def<sup>t.</sup> occupied land bounded on the south by this river, so that the river divided the p<sup>lt.</sup>'s land from the def<sup>t.</sup>'s. In the year 1815 the Inclosure Commissioners for the parish of Gosforth, where the def<sup>t.</sup>'s land is, awarded it by a sale thereof to the def<sup>t.</sup>'s wife's father, a Mr. Butler.

By the Act (4 Geo. 3) for inclosing the lands of the parish of Gosforth, the 13th section required the commissioners "to allot and set out by marks and bounds so much of the commons and waste grounds as shall seem necessary, and to sell the same, and the purchasers thereof and their heirs and assigns shall be liable to make and keep in repair such part of the ring or outer fences as shall be directed by the said commissioners." And the commissioners by their award required "fences to be erected and kept in repair east and south" of the lands so allotted to Mr. Butler, and which land was called Bridge-green. Butler had since died, and the def<sup>t.</sup> was now the owner of Bridge-green. On the north of Bridge-green the def<sup>t.</sup> has a piece of arable



[Ex.]

SINGLETON v. WILLIAMSON.

[Ex.]

land which is bounded on the south by a fence in good repair. In June 1861 six or seven of the plt.'s beasts in Hail-moor crossed the river Irt, and got into the deft.'s land called Bridge-green, the fence being out of repair, and thence from Bridge-green, over the fence that was in good and perfect repair, into the deft.'s arable land, where they did damage. The deft. caused them to be distrained as damage feasant and impounded, for which this action was brought. The cause was tried at the last Carlisle summer assizes, before Wilde, B., who told the jury that it was the deft.'s duty to maintain a fence in Bridge-green along the margin of the river, and this in many places was shown to be level with the ground. If the jury believed the plt.'s cattle crossed the river into Bridge-green and thence into the corn field, it was immaterial whether the fence of the corn field or arable land was in repair or not. The jury returned a verdict for the plt. for 14. 10s. 6d. A rule nisi having been obtained for a new trial on the ground of misdirection, first, in directing the jury that it was immaterial what was the state of the fences of the field, or whether the cattle were taken damage feasant; secondly, in discharging the jury from giving any verdict as to the second count,

*Mellish, Q. C. and T. Jones* showed cause against the rule.—Where cattle escape through the defect of one man's fences into that person's land, and thence into the land of another, doing damage, the owner of the cattle would be liable to an action, and he would have his remedy over against the party who neglected to keep good the defective fence: (*Powell v. Salisbury*, 2 Y. & Jer. 391; *Holbach v. Warner*, Cro. Jac. 665.) The person who ought to have kept the fences, but did not, is liable for all the consequences. If therefore the land into which the plt.'s cattle escaped over the sound fence had not been the deft.'s, but another person's, the plt. would have been liable to that third person for the damage his cattle had done, and the deft. would have been again liable to the plt., because it was in consequence of his defective fence the cattle first escaped. It was the deft.'s own neglect that the cattle first got into Bridge-green, from his omission properly to fence against the river, and having reached Bridge-green through the deft.'s defective fence, the plt. is not liable to him for their subsequently getting into the deft.'s corn field over a good fence. It thus avoids a circuitry of action. Nor is it to be taken as certain that, if the cattle had not been permitted to escape into the first field, they would have gone over the good fence into the corn field at all; they may not have broken through a good fence in the first instance. But having once got out through a defective fence, there was then no stopping them, and the person whose first fence is defective, and by which they escaped, would be ultimately liable. The deft. was, in fact, as much bound to fence to keep his own cattle in his own field as to keep the plt.'s out. [*BRAMWELL, B.*—I do not understand the deft. will say that he is not bound to keep up a sufficient fence; what he says is, that there was a proper and substantial fence against the corn field into which the plt.'s cattle escaped and did the damage.]

*Edward James, Q.C.* (Kempsey with him) in support of the rule.—The learned judge's direction to the jury was erroneous; the deft.'s land was properly fenced, and it can make no real difference whether the fence was against the river in Bridge-green or a little further in—against the corn field; the cattle broke over a good substantial fence, and thus got into the corn field, where the damage was done of which he complains; probably for anything done by the cattle in Bridge-green he may have had no just ground of complaint. [*POLLOCK, C.B.*—On the contrary, if they had sustained any injury there he may have been liable.] There being a sound fence against the plt.'s cattle, and over which they broke into the deft.'s corn, the plt. is liable. [*WILDE, B.*—If one man's bullock,

through a defective fence, gets into another's field, and stakes itself in breaking through a strong inner fence, could the owner of the bullock maintain an action for the injury to the bullock against the occupier of the first field by reason of his defective fence?] Possibly he might. [*WILDE, B.*—And the owner of the fence damaged against the owner of the beast for the injury to the fence?] Perhaps so; but the learned judge at the trial told the jury in effect that the condition of the second fence was immaterial. It is admitted the deft. was bound to fence as against his neighbour's field; that he did. Here was a perfectly good fence as against the plt.'s cattle, and the deft. is not to suffer because his fence was further in than may have been desired, or because there were not two fences.

*POLLOCK, C.B.*—I am of opinion that this rule should be discharged. It was a motion for a new trial on an alleged misdirection of my brother Wilde to the jury. When application was made for the rule it certainly appeared to me to be not only a case of hardship upon the deft., but one which was worthy of some consideration. After hearing the argument upon it, I have come to the conclusion that my brother Wilde was quite correct, and that it is in accordance with the whole policy of the law of England upon the subject. When any wrong is done or damage sustained, the law inquires when was the first wrong done, who was the cause of first setting it in motion, or what was the origin of the mischief? In this instance the owner of the close called Bridge-green was bound so to fence it as to prevent his neighbour's cattle from getting into it. This it appears he neglected to do; there was little or no fence at all there in some places; the consequence was, that the plt.'s cattle got into the close called Bridge-green, and thence on over a fence into the deft.'s corn field, where they were distrained by him as damage feasant. It was argued for the deft. that it was not a necessary consequence of their being on the corn land that their original escape was by the deft.'s default in fencing Bridge-green as against the river; but, if a man dig a pit in a highway, it is not a necessary consequence that a passenger should fall into the pit, but if he does, it is sufficient if the accident is the result of something that ought not to be done. I think the learned judge's summing-up was in this case quite correct.

*BRAMWELL, B.*—I am entirely of the same opinion. The deft. was bound to fence his own land as between himself and the plt. The deft. is as much obliged to fence his land to keep the plt.'s cattle in his (the plt.'s) own land as he is to keep his (the deft.'s) own cattle upon his own land. If any injury arises from his neglect, the party injured has a right to complain of the injury which is the necessary consequence of the omission to perform that duty. It is conceded that, according to the authorities, if the plt.'s cattle being by deft.'s default in his land, had escaped therefrom into the close of a third party and had there sustained an injury, the plt. could maintain an action against the deft. for damages in consequence of the injury, and on that ground, to avoid circuitry of action, the deft. should not be at liberty to impound the plt.'s cattle damage feasant, and then leave the plt. to a cross-action against him for the injury sustained by the impounding. The damages to be occasioned is the not unnatural consequence of the deft.'s own omission to fence the first close, called Bridge-green. No man should complain of another's act when it is the immediate result of his own negligence. Suppose the plt.'s bull escaped into the deft.'s first field from a neglect of the deft. to fence his land, and while in the first field, where he had escaped from the deft.'s neglect to fence, from some excitement or other he broke down a sound fence, and got over into a second close, where he would not otherwise have gone if he had not been induced to do

Ex.]

SINGLETON v. WILLIAMSON.

[Ex.]

so when in the first field; surely the deft. could not complain of it.

CHANNELL, B.—I am also of opinion that this rule should be discharged. We are asked to grant a new trial on the ground that the jury were misdirected; but I think the ruling of my brother Wilde was quite correct. Assuming in this case that the second or inner hedge, as it has been called, was a strong and sufficient one, the question is, whether the deft. can resist this action, it being clear that the cattle would not have escaped from the plt.'s land but for the defect of the deft.'s fence to his close Bridge-green. It was the deft.'s duty to keep good that fence, and but for his default the plt.'s cattle would not have escaped, and their doing so was the natural, if not the necessary, consequence of his omission, and therefore the deft. had no right to distract them. I do not think it distinguishable from the case I put and compared it to during the argument—that when the deft. complains of the plt.'s cattle breaking into his land and then over an inner fence into his corn, the plt. may very well reply, "My cattle were in a pound, and you opened the gate from whence they escaped and did the damage complained of—you were the cause of it."

WILDE, B.—I am of the same opinion, that the rule should be discharged. I am not sorry that the question has been discussed, as it has proved to be one of some novelty; but I retain the same opinion now, after having heard the arguments, as I entertained at the trial. Ordinarily speaking, if cattle stray and damage is done by them, the owner is liable; but in this case it was the deft.'s neglect to repair his fence that was the cause of the cattle escaping in the first instance. The deft. was bound to fence the first field in order as much to keep the plt.'s cattle out of it as his own in; he did not do so, and the plt.'s cattle having got into the deft.'s close called Bridge-green, over a defective fence which it was the deft.'s duty to keep good, they escaped into another field of the deft., where the damage was done which was complained of. I do not think the plt. is liable for that damage, either according to common sense or the common principles of justice. *Rule discharged.*

Plt.'s attorney, C. E. Abbott, 52, Lincoln's-inn-fields.

Deft.'s attorney, Gregory and Co., Bedford-row.

Wednesday, Jan. 22.

SINGLETON v. WILLIAMSON (see the previous case).

*Distress damage feasant—Tender of amends after impounding too late—Detinue to recover the cattle after such tender.*

*Where cattle are distrained as damage feasant and impounded, and the owner after the impounding tenders amends—Such tender is too late to enable him to maintain detinue for the recovery of the cattle.*

This was an action of detinue to recover cattle which had been distrained damage feasant and impounded; and after the impounding the plt. had tendered ample compensation for the damage the cattle had done, which deft. refused to accept.

The declaration stated that the deft. detained from the plt. the plt.'s cattle, that is to say, two other bullocks, whereby they were injured, and plt. was put to costs in and about endeavouring to procure a return of them, and the plt., under the last count, claims a return of the cattle therein mentioned, or their value, and 20l. for detention, and under the rest of the declaration he claims 50l.

Plea.—And for a fifth plea to the second count, deft. says that before and at the time of the alleged detention the deft. was lawfully possessed of closes of land situate in the parish of Gosforth, in the county of Cumberland, and because the said cattle were then wrongfully

in the said closes doing damage there to the deft., and eating, and depasturing, and treading down the corn, grass, and herbage of the deft. there then growing, the deft. then seized and took the said cattle in the said closes, so doing damage as aforesaid, as a distress for the said damage, and led and drove the same out of the said closes, in which, &c., to a certain common pound, and there impounded the same, and kept the same impounded there, pursuant to the statute in such case made and provided, until the plt. paid the said costs to have the same released, as and for, and the same being a reasonable satisfaction for the said damage so done, as it was lawful for the deft. to do for the cause aforesaid, he, the deft., using no unnecessary force or violence, and doing no unnecessary damage on such occasion, which is the alleged detention and grievance in the said second count mentioned.

Replication.—And for a second replication to the fifth plea the plt. says, that, after deft. had so impounded the said cattle, the plt. was ready and willing, and then tendered and offered to pay to the deft. the sum of 1l. 2s. 4d., which said sum of 1l. 2s. 4d. was a reasonable and sufficient satisfaction and amends for the damage done by the cattle, as in the fifth plea mentioned, and all that the deft. was entitled to detain the said cattle for, and all things were done and happened to make the said tender a good tender, and to entitle the plt. to sue deft. for the subsequent detention hereinafter mentioned. And the plt. says that the deft. would not accept the said sum of 1l. 2s. 4d. when so tendered as aforesaid, but afterwards wrongfully detained the said cattle from the plt., which is the detainer complained of,

Demurrer thereto and joinder in demurrer.

Edward James, Q.C., in support of the demurrer, contended that a tender after impounding, when goods are in *custodia legis*, comes too late, and is not the subject of an action of detinue. The tender is a nullity, because it comes too late after the cattle have been impounded; the owner may get them back by replevin, when the opponent would obtain a bond as a security, and he should have adopted the remedy the law has provided by suing out a replevin. *Pilkington v. Hastings*, Cro. Eliz. 813, shows that a tender after impounding is too late. The law is clearly stated by Lord Coke in the *Six Carpenters* case, 8 Co. Rep. 147, that tender upon the land before the distress makes the distress tortious; tender after the distress and before the impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plt. makes him a sufficient tender he may have an action of detinue for the detainer after, or he may, on satisfaction made in court, have a writ for the redelivery of his goods. In *Gulliver v. Cowans*, 1 C. B. 788, where cattle were distrained as damage feasant, the owner paid under protest an excessive sum demanded, and then brought an action for money had and received to recover it back: it was held the action would not lie without a tender of sufficient amends. Tindal, C. J. said: "When the plt. found he was too late to make a tender, so as to entitle himself to replevy, his proper course was to make a tender of sufficient amends to cover the damage sustained; and in the event of the tenant refusing to accept the sum tendered and deliver up the sheep, he should have brought detinue [the reporter adds, i. e., upon a tender before the impounding], for they were held by the deft. merely as a pledge." Maule, J. there also adds: "If a sufficient tender had been made before the impounding, the deft. would have been bound to restore them, otherwise not." He also referred to *Thomas v. Harris*, 1 Man. & Gr. 693;

[Ex.]

GRUBB v. THE INCLOSURE COMMISSIONERS OF ENGLAND AND WALES.

[Ex. Ch.]

to the C. L. P. A. 1852, and the commissioners' report upon such proceedings before the Act was passed.

*Mellish*, Q.C. (*T. Jones* with him), for plt., was then called upon by the court.—He contended that on a tender after impounding detinue may be maintained, though the tender is too late for replevin. That the reporter's note in *Gulliver v. Cousens*, 1 C. B. 796, is a mistake for the following reasons: first, because it appears from the report, 14 L. J. 215, C. P., that the cattle had been impounded before the tender; and secondly, because from *Evans v. Elliott*, 5 Ad. & Ell. 142, it is quite clear that a tender made after the taking, and before the impounding, is not too late for replevin. That the expression used in the judgment in *Glynn v. Thomas*, 25 L. J. 128, Ex., line 22–23, must have been taken incautiously from the reporter's note in *Gulliver v. Cousens*. That *Lovring v. Warburton*, 28 L. J. 31, Q. B., shows that a special count for detaining will lie, and there is no reason why detinue should not. That the law allows a distress as the mode of obtaining compensation, and if the party is not bound to accept the compensation he may hold on forever, unless plt. replevies, and after having necessarily failed in the action of replevin makes a tender, and thereby entitles himself to maintain detinue according to what is said in the *Six Carpenters'* case. That the law abhors unnecessary litigation, and may safely hold that an action of replevin is not a necessary preliminary to a tender. It has been held that no other action except detinue could be maintained; but there is no case in which it has been held detinue will not lie; the proceedings in replevin do not ascertain the damage, and the sheriff who detains for the distrainer only acts for him, and if the owner of the cattle is ready and willing, and offers, after the impounding, amends for the damage, why is he not to be at liberty to do so and have his cattle returned?

*James*, in reply, referred to *Glynn v. Thomas*, 11 Ex. 870; *Ellis v. Taylor*, 8 M. & W. 415; and *Ladd v. Thomas*, 12 A. & E. 128. No doubt there are difficulties; but the law is so. After impounding, the deft. does not detain, and has not the possession.

*POLLOCK*, C.B.—I am of opinion that the deft. is entitled to our judgment upon this demurrer. The books and authorities upon the subject have existed for so long a period that we are not now at liberty to overrule them. The law appears to be, that a tender of amends for damage done by cattle distrained damage feasant after they have been impounded, is too late, because they are then in the custody of law, and not of the deft., so that a tender after impounding may be as ineffective as it would in any other case be after action brought. The plt. therefore cannot maintain detinue.

*MARTIN*, B.—It seems very strange that, when a person's cattle have been distrained as damage feasant and impounded, the owner of the cattle should not be allowed to tender to the distrainer full compensation and amends for such damage, and get back his cattle. Oftentimes, perhaps, no real damage has been sustained, and yet the owner, after impounding, cannot get back his property without proceedings in replevin. The law may be so, and it may be a very absurd law; but it appears to be the law, and we are bound by it.

*CHANNELL*, B.—I also think our judgment must be for the deft. The authorities are so strong that we cannot get over them, and the court must abide by them. I was struck at first with the dicta of *Tindal*, C.J. in *Gulliver v. Cousens*, but the observations to which I refer were not at all necessary for the decision of the case then before the court.

*WILDE*, B.—I am of the same opinion. The law is, that a tender of amends, after impounding cattle distrained damage feasant, is too late. If so, the owner cannot maintain an action of detinue against the distrainer

to recover the cattle, the same being then not in the possession of the deft., but in the custody of the law. We cannot alter the law as so long existing, and decide in favour of the replication, without overruling that law. Whatever practical inconvenience may arise from it we cannot disturb it. *Judgment for deft.*

Plt.'s attorney, Mr. C. E. Abbott, 52, Lincoln's-inn-fields.

Defts. attorneys, Messrs. Gregory and Co., Bedford-row.

### EXCHEQUER CHAMBER.

Reported by W. MART, Esq., Barrister-at-Law.

ERROR FROM THE COMMON BENCH.

Friday, Nov. 29.

GRUBB v. THE INCLOSURE COMMISSIONERS OF ENGLAND AND WALES.

*Inclosure Acts*, 8 & 9 Vict. c. 118, and 11 & 12 Vict. c. 99—*Provisional order—Power of commissioners to set out private roads over allotted lands.*

*A provisional order, made under the Inclosure Acts, ordered certain land to be allotted to the plt. in lieu of his right in the lands to be inclosed, but the order did not expressly exempt such allotment from having a private road made over it:*

*Held, that the commissioners had power to order the valuer to set out a private road over such land.*

This was a rule to set aside a writ of prohibition issued out of the Petty Bag-office, prohibiting the Inclosure Commissioners from confirming an award about to be made by them in the matter of a certain inclosure. From the affidavits it appeared that an application had been made to the Inclosure Commissioners by Lord Carrington and the plt. Mr. Grubb to sanction the inclosure of certain lands of the manor of Hughenden, in the county of Buckingham, and the usual proceedings required by the Inclosure Acts having been made, the said commissioners, on the 5th June 1856, issued their provisional order, by which they declared the following, amongst others, to be the terms and conditions upon which they were of opinion that the proposed inclosure should be made; that is to say, "that Piggott's-common and part of Spring-copple, High-copple, North Dean Bottom, Willow-copple, Drift-way, together with all wood and underwood now growing on such tracts proposed to be inclosed, except Naphill-common, Greenhill and the common fields, be allotted to Edward Grubb, Esq. in lieu of his right and interest in the lands to be inclosed." "That Chappell-hill, Bryants-bottom, Denner-hill-copple, bottom of Widdenton-hill and Denner-hill-common, containing together 99a. 1r. 8p., be allotted as follows; that is to say, that an allotment equal in value to one-seventh part thereof, after deducting the allotment of two acres for the labouring poor, and the allotments (if any) for defraying the expenses of the inclosure, be made to the Right Hon. Benjamin Disraeli, in lieu of his right and interest in the soil of the said tracts, and in all substrata under the same, and that the residue of the said tracts be allotted among the commoners in proportion to their respective rights;" and "that the residue of the said Naphill-common and Greenhill be allotted among the parties entitled to rights of common or pasture thereon." The inclosure was sanctioned and directed to be proceeded with, and a valuer was appointed; and on the 31st March 1859 he made his report to the Inclosure Commissioners, and at a meeting held by the assistant-commissioner on the 30th Nov. 1859, for the purpose of hearing objections to the valuer's report, one Roger Williams, to whom lands were to be allotted according to the terms of the provisional order, applied to have a private carriage-road set out for him under the provisions of sect. 68 of 8 & 9 Vict. c. 118, over Piggott's-common, being part of the land to be

allotted to Mr. Grubb, when Mr. Grubb objected thereto, and to the right and jurisdiction of the said Inclosure Commissioners to set out the same. His objection was overruled by the commissioners, on the ground that the lands to be allotted to Mr. Grubb, according to the terms of the provisional order, were lands still subject to be inclosed within the meaning of the Inclosure Act, and that there was nothing to take them out of the jurisdiction of the valuer, or to preclude him from dealing with them in the course of such inclosure in the same manner as other allotments; and being of opinion that Mr. Williams' application was reasonable and well founded, reported accordingly to the commissioners, who directed the valuer to set out such private road over Figgott's common, and it having been accordingly staked out, Mr. Grubb caused the writ of prohibition to be issued.

Judgment for the debts, and error thereon.

*Couch* for the plt. in error (the plt. below).

*F. M. White* contra.

WIGHTMAN, J.—In this case the question is, as to the effect of the provisional order. For the plt. it is contended that it conveys to him an indefeasible right to the lands allotted to him by such order, such land to be free and clear of all charges and incumbrances, and particularly those of roads and ways. In the provisional order no mention is made as to the making of roads, so that there is nothing which excludes the commissioner or the valuer from setting out private roads. By the Inclosure Acts it is provided that the valuer is to set out ways after the issuing of the provisional order, and before the final allotment of the lands to be inclosed. Sect. 68 of the General Inclosure Act authorises the valuer to set out roads through the lands to be inclosed, and therefore the provisional order must be taken to be made subject to the right of the valuer to set out private roads; and upon this view we ground our decision that the judgment of the court below should be affirmed.

*Judgment affirmed.*

### CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 18,

(Before ERLE, C.J., BLACKBURN, J., KEATING, J., WILDE, B. and MELLOR, J.)

REG. v. JOHN BAIN.

*Indictment for felony—Breaking and entering a shop with intent—Attempt to commit a felony.*

On an indictment under the 24 & 25 Vict. c. 96, s. 57, for feloniously breaking and entering a shop with intent to commit a felony:

Held, that a prisoner might be found guilty of misdemeanor in attempting to commit that felony.

Case for the opinion of the Court of Criminal Appeal by the recorder of Manchester.

At a court of quarter sessions of the peace holden in and for the city of Manchester, in the county of Lancaster, on the 13th Dec. 1861, John Bain was tried before me on an indictment for having on the 5th Dec. feloniously broken and entered a certain shop with intent to commit felony, to wit, feloniously to steal certain moneys, goods and chattels therein.

At the trial it appeared the prisoner was disturbed before he had completed the offence with which he was charged. He was seen on the roof of the shop he was indicted for breaking and entering, and taken coming off the roof. On examining the roof it was found that a large hole, upwards of two feet square, had been broken in it, but there was no evidence at all of his having in any way entered the building.

Upon this I told the jury that the prisoner was entitled to his acquittal on the charge of felony, but that if they were of opinion that he broke the roof

with intent to enter the shop and steal the goods, they might find him guilty of a misdemeanor in attempting to commit that felony.

The jury found him guilty of the misdemeanor of attempting to commit a felony.

The question for the opinion of the Court of Criminal Appeal is whether the prisoner could be convicted of a misdemeanor on this indictment, which is for a felony created by the 24 & 25 Vict. c. 96, s. 57. The prisoner was on bail before the trial, and is now on bail to appear and receive sentence when called on.

R. B. ARMSTRONG, Recorder of Manchester.

The 24 & 25 Vict. c. 96, s. 57, enacts that whoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of Divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony; and being convicted thereof shall be liable to penal servitude not exceeding seven years, and not less than three years, or to imprisonment not exceeding two years, &c.

No counsel appeared to argue on either side.

By the COURT: *Conviction affirmed.*

### COURT OF COMMON BENCH.

Reported by DANIEL THOMAS EVANS and W. MAYD, Esqrs. Barristers-at-Law.

#### REGISTRATION APPEAL.

Nov. 11 and Dec. 7.

COLLIER (app.) v. KING (resp.)

*Election law—County vote—Qualification—*

*Dissenting minister.*

The app., who was minister of a sect called Particular Baptists, claimed to vote in respect of a copyhold house and garden of which he was occupier. The property in respect of which he claimed was vested in trustees, upon trust that the trustees "do and shall from time to time, and at all times for ever hereafter, permit and suffer the said dwelling-house and premises to be held, used and occupied by the minister of the congregation, &c., as and for his place of abode." The deed contained no direction by whom the minister was to be appointed, nor any power for his removal; but in fact he was appointed by a "call" or invitation by letter, signed by three deacons, asking him to become their minister. The evidence as to the appointment being for life consisted in his own statement that he so considered it, and the evidence of one of the deacons who had been a member of the congregation thirty-five years, that the appointment was in the usual mode, and in his opinion was for life.

The revising barrister on these facts decided that it was not proved that the appointment was for life, and expunged the name of claimant from the register:

Held, that though the revising barrister might have inferred from the facts that the appointment was for life, still it was not a necessary inference, and therefore the court would not say he was wrong in expunging the name from the register.

This was an appeal from the decision of the revising barrister, at his court for revising the list of voters for the parish of Downton, in the southern division of the county of Wilts.

#### CASE.

At a court held at Downton, before the barrister-at-law, duly appointed to revise the list of voters in the parish of Downton, Frederick King objected to the name of John Thomas Collier being retained in the list of voters for the said parish.

The facts of the case are as follows:—John Thomas Collier is the minister of a Dissenting congregation called Particular Baptists, at Downton aforesaid, and

C. B.]

COLLIER v. KING.

[C. B.]

stood in the register of South Wilts as follows:—"Collier, John Thomas Downton (copyhold house and garden), South-lane, himself occupier."

By deed, dated the 25th Sept. 1813, the property in respect of which he claims to be registered appears to be vested in trustees upon certain trusts, and among others, "that the trustees, and the survivors and survivor of them, and the heirs of such survivors, or such new and other trustees as aforesaid, do and shall, from time to time, and at all times for ever hereafter, permit and suffer the said dwelling-house and premises thereto belonging to be held, used and occupied by the minister of the said congregation for the time being, as and for his place of abode and residence."

There is no direction in the deed as to the mode by which the minister should be appointed, nor any power given for his removal. It appeared that in the year 1947 the said John Thomas Collier received a letter from three deacons of the congregation, of which the following is a copy:—

"From the two visits you have paid us in the capacity of a supply, from the intercourse we have had with you, and from the enjoyment and profit we have experienced under your ministry, we have acquired a conviction of your adaptation and qualification 'to take the oversight of us in the Lord'; in accordance with which we herewith cordially and unanimously invite you to become our pastor. But in doing so we leave it entirely to your own judgment whether you will, without any further knowledge of us, at once accede to the invitation, or whether you would prefer to come amongst us for three months longer on probation before you decide, in order that you and we may enjoy the satisfaction of a more marked intimation of the Divine will.

"Aware of the solemnity of the step we are taking, and of the sacredness of the relation subsisting between a pastor and a people, we would earnestly pray that, should that relation subsist between yourself and us, it may be richly realised beneath the most expressive tokens of the Divine benediction. Most devoutly commending you to the wisdom and blessing of the Great Head of the Church,

(Signed) "JOHN ANDREWS,  
"WILLIAM EASTMAN, } Deacons."  
"JAMES MITCHELL,

In accordance with the request contained in the said letter, the said John Thomas Collier undertook the duties of minister to the said congregation for a probationary period of three months. At the expiration of that time he received, verbally, a second call, in general terms, to become the minister of the congregation, which he accordingly did, and still remains so, and in such capacity has ever since occupied the premises in respect of which he now stands on the register, and which are of the sufficient value to qualify him to vote if otherwise entitled.

The proof of his appointment for life consisted of his own statement, that he so considered it, and the evidence of one of the deacons, who had been a member of the congregation for thirty-five years, that the appointment was made in the usual mode, and, in his opinion, was for life. It was objected that the said John Thomas Collier, under the circumstances above mentioned, is not legally appointed for life, and does not take such an interest by virtue of the said office as would qualify him to be retained on the register.

On the other side it was maintained that, from the above facts, it was shown that such appointment constitutes a freehold interest sufficient to establish the said John Thomas Collier's right to be so retained.

I was of opinion that the right of the said John Thomas Collier to be retained on the register was not established, and accordingly expunged his name.—John Aldridge.

If the court should be of opinion that I was wrong in this decision, the name should be restored.

J. A., Revising Barrister.

*Wesley* for the app.—Here the claimant asserts his qualification for the franchise in respect of an equitable freehold, he being a minister of a sect called "Particular Baptists." I am unable to distinguish this case from that of *Burton*, app., v. *Brooks*, resp., 11 C. B. 41. It seems to come back to the question whether the appointment of the minister is one to an office for life. The claimant himself and one of those who appointed him say that they believed the office to be an office for life. It is found in the case that the deed contains no power of removal. The case is within the authority of *Burton* v. *Brooks*, and the court will therefore hold that the claimant had a right to the franchise.

*J. D. Coleridge* contra.—When looked at closely, the case of *Burton* v. *Brooks* will be found to be an authority adverse to this claim. It was a question of fact for the revising barrister to determine on the evidence before him; and he rightly rejected the claim. Besides this, the appointment to such an office must be in writing to satisfy the 3rd section of the Statute of Frauds.

*Wesley* in reply.—The case shows that the revising barrister thought he was deciding a question of law: (*Rees* v. *Jotham*, 3 T. R.) *Cur. adv. vult.*

*Dec. 7.*—*ERLE*, C.J. now delivered judgment.—In this case the app. claimed to be qualified by an equitable freehold estate, which was vested in the trustees for the minister of the time being of a congregation at Downton. The case sets forth a letter signed by three deacons, requesting the app. to become the minister after three months' probation; the three months' probation and call, in general terms, to become minister; and the continuance in that capacity from 1847. The further evidence in support of the duration of the appointment was the statement of himself and one of the deacons who had known the usage for thirty-five years, that they considered it to be for life. The revising barrister decided that, from these facts, he could not draw the conclusion that the appointment was for life; and we are to say whether that decision is wrong in point of law. The facts found do not necessarily prove that this general appointment operated as an appointment for life. The barrister had, by law, the duty of stating what inference he drew from the premises before him; and although we think he might have inferred that the appointment was for life, it is not a necessary inference, and we cannot say that he was wrong in declining to draw that inference. In *Burton* v. *Brooks*, 11 C. B. 46, the revising barrister did infer that the appointment was for life, and the court affirmed his decision, and Maule, J. approved of it. Still, it must be noted that there was additional evidence in that case, for the deed creating the trust expresses it to be for the life of the minister therein named; so that the existing appointment at the time of the deed was clearly for life, and it might well be presumed the subsequent appointment would be for life if no change was indicated. In the *Attorney-General* v. *Pearson*, 3 Mer., Lord Eldon directs an inquiry to be made by the master to ascertain whether the general appointment of a dissenting minister there operated as an appointment for life. This direction is more fully stated at the conclusion of this judgment. In *Porter* v. *Clarke*, 3 Sym. 323, the appointment was general, and the V. C. refused to infer that it was for life, but he relied much on the fact that there was no house and no endowment for the minister, and nothing beyond voluntary contributions. Although the question referred to us is, strictly speaking, a question of fact, it probably is sent to us in order that some principle may be suggested for future guidance. We

[Ex.]

COOPER v. HANNAH SIMMONS.

[Ex.]

would add, that the question is the same as that which would arise in equity, if the trustees brought ejectment against the minister without any legal cause for removal, and the minister applied for an injunction to stay the action. Lord Eldon, for his guidance on that point, in the *Attorney-General v. Pearson*, above cited, directed the master to inquire as to the usage in respect of the duration of the office, and particularly whether any agreement or understanding was entered into between the minister and the persons for the time being members of the congregation attending the meeting-house and subscribing to its support, touching the duration of the ministry of the minister. According to the result of such inquiry upon the duration of the appointment would be the decision of the revising barrister for or against the qualification. This decision is affirmed.

*Judgment for the resp.*

### COURT OF EXCHEQUEER.

Reported by F. BAILEY and H. LEIGH, Esqrs., Barristers-at-Law.

Monday, Jan. 20.

COOPER (app.) v. HANNAH SIMMONS, Executrix, &c. (resp.)

*Master and apprentice—Infant—Master's death—Apprentice continuing his services with executor. An apprentice, who was an infant, put himself apprentice for seven years, as well of his own free will and accord, as with the consent of his father, to T. Simmons, of Wolverhampton, lock-maker, his executors and administrators, such executors or administrators carrying on the said trade or business, and in the town of Wolverhampton; the master died, and his widow and executrix continued the business in the same place. During the apprenticeship the apprentice remained with the executrix in the business for ten months after his master's death, and then, obtaining more wages, being still an infant, went elsewhere. He was summoned before the justices for absents himself from service under the indenture of apprenticeship, and convicted: Held, upon appeal, that he was liable to serve the executrix under the contract, and the conviction of justices was affirmed, notwithstanding the apprentice was advised by his attorney, and believed, he was not bound to continue in the service after his master's death.*

This was an appeal against the conviction of justices, pursuant to the provisions of the 20 & 21 Vict. c. 43, and the following are the facts for the opinion of the court as stated in the following case:—

At a petty sessions of the peace holden in and for the borough of Wolverhampton, on the 19th Sept. 1861, before us, two of her Majesty's justices of the peace in and for the said borough, John Cooper (the above-named app.) was charged upon the complaint of Hannah Simmons (the above-named resp.) as the sole executrix and widow of Thomas Simmons deceased; for that he, the said John Cooper, was bound apprentice to him, the said Thomas Simmons, his executors and administrators, by an indenture bearing date the 5th April 1859, for a certain term which was then existing and unexpired (and upon whose binding no premium was paid or contracted to be paid), and had in the service of his apprenticeship been guilty of misdemeanors, miscarriages and ill-behaviour towards his said mistress, and particularly on the 15th day of April 1861 did, without lawful cause, absent himself from the service of his said mistress, and against her consent. And the said parties being present, the said charge was duly heard before us, and upon such hearing we adjudged the said John Cooper to be guilty of the said offence, and that he should for such offence be imprisoned in the house of correction at Stafford, there to remain and to be held to hard labour for the space of fourteen days.

[MAG. CAS.]

And whereas, the said John Cooper hath, pursuant to the provisions of the before-mentioned statute, given a notice and required us to state and sign a case setting forth the facts and grounds of our determination upon the hearing of the said complaint, in order that he might take the opinion of the said Court of Ex. thereon, and he hath entered into a recognisance with a sufficient surety to prosecute such appeal.

Now we, the said justices, pursuant to such notice and statute as aforesaid, do hereby state and sign such case as aforesaid as follows:—

At the hearing of the said complaint the following indenture was proved:

"This indenture witnesseth that John Cooper the younger, son of John Cooper the elder, of Wolverhampton in the county of Stafford, tailor, as well of his own free will and accord as with the consent of his said father, testified by his being a party to and executing these presents, doth put himself apprentice to Thomas Simmons, of Wolverhampton aforesaid, rim and mortice lock maker, his executors and administrators, such executors or administrators carrying on the same trade or business and in the town of Wolverhampton aforesaid, to learn his art, and with him and them after the manner of an apprentice to serve from the 23rd day of April inst., until the full end and term of seven years thence next following, to be fully complete and ended. During which term the said apprentice his master faithfully shall serve, his secrets keep, his lawful commands everywhere gladly do, he shall do no damage to his said master, nor see it to be done of others, but to his power shall tell or forthwith give warning to his said master of the same. He shall not waste the goods of his said master, nor lend them unlawfully to any. He shall not play at card or dice tables, or any other unlawful games whereby his said master may have any loss with his own goods, or others, during the said term, without licence of his said master. He shall neither buy nor sell. He shall not haunt taverns or playhouses, nor absent himself from his said master's service day or night unlawfully. But in all things as a faithful apprentice he shall behave himself toward his said master and all his during the said term. And the said Thos. Simmons, for and in consideration of the due and faithful service of his said apprentice so as aforesaid to be done and performed, his said apprentice in the art of a rim and mortice lock maker, which he uses, by the best means that he can, shall teach and instruct, or cause to be taught and instructed during the said term. And also shall and will pay, or cause to be paid, unto the said apprentice, or his said father, the sum of 4s. a week from the 23rd day of April inst. until the 23rd day of April 1860, the sum of 5s. a week for the first year thereafter, a sum of 6s. a week for the second year thereafter, the sum of 7s. a week for the third year thereafter, the sum of 8s. a week for the fourth year thereafter, the sum of 9s. a week for the fifth year thereafter, and the sum of 10s. a week for the sixth year thereafter, being the last year of the said term. And the said John Cooper the elder, for himself, his executors and administrators, covenants with the said Thos. Simmons, his executors and administrators, that the said John Cooper the elder, his executors or administrators, will at his or their own expense find his said son during the said term sufficient meat, drink, lodging, wearing apparel, medicine, and all necessities, and exempt the said Thomas Simmons therefrom. And for the true performance of all and every the said covenants and agreements either of the said parties bindeth himself unto the other by these presents. In witness whereof the parties above named to these indentures interchangeably have put their hands and seals the 23rd day of April, and in the twenty-second year of the reign of our Sovereign Lady Victoria, by the grace of God, of the United Kingdom of Great Britain and

[Ex.]

COOPER v. HANNAH SIMMONS.

[Ex.]

Ireland, Queen, Defender of the Faith, and in the year of our Lord 1859.

"JOHN COOPER the younger (L.S.)

"JOHN COOPER (L.S.)

"THOS. SIMMONS his  $\frac{1}{2}$  mark.

"Signed, sealed and delivered by the above-named John Cooper the younger, and Thos. Simmons, in the presence of Robert R. Arnold, clerk to Mr. Foster Gough, solicitor, Wolverhampton.

"Signed, sealed and delivered by the above-named John Cooper the elder, in the presence of Chas. Moody, clerk to the said F. Gough."

At the hearing of the said complaint it was proved on the part of the complainant that the said app. had served under the said indenture of apprenticeship the said Thomas Simmons, her husband, during which time she had taken an active part in the management of the business; that the husband died on the 24th June 1860, having by his will bequeathed his business and personal estate to the resp., and appointed her executrix of his will; that she had continued to carry on the business and take an active part therein, and employed competent workmen, who taught and instructed the apprentices, and the app. had continued to serve her as such executrix under the said indenture of apprenticeship for a period of nearly ten months, namely, until the 15th April 1861, when he ran away and absented himself from her service, immediately upon which she obtained a warrant for his apprehension. The constable in whose hands the warrant was placed was not able to find him, but he voluntarily surrendered himself on the 19th Sept. 1861, having in the interim been working for another master of the like trade at increased wages to those mentioned in the apprenticeship indenture. The resp. was and is still carrying on the same trade as her late husband, and employs competent workmen, who, as well as the resp., are able and willing to teach and instruct the app. in his trade. It was admitted that at the date of the said apprenticeship indenture the app. was an infant, and also was an infant on the 19th Sept. 1861.

Upon the above state of facts the attorney for the resp. contended that the binding to the executors and administrators was usual in such cases, and inasmuch as the executrix was carrying on the same trade as her late husband in Wolverhampton, and was liable, on the husband's covenant, to pay app.'s wages, and to teach and instruct, or cause him to be taught and instructed, and the app. had for his own good served the executrix of his own free will and accord for a period of ten months, the app. was bound to serve the executrix; and that the app.'s father was equally liable on his covenant that he should serve not only the husband but his executrix.

On the part of the app. it was contended by his attorney that the app. was not bound to serve the executrix, the contract for service being a personal one only with the husband to the executrix, being under no personal liability to adopt or to continue to comply with the testator's covenants; and that the app., being an infant, was not competent to bind himself, except by an ordinary indenture of apprenticeship, and that the binding to the executrix was unusual, and as they incurred no liability (except in the representative capacity), it was manifestly for his benefit, and was, therefore, so far as the binding to the executors was concerned, void and of no effect; and he cited *Reg. v. Lord*, 17 L. J. 181, 182, M. C. He also stated that he, as the attorney for the app., had advised that the apprenticeship was at end on the death of the husband, and that the app., acting on the *bona fide* belief that the opinion of his attorney was correct, had absented himself from his service, but no evidence was adduced before us, or required by the resp., as to when the advice was given.

In support of his case he quoted *Reg. on the prose-*

*cution of Mappin and another v. Youle*, 4 L. T. Rep. N. S. 299, Ex.

After a careful consideration of the whole case, we were of opinion that the resp. and her workmen were quite as capable of instructing the app. as the husband was during his lifetime, and that the app. had not left his service for want of proper instruction, but with a view only to get better wages elsewhere. We are also of opinion that the app. is bound to serve the executrix resp. in this case under the above indenture of apprenticeship until the expiration of his term, so long as she manages and carries on the business in the manner proved before us; and with respect to the plea that the app. had been advised by his attorney that the apprenticeship was at an end, and supposing such advice to have been given before absenting himself from his service, he must abide the consequences thereof, as we think it would be no excuse for his doing an illegal act, and having been advised to do it, thereby oust the jurisdiction of justices to deal with the case in a summary manner; besides which we see great danger in allowing defences of this description being set up, as advocates, in their zeal to obtain an acquittal of their clients, may be encouraged to advise the committal of an offence which may turn out to be a criminal one.

And hereupon the judgment of her Majesty's Court of Exchequer of Pleas is respectfully required, whether we were correct in point of law in our determination as aforesaid, or as to what should be done in the premises. Given under our hands the 26th Oct. 1861.

CHARLES CLARK (Mayor).

EDWARD PERRY.

*Gray* for the app.—The apprentice being an infant, this indenture of apprenticeship is not binding upon him, nor is it any longer in force. It was simply a personal trust, and the master having died, the apprenticeship continued no longer. There is no agreement by the master's executors to teach the apprentice the trade of the master; they are not bound to teach the apprentice the master's trade; they may not have been capable of doing so, nor was the apprentice bound to serve beyond his master's life. There is no covenant on the part of the executors of the deceased to teach: (see *Burn's Justice*, title "Apprentice," sect. 7.) In *Bacon's Abr.* "Master and Servant," E. it is said: "The placing out an apprentice to a particular master arises from the good opinion of the party to whom he is so committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety, and therefore the law has made it such a personal trust that the master cannot assign or transfer it over; the master must also have the apprentice under his own care and inspection." Here the apprentice is only an infant; if he had been of age the case may have been altered. In the city of London there is a particular custom for assigning the apprentice to another. The executors of a testator are in one sense similar to that of assignees; but the principle to be gathered from all the authorities would appear to be that the relations and friends of the apprentice shall select his own master. *Baxter v. Burfield*, 2 Strange, 1266, was referred to; also the 32 Geo. 3, c. 57, which would tend to show that such a contract did not bind executors. [MARTIN, B.—Here the party expressly agrees to serve the executors.] Yes; but then it must be remembered that he is an infant. *Rez v. Guildford*, 2 Chitty's Rep. 284; *Rez v. Lord*, 12 Q. B. 757, were also cited. There is no covenant binding the executors to teach, and the infant may be left to his remedy against the assets of his late master, and the justices could not act against the executors of the deceased master; there must be some person who is bound to teach, instruct, &c., &c., but the executors are not so bound. It is of the very essence of such a contract that there is a person competent, and does

[Ex.]

COOPER v. HANNAH SIMMONS.

[Ex.]

contract to instruct. Here the indenture of apprenticeship became void at the death of the master. [WILDE, B.—Why is this not a covenant for the benefit of the infant?] It does not say the infant shall be taught by the executors. Secondly, the apprentice *bond fide* believed, and was advised by his legal adviser, that he was not liable to serve the executrix, his master's widow; this is stated in the case, and on that ground he ought not to have been convicted for this alleged offence: (*Mappin v. Youle*, 30 L. J. 234, Ex.)

*Hayes, Serjt.*, for Mrs. Simmons, the resp.—This is a contract which is valid in law, binding on the apprentice, although he be an infant, and it is such a contract as, when it comes to be considered, is really beneficial to him. It is of importance to him that his term of apprenticeship should be continued and finished where it began. The widow, the executrix, took a very active part in the business of her husband during his lifetime, and is quite as capable of teaching the business with the assistance she has in it as her husband could have been. [WILDE, B.—And it must be remembered that the most valuable part of an apprentice's time and services is towards the end of his apprenticeship, when he knows his work and duties. The earlier part is probably of more work and labour to the master when he has to be continuously instructing the apprentice.] Certainly; and the case finds he has gone away and obtained more wages. By *Baxter v. Burfield*, 2 Strange, 1266, it would seem that if there had been such conditions in the indenture as these they would have been valid. It is not denied but that the apprentice, with his own consent and that of his friends, may have been transferred, or an apprentice may invalidate the indenture when he becomes of age, perhaps leaving the several other parties to their respective remedies over; but here he continued to serve the executrix for ten months after her husband's death, and then left because he was so well taught that he could go elsewhere and get higher wages for his work. He referred to *R. v. East Bridgeford*, 2 Strange, 1115, Cro. Cas.; *Madden v. White*, 2 T. R. 161; *R. v. Great Wigton*, 3 B. & C. 484. Secondly, the justices find the absenting by the apprentice was without lawful excuse, which takes it out of the principle in *Wood v. Ryder*, 21 L. J. 1, M. C. If such an excuse as that were to prevail, there would be scarcely ever any conviction.

*Gray* in reply.—It is ill behaviour in an apprentice in absenting himself, as it is said, without having any lawful excuse for doing so; that justifies magistrates in convicting. But here the apprentice believed, and was advised by his solicitor, that, after his master's death, he was no longer bound to serve or remain with the executrix. It is a mere construction of the terms of a special contract, not that of law which it is supposed every one is bound to know. The indenture must be manifestly for the infant's benefit when he enters into the contract, or it will not bind him. Here it is not so; the executors could not be compelled to teach, and the only remedy may be to sue for possible damages.

*POLLOCK, C.B.*—This case comes before us under a recent statute (the 20 & 21 Vict. c. 43) for us to say, whether we think certain justices were correct in point of law in the decision they had come to upon the facts stated in the case—an appeal, in fact, against their conviction of an apprentice for absenting himself from his service under an indenture of apprenticeship. The apprentice, who is the app., was bound as an apprentice to the husband of the resp. He served his master as such apprentice until the master died, and after his death his widow and executrix continued the business, and the app. continued to serve on with her some ten months afterwards. He then left and obtained another place, where he was paid more wages than, according to the indenture of apprenticeship, he would have been entitled to if he had continued with the resp. It appeared that the executrix during her

husband's lifetime attended a good deal to his business, and was quite competent to manage it then, and to continue it on after his decease, and the apprentice during the whole period up to the time when he ran away was properly taught and instructed according to the indenture of apprenticeship. The app. having left the resp.'s employ, he was summoned before the justices for absenting himself from her service, under the indenture of apprenticeship; the magistrates heard the facts of the case, found him guilty of that with which he was charged, and sentenced him to fourteen days' imprisonment, by way of punishment; from their decision he appealed, and required a case to be stated for the opinion of this court, whether that conviction is correct in point of law. When the apprentice was before the magistrates it seems he stated that he was advised by an attorney that he was not legally bound to serve the executrix, and believing it, he says, to be true, he sets up that also as an objection to the magistrates' decision. The first question is, whether the indenture of apprenticeship is binding; and I think it is. It states that the app. "doth put himself apprentice to Thomas Simmons, of Wolverhampton, aforesaid, rim and mortice lock maker, his executors and administrators, such executors or administrators carrying on the said trade or business, and in the town of Wolverhampton aforesaid." The executrix carries on the business, and in the town mentioned. Where executors are left out of an indenture altogether the case might be different. The next question is, whether the attorney's advice is any answer to the resp.'s complaint; and I think it is not. Several cases were put during the argument, and it may be that, under some circumstances, a mistake upon a question of fact might excuse the strict performance of a special contract; but a mistake as to the law is a different thing. Every one is supposed to know the law; he said he believed he was not bound to remain any longer under the indenture after the master's death, and his having the advice of an attorney is no answer to the application. It would be dangerous doctrine, indeed, if we were to hold that because the party charged believed and was advised by an attorney that he was not liable in respect of it, that such advice and belief would exempt him from all punishment in consequence. The question is, was the app. justified in what he did? I think he was not; and, assuming he thought he was right in leaving the executrix, having remained in her service ten months after the death of her husband, his master, that would be no justification; no doubt he thought he was right, but that is not sufficient. I think the magistrates were right in their decision in point of law, and that the apprentice is not free from the misconduct charged.

*MARTIN, B.*—I am of the same opinion. There are two objections taken to this conviction: the first was, that the indenture was not binding upon him, because he was an infant; and the second was, that there was no covenant in the indenture binding the executors to teach the apprentice. I think it is implied in the indenture, and that the covenant of the master is binding on the representative of the master. Generally speaking, an apprentice is bound to the master only, and in many cases this is the proper and necessary arrangement, as the business may be one which it would be impossible to have taught by an executor; that is, however, not so here, and it is not improbable such may have been in the contemplation of the parties when the indenture was entered into, and provision made for it to be continued in the same way and in the same town. The indenture states, "that John Cooper the younger doth put himself apprentice to Thomas Simmons, of Wolverhampton, his executors and administrators, such executors and administrators carrying on business in the trade and business of lock-makers in the town of Wolverhampton."



[BAIL.]

PENNELL v. THE CHURCHWARDENS OF UXBRIDGE.

[BAIL.]

ton, aforesaid," &c. Is this contract absolutely void? It is said in 2 Co. Litt. s. 259, p. 172 a, that an infant may bind himself for good teaching and instruction whereby he may profit himself afterwards. There is no particular known mode of binding an apprentice; the object and intention of the parties in each case is to secure a beneficial result. It has been said that the courts only pronounce contracts of infants to be void when they are prejudicial. Is this to the prejudice of the infant in this case? Certainly there is nothing to his prejudice in it by which we could say it is void. But then it was also said that he was advised he was not bound to serve after his master's death. Can that be any answer? This was treated by Mr. Gray as a criminal proceeding; I think that is not the right way of treating it. It is a proceeding for civil rights, and it may have been thought this was a case requiring summary remedy rather than leaving parties to their right of action. There will be no imputation against this apprentice—certainly not as having done or committed anything in the nature of a criminal offence. Is it then any answer to the complaint that he was advised by his attorney he was not bound to continue his apprenticeship after the death of the master? I think it is not; and having broken the contract, the magistrates have power to punish him in the way pointed out by the statute, and he must abide the legal consequences.

WILDE, B.—I am of the same opinion. In the indenture it is stipulated the apprentice shall serve the executors. The master dies, the apprentice remains, the business is continued by the executrix in the same place, and the apprentice is there instructed. The question is, whether the contract is binding? Mr. Gray says, and rightly, that in order to ascertain this we must look to see what the contract was at the time it was made, and upon the supposition that it was to be performed, and he also says that unless it appears clear that it was to the benefit of the apprentice it is void. I apprehend that is not the law, but rather whether the contract is manifestly to his prejudice. Is this a contract manifestly to his prejudice? If so it is void. Ordinarily speaking, the binding an infant as an apprentice is beneficial to him. Do the additional terms of extending the contract to the executors and continuing in the same town render it less beneficial? I do not think they do. As to the other objection in reference to the advice given to the app. by his attorney, the observations that have been made by the court are, I think, quite right, and as I concur I have nothing to add upon that subject.

*Judgment for the resp.*

Attorney for the app., *W. H. Duignan*, of Walsall.  
Attorney for the resp., *J. Prior*, of Wolverhampton.

### RAIL COURT.

Reported by T. W. SANDERS, Esq., Barrister-at-Law.

Thursday, Jan. 30.

(Before BLACKBURN, J.)

PENNELL (app.) v. THE CHURCHWARDENS OF UXBRIDGE (resps.)

*Summary conviction—Statement of case under 20 & 21 Vict. c. 43—Transmitting case to the court—Sunday—Delivery of case to app.'s attorney.*

*Under section 2 of the 20 & 21 Vict. c. 43, the app. must transmit the case within three days after receiving the same, to the court named in his application; and when the last of such three days falls upon a Sunday it is too late to transmit it the day following.*

*An attorney who appears to conduct the case for the app. before the justices is a proper person (unless his authority be revoked) to whom to send the case when stated by the justices, and it will be deemed to*

*be received by the app. at the time when received by such attorney.*

This was a rule calling upon the app. to show cause why this appeal should not be struck out of the Crown paper, on the ground that the provisions of sect. 2 of the 20 & 21 Vict. c. 43, had not been complied with.

It appeared that the app. is the official assignee under the bankruptcy of one David Bassett, and that a poor-rate being due in respect of premises occupied at Uxbridge by the said bankrupt, the said app., as assignee, was summoned to show cause why he should not pay the amount; the demand was resisted on his behalf by Messrs. Ford and Lloyd, who were solicitors to the bankruptcy. These gentlemen, by letter, instructed Mr. Gardiner, solicitor, of Uxbridge, "to appear at the hearing of the summons on the part of the assignees;" at the hearing he accordingly attended, and resisted the application. The justices, however, decided in favour of the churchwardens, whereupon Mr. Pennell himself gave a written demand for a case to be stated under the 20 & 21 Vict. c. 43. On Thursday, 31st Oct. last, the case was sent to Mr. Gardiner, at Uxbridge, too late (as he stated) to enable him to transmit it that evening to Messrs. Ford and Lloyd in London, but that he took it to them the next day (Friday), and they delivered it at the Crown-office on the following Monday.

By sect. 2 of the 20 & 21 Vict. c. 43, it is enacted that the app. "shall within three days after receiving such case transmit the same to the court named in his application," &c.

The ground upon which this rule was obtained was, that inasmuch as the case was received by Mr. Gardiner (the app.'s attorney) on Thursday, it was too late to transmit it to the Crown-office on the following Monday, which was the fourth day after its receipt by the app.

*Practice* now showed cause and contended, first, that, as the last of the three days was Sunday, the app. was entitled to exclude that day from the computation, and so was in time in delivering it on the following Monday. He admitted, however, that, if this court would hold itself bound by the decision of the Common Pleas in *Peacock v. The Queen*, 27 L. J. 224, C.P., he could not sustain the objection. Secondly, that as Mr. Gardiner was only engaged for the special purpose of appearing for the assignee at the hearing, he must not be deemed his attorney for all purposes afterwards, and that the sending of the case to him, therefore, and not to the app., who himself gave a written demand of a case, was a nullity.

*Keane*, contra, argued that, as regarded the first point, it was settled by *Peacock v. The Queen*; *Woodhouse v. Wood*, 29 L. J. 149, M. C.; and *Morgan v. Edwards*, 29 L. J. 108, M. C., that, as regarded the second point, Mr. Edwards must be taken to be the attorney for the app. in all the stages of the litigation until there was something to show the contrary, which did not exist in this case.

BLACKBURN, J.—The decision of the Court of C. P. is an authority upon the first point, which, sitting here, I am bound by; and, although not wishing to be considered as disagreeing from it, yet, if it were *res integra*, I should have liked to have further considered it, since it seems hard that the party should be thus deprived of a day. As regards the other point, the question is, when was this case "received" within the meaning of the Act of Parliament? As I take it, the facts were these. [His Lordship here stated the facts.] Now, when the demand of a case was made, there was nothing to show that Mr. Gardiner's authority was revoked; nor is there anything to show that Mr. Gardiner was a mere meddler in the case after the hearing. The justices had a fair reason for believing that Mr. Gardiner had still authority in the matter, and there

C. CAS. R.]

REG. V. ALFRED CHEESEMAN.

[C. CAS. R.]

is nothing in the affidavits to show the contrary. Then, was he an agent to receive the case? There is nothing in the Act of Parliament to show that an agent may not receive it, and indeed it might be very inconvenient if he could not receive it. Therefore, I think that the case was received within the meaning of the statute, when it was received by Mr. Gardiner, and therefore that it was transmitted to the Crown-office too late.

*Rule absolute without costs.*

### CROWN CASES RESERVED.

Reported by JOHN THOMSON, Esq., Barrister-at-Law.

*Saturday, Jan. 18.*

(Before ERLE, C.J., BLACKBURN, J. and KEATING, J.,  
WILDE, B., and MELLOR, J.)

REG. V. ALFRED CHEESEMAN.

*Larceny—Attempt to commit—Proximate act—Ownership.*

*It was the course of business for a contractor who supplied the camp, to send the meat to the quartermaster-sergeant at the camp. The quartermaster-sergeant had his own weights and scales; he and a servant of the contractor weighed out the quantities for the messes, and a soldier attended from each mess, and took his portion away as weighed. The amount delivered was credited to the contractor, and the surplus meat taken away by the contractor's servant. The prisoner, the contractor's servant, in charge of the meat, fraudulently put a false weight into the scale, and a complaint having been made that a mess was short weight, absconded when it was discovered. It was found that the quartermaster's weight had been removed, and the false weight substituted; that the weight of meat delivered was certain pounds short.*

*The jury found that the prisoner fraudulently substituted the weight with intent to cheat, intending to carry away and steal the difference between the just surplus for which he would have to account to his master, and the apparent surplus remaining after the false weighing, and that he would have carried it away if the fraud had not been detected: Held, that the prisoner was properly convicted of an attempt to steal the particular meat, and also that the property in such meat was properly laid in the prisoner's master.*

Case reserved for the opinion of this Court by Blackburn, J., at the Maidstone summer assizes 1861.

The indictment contained three counts:—

The first charged the prisoner with fraudulently keeping a false weight and selling thereby to the Queen 467lbs. of meat as 512½lbs.

The second count stated that Alfred Cheeseman was accustomed to furnish the Queen with large quantities of meat for the supply of soldiers, and that the prisoner, being his servant, fraudulently kept a false weight, &c., as in the first count.

The third count was for an attempt to steal 451bs. of meat of Alfred Cheeseman.

On the trial it was proved that Alfred Cheeseman was the contractor who supplied meat to the camp at Shorncliffe.

The course of business was, that the contractor each morning sent down by his servants a quantity of meat to the quartermaster-sergeants at the camp, and a soldier from each mess attended. The quartermaster-sergeant has his own weights and scales, which are kept at the camp, with these he and the contractor's servant together weigh out to each of the soldiers in attendance, respectively, the proper quantity of meat for each of their respective messes, and each mess is taken away by the soldier as weighed

out and delivered to him. The amount of the whole thus delivered is credited to the contractor as supplied to the Queen, and the surplus of the meat brought down remaining after all the messes have been supplied is taken away by his servants on his account.

On the 27th June, the prisoner, who was a servant of the contractor, came down in charge of the meat, and he and the quartermaster-sergeant proceeded to weigh out the meat to the different messmen with the quartermaster-sergeant's weights, the prisoner being the person who put the weights on the scale. Before the weighing was complete one of the messmen brought back his mess portion with a complaint that it was short weight. He was desired to wait till the weighing was over, when his complaint should be investigated. The weighing proceeded, and in all thirty-four messes were weighed out, which were supposed to be in the whole 512½lbs.; about 60lbs. weight of meat remaining over, which, in the course of business, would have been removed by the contractor's men. The complaint as to short weight was then investigated; it was discovered that the 14lb. weight belonging to the quartermaster-sergeant had been removed and concealed under a bench, and that a false 14lb. weight had been substituted for it and used in weighing out the thirty-four messes, and that the prisoner had absconded on the commencement of the investigation. The messes were all brought back and reweighed, and it was found that the weight delivered was 467½lbs. instead of being 512½lbs., as on the first weighing it had appeared to be, and after the true weight was supplied to the different messes the surplus remaining to be taken by the contractor's men was about 15lbs. instead of being about 60lbs. as it had appeared to be.

The counsel for the prisoner objected that there was no case to go to the jury, inasmuch as the circumstances stated did not amount to a cheat at common law, and there was no overt act so proximately connected with an attempt to steal as to justify a conviction under the third count.

The jury, in answer to questions from me, found that the prisoner fraudulently substituted the false 14lb. weight for the true weight, with intent to cheat; that his intention was to carry away and steal the difference between the just surplus of about 15lbs., for which he would have to account to his master, and the apparent surplus meat actually remaining after the false weighing, and that nothing remained to be done on his part to complete his scheme, except to carry away and dispose of the meat, which he would have done had the fraud not been detected.

I directed a verdict of not guilty on the first count, and guilty on the second and third counts, and reserved for this Court the question whether, on these facts and findings, the prisoner was properly convicted on either of those counts.

The prisoner was admitted to bail.

COLIN BLACKBURN.

*Ribson* for the prisoner.—As regards the second count, there is no offence disclosed which is indictable at common law. That count is substantially the same as the first, the only difference being that the prisoner is charged as a servant in the second count. There was no evidence to show that the prisoner kept a false weight in the sense required to sustain this count. Merely keeping a false weight is no offence at common law. The prisoner may have had it in his pocket. The offence is when a man keeps a false weight in his shop for the purpose of being used in the course of his trade and defrauding the public. The count also alleges that the prisoner sold, but it was his master who sold the meat to the Queen; he was the contractor. As to the third count, the finding of the jury

C. CAS. R.]

REG. v. STANBURY.

[C. CAS. R.]

is not sufficient to support the conviction upon it. The jury say it was the prisoner's intention to carry away and steal the difference between the false weight and the true weight. That does not warrant the jury in finding the prisoner guilty of an attempt to steal. There must be some overt act connected with the thing itself. Here nothing was done by the prisoner in the way of an attempt; the only thing he did was to put the false weight into the scale. That is too remote to make it evidence of an attempt to commit a larceny of the meat. There is a difference between an attempt, and the doing an act with intent to obtain an object. A man may get a rifle made in America wherewith to shoot some one in England, or a burglar may procure a picklock to be made, but without some extrinsic evidence, the procuring a rifle or the picklock is no evidence of an attempt to murder or to break into a house. But for the act of the prisoner's absconding, there could be no pretence for saying that the prisoner had been guilty of an attempt to steal the meat. In *Reg. v. St. George*, 9 Car. & P. 483 (a), it was held that if a person, intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded firearms "by drawing a trigger or in any other manner" within the 1 Vict. c. 85, s. 34. So in *Reg. v. Lewis*, 9 Car. & P. 523, where the prisoner, on a refusal by the prosecutor to give him some title-deeds, addressed him, "Then you are a dead man," and immediately unfolded a great coat and took out a loaded blunderbuss, but was not able to point it at the prosecutor before he was seized, it was held not sufficient to sustain a charge of attempting to discharge the blunderbuss at the prosecutor. Farther, the third count describes the meat as the property of the prisoner's master. It is submitted that the meat when put into the scale was the property of the Queen, and that portion which the jury find the prisoner intended to steal ought to have gone to the soldiers. The conviction, therefore, is bad on this ground also.

ERLE, C. J.—I am of opinion that the prisoner was properly convicted. It is not necessary to determine whether this was a cheat at common law. The evidence is sufficient to support the verdict on the third count, which charged an attempt to steal 45lbs. of meat of Alfred Gibesman. It is said on behalf of the prisoner that there was no overt act proximately connected with an attempt to steal, and that the meat was not the property of the prisoner's master, as laid in the indictment. I think that the prisoner's counsel has failed on both grounds. It appears that the prisoner, having the charge of the meat, took it down to the camp, and went through the form of delivering a part without delivering the whole quantity. If he had kept back a part and had begun to carry it away, he would have been guilty of the crime of larceny. Where there are several acts proximately connected with larceny, and close to the point of completion, as the preparing the false weight and substituting it for the true weight, and handing over a false weight of meat for the true weight, and keeping back the difference between the false weight and the true weight under his (the prisoner's) own control and possession, it seems very like the case of a servant, sent to deliver two articles, fraudulently keeping one in his pocket and handing over one only. Everything was complete in this case but the beginning to move off with the meat so kept back. The prisoner had the very control of the thing he intended to steal. There was evidence therefore of a sufficiently proximate overt act to constitute an attempt to commit a larceny. Then the next point is, was the meat the property of the prisoner's master? The transaction was not complete, and all the property in the meat remained in the vendor till [by delivery it had passed to the vendee. The conviction therefore was right on the third count.

BLACKBURN, J.—I am of the same opinion. There is a great difference between preparations antecedent to the commission of an offence and an attempt to commit the offence, as in the case of merely going to buy a gun wherewith to commit a murder, which I do not think would be evidence of an attempt to commit a murder. But in the present the actual crime has commenced, and the attempt would have ended in the completion of the crime, had not the prisoner been interrupted. Though nothing had been done which formed part of the crime, the attempt to commit it had commenced. There is nothing in the second point, because until the meat was weighed out and delivered over to the quartermaster the property remained in the prosecutor.

WILDE, B.—I am of the same opinion. The crime which the prisoner intended to commit consisted of two parts. First, there was the reception of the thing intended to be stolen, the getting it into the prisoner's custody; and secondly, the carrying it away. The prisoner had completed the first part, but was detected before he could complete the second. He had therefore attempted to commit the offence.

MELLOR, J.—I am of the same opinion, and for the same reasons. *Conviction affirmed. (a)*

(Before ERLE, C.J., BLACKBURN and KEATING, JJ., WILDE, B. and MELLOR, J.)

REG. v. STANBURY.

*False pretences—Venus.*

*The venue in an indictment for obtaining sheep by false pretences was laid in county E., where the prisoner was convicted.*

*It appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into the county of E. where he was apprehended: Held, that he had been indicted in a wrong county.*

Case reserved for the opinion of this Court by T. C. G. Marsh, chairman of the Essex Quarter Sessions.

The prisoner was indicted at an adjourned quarter sessions held for the county of Essex, for obtaining sheep by false pretences. The venue was laid in Essex. The sheep were, in the first instance, obtained in Middlesex, and remained continuously in his possession till a few days subsequently. He conveyed them into Essex, where he was apprehended.

The prisoner was convicted and sentenced to twelve months' imprisonment with hard labour, and is now in prison.

The question reserved was, whether, under the venue, the indictment could be sustained: (*Reg. v. Simmons*, 1 Moo. C. C. 408 (b); 24 & 25 Vict. c. 96, s. 114.) (c)

(a) When this case was called on, five judges were in court, but one immediately left *ante revertere*, as was supposed, but this turned out to be an error. In the course of the argument in the next case the court was reminded that by the 11 & 12 Vict. c. 78, s. 2, the presence of five judges was required to constitute a court, whereupon Keating, J. came and made up the number. This case was then formally called on again, and *ERLE* quoted *Reg. v. St. George*, 9 Car. & P. 483, and *Reg. v. Lewis*, 1b. 523, in addition to his former argument. The Court said that those cases made no difference in the judgment, and that there is a difference between those cases and the acts proved here with reference to the crime of larceny.

(b) In *Reg. v. Simmons*, the facts were, that a constable took the prisoner with two stolen horses in Surrey, and afterwards, at his request, rode with him and the horses into Kent, where the prisoner escaped. The prisoner was subsequently apprehended in Surrey, taken into Kent, and indicted there for stealing the horses, and convicted. On a question reserved, the judges were unanimously of opinion that there was no evidence of stealing in Kent, and that the conviction could not stand, but that the prisoner should be removed to Surrey.

(c) The 24 & 25 Vict. c. 96, s. 114, enacts that stealers of property in one part of the United Kingdom who have the same in any other part of the United Kingdom, may be tried and punished in that part of the United Kingdom where they have the property.

C. CAS. R.]

REG. v. BENJAMIN WOODWARD.

[C. CAS. R.]

No counsel appeared on either side.

ERLE, C. J.—I regret to say that we are obliged to come to the conclusion that the prisoner was indicted in a wrong county. He is liable to be indicted and prosecuted in the county in which he obtained the property by false pretences.

— Conviction quashed.

Saturday, Jan. 25.

(Before ERLE, C. J., WIGHTMAN and WILLIAMS, JJ., WILDE, B., and MELLOR, J.)

REG. v. BENJAMIN WOODWARD.

*Feloniously receiving—Husband and wife—Guilty knowledge.*

*The principal felon, during the prisoner's absence, left the stolen property with the prisoner's wife, who gave him sixpence on account. Afterwards the principal felon and the prisoner met and agreed on the price, and the prisoner paid the balance. Guilty knowledge as to the property having been stolen was inferred from the other circumstances of the case:*

*Held, that the receipt was not complete till the principal felon and the prisoner had agreed as to the price, and that the prisoner knowing then that the property was stolen, was properly convicted of feloniously receiving.*

Case reserved for the opinion of the Court of Criminal Appeal.

At the quarter sessions of the peace for the county of Wilts, held at Marlborough, on the 16th day of Oct. 1861, before me Sir John Wither Awdry, Bart., and others my fellows, Benjamin Woodward, of Trowbridge, in the county of Wilts, dealer, was found guilty of receiving stolen goods knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labour, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the principal felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6d. on account, but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

The court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the court shall be of a contrary opinion, then the conviction is to be quashed.

J. W. AWDRY, Chairman.

G. Broderick for the prisoner.—This conviction, it is contended, cannot be sustained. At the trial it was not said on the part of the prosecution that the wife of the prisoner was her husband's agent in receiving the property, but that he subsequently adopted her act of receiving by paying the balance of the price agreed upon. But there was no evidence of any guilty receipt by the wife, or of any subsequent act of receiving by the prisoner. The guilty knowledge and act of receiving must be simultaneous. In *Reg. v. Dring and Wife*, 1 Dears. & Bell, 329; 7 Cox C. C. 382, where a husband and wife were jointly indicted for receiving stolen goods, and the jury found both guilty, stating that the wife received them without the control or

knowledge of and apart from her husband, and that he afterwards adopted her receipt, it was held that the conviction could not be sustained as against the husband; and in his judgment, Cockburn, C. J. observed that, "If we are to take it that the jury meant to say, 'We find the prisoner guilty if the court should be of opinion that upon the facts we are right,' then we ought to be able to see that the prisoner took some active part in the matter, that the wife first received the goods and then the husband from her, both with a guilty knowledge." [BLACKBURN, J.—The verdict in this case is, that he did receive them; there is no question raised as to whether the verdict was justified. ERLE, C. J.—Receiving is a very complex term. There is the case where two persons stole fowls, and took them for sale in a sack to another person, who knew them to have been stolen. The sack was put in a stable and the door shut, while the three stood aside haggling about what was to be paid for them. There the judges differed as to whether there was a receiving by the third person in whose stable the sack was put.] That was the case of *Reg. v. Wiley*, 4 Cox C. C. 412. The actual receipt of the goods was by the wife, and it is consistent with the evidence that the goods may never have come into the prisoner's possession at all: (The case of *Reg. v. Bulton*, 11 Q. B., 3 Cox C. C. 229, were also cited.)

ERLE, C. J.—The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods and left them, and that sixpence was paid on account of them by the prisoner's wife, but there was nothing in the nature of a complete receipt of the goods until the thief found the husband and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the husband agreed; till then the thief could have got the goods back again on payment of the sixpence. I am of opinion, therefore, that the conviction should be affirmed.

BLACKBURN, J.—The principal felon left the stolen property with the wife as the husband's servant, but the court below, as I understand the case, doubted whether the husband could be found guilty of feloniously receiving, as he was absent at the time when the goods were delivered to the wife, and could not then know that they were stolen. It is found that, as soon as the husband heard of it, he adopted and ratified what had been done, and that as soon as he adopted it he had a guilty knowledge; he therefore at that time received the goods knowing them to have been stolen.

KEATING, J.—I am of the same opinion. The case finds that the agreement as to the price was not complete till the thief and the husband agreed. I think therefore that the receipt was not complete till then, and that the conviction was right. If we were to hold that the conviction was not right, the consequences would be very serious.

WILDE, B.—I read the case as showing that the wife received the goods on the part of the prisoner her husband, and that act of her was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of *Reg. v. Dring and Wife*, the only statement was "that the husband adopted his wife's receipt," and the court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

MELLOR, J. concurred.

Conviction affirmed.

C. CAR. R.]

REG. V. STANBURY.

[C. CAR. R.]

is not sufficient to support the conviction upon it. The jury say it was the prisoner's intention to carry away and steal the difference between the false weight and the true weight. That does not warrant the jury in finding the prisoner guilty of an attempt to steal. There must be some overt act connected with the thing itself. Here nothing was done by the prisoner in the way of an attempt; the only thing he did was to put the false weight into the scale. That is too remote to make it evidence of an attempt to commit a larceny of the meat. There is a difference between an attempt, and the doing an act with intent to obtain an object. A man may get a rifle made in America wherewith to shoot some one in England, or a burglar may procure a picklock to be made, but without some extrinsic evidence, the procuring a rifle or the picklock is no evidence of an attempt to murder or to break into a house. But for the act of the prisoner's absconding, there could be no pretence for saying that the prisoner had been guilty of an attempt to steal the meat. In *Reg. v. St. George*, 9 Car. & P. 483 (a), it was held that if a person, intending to shoot another, put his finger on the trigger of a loaded pistol, but is prevented from pulling the trigger, this is not an attempt to discharge loaded firearms "by drawing a trigger or in any other manner" within the 1 Vict. c. 85, s. 34. So in *Reg. v. Lewis*, 9 Car. & P. 523, where the prisoner, on a refusal by the prosecutor to give him some title-deeds, addressed him, "Then you are a dead man," and immediately unfolded a great coat and took out a loaded blunderbuss, but was not able to point it at the prosecutor before he was seized, it was held not sufficient to sustain a charge of attempting to discharge the blunderbuss at the prosecutor. Farther, the third count describes the meat as the property of the prisoner's master. It is submitted that the meat when put into the scale was the property of the Queen, and that portion which the jury find the prisoner intended to steal ought to have gone to the soldiers. The conviction, therefore, is bad on this ground also.

ERLE, C. J.—I am of opinion that the prisoner was properly convicted. It is not necessary to determine whether this was a cheat at common law. The evidence is sufficient to support the verdict on the third count, which charged an attempt to steal 45lbs. of meat of Alfred Cheeseman. It is said on behalf of the prisoner that there was no overt act proximately connected with an attempt to steal, and that the meat was not the property of the prisoner's master, as laid in the indictment. I think that the prisoner's counsel has failed on both grounds. It appears that the prisoner, having the charge of the meat, took it down to the camp, and went through the form of delivering a part without delivering the whole quantity. If he had kept back a part and had begun to carry it away, he would have been guilty of the crime of larceny. Where there are several acts proximately connected with larceny, and close to the point of completion, as the preparing the false weight and substituting it for the true weight, and handing over a false weight of meat for the true weight, and keeping back the difference between the false weight and the true weight under his (the prisoner's) own control and possession, it seems very like the case of a servant, sent to deliver two articles, fraudulently keeping one in his pocket and handing over one only. Everything was complete in this case but the beginning to move off with the meat so kept back. The prisoner had the very control of the thing he intended to steal. There was evidence therefore of a sufficiently proximate overt act to constitute an attempt to commit a larceny. Then the next point is, was the meat the property of the prisoner's master? The transaction was not complete, and all the property in the meat remained in the vendor till [by delivery it had passed to the vendee. The conviction therefore was right on the third count.

BLACKBURN, J.—I am of the same opinion. There is a great difference between preparations antecedent to the commission of an offence and an attempt to commit the offence, as in the case of merely going to buy a gun wherewith to commit a murder, which I do not think would be evidence of an attempt to commit a murder. But in the present the actual crime has commenced, and the attempt would have ended in the completion of the crime, had not the prisoner been interrupted. Though nothing had been done which formed part of the crime, the attempt to commit it had commenced. There is nothing in the second point, because until the meat was weighed out and delivered over to the quartermaster the property remained in the prosecutor.

WILDE, B.—I am of the same opinion. The crime which the prisoner intended to commit consisted of two parts. First, there was the reception of the thing intended to be stolen, the getting it into the prisoner's custody; and secondly, the carrying it away. The prisoner had completed the first part, but was detected before he could complete the second. He had therefore attempted to commit the offence.

MELLOR, J.—I am of the same opinion, and for the same reasons. *Conviction affirmed. (a)*

(Before ERLE, C.J., BLACKBURN and KEATING, JJ., WILDE, B. and MELLOR, J.)

REG. V. STANBURY.

*False pretences—Venus.*

*The venue in an indictment for obtaining sheep by false pretences was laid in county E., where the prisoner was convicted.*

*It appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into the county of E. where he was apprehended: Held, that he had been indicted in a wrong county.*

Case reserved for the opinion of this Court by T. C. G. Marsh, chairman of the Essex Quarter Sessions.

The prisoner was indicted at an adjourned quarter sessions held for the county of Essex, for obtaining sheep by false pretences. The venue was laid in Essex. The sheep were, in the first instance, obtained in Middlesex, and remained continuously in his possession till a few days subsequently. He conveyed them into Essex, where he was apprehended.

The prisoner was convicted and sentenced to twelve months' imprisonment with hard labour, and is now in prison.

The question reserved was, whether, under the venue, the indictment could be sustained: (*Reg. v. Simmons*, 1 Moo. C. C. 408 (b); 24 & 25 Vict. c. 96, s. 114.) (c)

(a) When this case was called on, five judges were in court, but one immediately left *andine revertendi*, as was supposed, but this turned out to be an error. In the course of the argument in the next case the court was reminded that by the 11 & 12 Vict. c. 78, s. 3, the presence of five judges was required to constitute a court, whereupon Keating, J. came and made up the number. This case was then formally called on again, and *Ridgen* quoted *Reg. v. St. George*, 9 C. & P. 483; and *Reg. v. Lewis*, 11, 523, in addition to his former argument. The Court said that those cases made no difference in the judgment, and that there is a difference between those cases and the acts proved here with reference to the crime of larceny.

(b) In *Reg. v. Simmons*, the facts were, that a constable took the prisoner with two stolen horses in Surrey, and afterwards, at his request, rode with him on the horses into Kent, where the prisoner escaped. The prisoner was subsequently apprehended in Surrey, taken into Kent, and indicted there for stealing the horses, and convicted. On a question reserved, the judges were unanimously of opinion that there was no evidence of stealing in Kent, and that the conviction could not stand, but that the prisoner should be removed to Surrey.

(c) The 34 & 35 Vict. c. 96, s. 114, enacts that stealers of property in one part of the United Kingdom, who have the same in any other part of the United Kingdom, may be tried and punished in that part of the United Kingdom where they have the property.

C. CAR. R.]

REG. v. BENJAMIN WOODWARD.

[C. CAR. R.]

No counsel appeared on either side.

ERLE, C. J.—I regret to say that we are obliged to come to the conclusion that the prisoner was indicted in a wrong county. He is liable to be indicted and prosecuted in the county in which he obtained the property by false pretences.

Conviction quashed.

Saturday, Jan. 25.

(Before ERLE, C. J., WIGHTMAN and WILLIAMS, JJ., WILDE, B., and MELLOR, J.)

REG. v. BENJAMIN WOODWARD.

*Feloniously receiving—Husband and wife—Guilty knowledge.*

*The principal felon, during the prisoner's absence, left the stolen property with the prisoner's wife, who gave him sixpence on account. Afterwards the principal felon and the prisoner met and agreed on the price, and the prisoner paid the balance. Guilty knowledge as to the property having been stolen was inferred from the other circumstances of the case:*

*Held, that the receipt was not complete till the principal felon and the prisoner had agreed as to the price, and that the prisoner knowing then that the property was stolen, was properly convicted of feloniously receiving.*

Case reserved for the opinion of the Court of Criminal Appeal.

At the quarter sessions of the peace for the county of Wilts, held at Marlborough, on the 16th day of Oct. 1861, before me Sir John Wither Awdry, Bart., and others my fellows, Benjamin Woodward, of Trowbridge, in the county of Wilts, dealer, was found guilty of receiving stolen goods knowing them to have been stolen, and was thereupon sentenced to nine calendar months' imprisonment with hard labour, and the prisoner now is undergoing his sentence.

The actual delivery of the stolen property was made by the principal felon to the prisoner's wife, in the absence of the prisoner, and she then paid 6d. on account, but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance.

Guilty knowledge was inferred from the general circumstances of the case.

It was objected that the guilty knowledge must exist at the time of receiving, and that when the wife received the goods the guilty knowledge could not have come to the prisoner.

The court overruled this objection, and directed the jury that until the subsequent meeting, when the act of the wife was adopted by the prisoner and the price agreed upon, the receipt was not so complete as to exclude the effect of the guilty knowledge.

If the court shall be of opinion that the circumstances before set forth are sufficient to support a conviction against the prisoner for the felonious receipt, the conviction is to stand confirmed; but if the court shall be of a contrary opinion, then the conviction is to be quashed.

J. W. AWDRY, Chairman.

*G. Broderick for the prisoner.*—This conviction, it is contended, cannot be sustained. At the trial it was not said on the part of the prosecution that the wife of the prisoner was her husband's agent in receiving the property, but that he subsequently adopted her act of receiving by paying the balance of the price agreed upon. But there was no evidence of any guilty receipt by the wife, or of any subsequent act of receiving by the prisoner. The guilty knowledge and act of receiving must be simultaneous. In *Reg. v. Dring and Wife*, 1 Dears. & Bell, 329; 7 Cox C. C. 382, where a husband and wife were jointly indicted for receiving stolen goods, and the jury found both guilty, stating that the wife received them without the control or

knowledge of and apart from her husband, and that he afterwards adopted her receipt, it was held that the conviction could not be sustained as against the husband; and in his judgment, Cockburn, C. J. observed that, "If we are to take it that the jury meant to say, 'We find the prisoner guilty if the court should be of opinion that upon the facts we are right,' then we ought to be able to see that the prisoner took some active part in the matter, that the wife first received the goods and then the husband from her, both with a guilty knowledge." [BLACKBURN, J.—The verdict in this case is, that he did receive them; there is no question raised as to whether the verdict was justified. ERLE, C. J.—Receiving is a very complex term. There is the case where two persons stole fowls, and took them for sale in a sack to another person, who knew them to have been stolen. The sack was put in a stable and the door shut, while the three stood aside haggling about what was to be paid for them. There the judges differed as to whether there was a receiving by the third person in whose stable the sack was put.] That was the case of *Reg. v. Wiley*, 4 Cox C. C. 412. The actual receipt of the goods was by the wife, and it is consistent with the evidence that the goods may never have come into the prisoner's possession at all: (The case of *Reg. v. Button*, 11 Q. B., 3 Cox C. C. 229, were also cited.)

ERLE, C. J.—The argument of the learned counsel for the prisoner has failed to convince me that the conviction was wrong. It appears that the thief brought to the premises of the prisoner the stolen goods and left them, and that sixpence was paid on account of them by the prisoner's wife, but there was nothing in the nature of a complete receipt of the goods until the thief found the husband and agreed with him as to the amount, and was paid the balance. The receipt was complete from the time when the thief and the husband agreed; till then the thief could have got the goods back again on payment of the sixpence. I am of opinion, therefore, that the conviction should be affirmed.

BLACKBURN, J.—The principal felon left the stolen property with the wife as the husband's servant, but the court below, as I understand the case, doubted whether the husband could be found guilty of feloniously receiving, as he was absent at the time when the goods were delivered to the wife, and could not then know that they were stolen. It is found that, as soon as the husband heard of it, he adopted and ratified what had been done, and that as soon as he adopted it he had a guilty knowledge; he therefore at that time received the goods knowing them to have been stolen.

KEATINGE, J.—I am of the same opinion. The case finds that the agreement as to the price was not complete till the thief and the husband agreed. I think therefore that the receipt was not complete till then, and that the conviction was right. If we were to hold that the conviction was not right, the consequences would be very serious.

WILDE, B.—I read the case as showing that the wife received the goods on the part of the prisoner her husband, and that act of her was capable of being ratified on the part of the prisoner. If so, that makes the first act of receiving by the wife his act. In the case of *Reg. v. Dring and Wife*, the only statement was "that the husband adopted his wife's receipt," and the court thought the word "adopted" capable of meaning that the husband passively consented to what his wife had done, and on that ground quashed the conviction. But here the prisoner adopted his wife's receipt by settling and paying the amount agreed on for the stolen goods.

MELLOR, J. concurred.

Conviction affirmed.

## REG. v. SARAH SHEPHERD.

*Misdemeanor—Parent and child—Neglect to provide medical assistance for daughter.*

*The prisoner's unmarried daughter, aged eighteen, having for some time previously gone out to service, and occasionally returned to live with her mother and stepfather, at such times working at glove-making in order to earn her subsistence, was confined with child at her stepfather's house, and the prisoner, her mother, purposely neglected to procure a midwife or other proper person to attend her daughter when she was taken in labour, and by reason thereof she died in childbirth:*

*Held, that there was no legal duty on the prisoner to procure proper assistance under the circumstances, and therefore that she was not guilty of manslaughter.*

Case stated for the opinion of this Court by Williams, J.

The prisoner was indicted for the murder of her daughter Mary Ann Ashton, and tried before me at the gaol delivery for the county of Devon, in December last.

The case for the prosecution was, that the prisoner having a great ill-will towards the deceased, had purposely neglected to procure a midwife, or other proper person, to attend her daughter when she was taken in labour; and that, by reason thereof, she died in childbirth. She was about eighteen years of age and unmarried.

The prisoner, nearly four years before the trial, had married a second husband, who was not the father of the deceased. After the marriage, the deceased lived with her stepfather and her mother for some time, and then went out to service, occasionally returning to live with them when she was out of place, and at such times working at glove-making in order to earn her subsistence. About the beginning of the harvest before her death (which took place on Oct. 26, 1861) she came back from service to her stepfather's house, and continued to reside with her mother and her stepfather and their family till she died, except that she was absent staying with an aunt near Bridgwater for about six weeks, whence she returned to her stepfather's house on Tuesday and continued there till the following Saturday, when she died.

At the close of the case for the prisoner it was objected by the counsel for the prisoner that she was under no legal duty or obligation to procure, or try to procure, the attendance of a midwife for her daughter, and therefore that she was not criminally responsible for neglecting to do so.

I told the jury to consider whether it was established by the evidence that the death of Mary Ann Ashton was attributable to the prisoner's neglect to use ordinary diligence in procuring the assistance of a midwife, or other proper attendant, and, if it was not so established, to acquit the prisoner. But, if it was so established, then to consider, secondly, whether, by so neglecting, she intended to bring about the death of her daughter, and if so, I told the jury to convict her of murder, but if not of manslaughter.

The jury convicted her of manslaughter, but I resisted the judgment in order to obtain the opinion of this court whether the objection to the conviction was well founded. EDW. VAUGHAN WILLIAMS.

*H. T. Cole* for the prisoner.—The conviction cannot be sustained. There was no legal obligation on the prisoner to procure or attempt to procure a midwife for her daughter. [WILLIAMS, J.—The view adopted by the jury must be taken to be that, if the deceased had had the assistance of a midwife of ordinary skill, her life would have been saved.] The sole question now is, was there a legal duty on the part of the prisoner to procure or attempt to procure for the deceased such assistance? Before the Act simplifying the forms of

indictments, the act by which the prisoner destroyed the life of the deceased must have been shown on the face of the indictment; in this case the duty must have been shown, and also that the prisoner had the means of complying with it. [WILLIAMS, J.—If the indictment had stated the facts, it would have been quite sufficient, and so now the question is, "Do the facts create the duty?"] The duty must arise, if at all, from the relation of the parties, or by virtue of a contract. Here there was no duty arising from contract, and it is submitted that there was no legal duty on the prisoner as the mother of the deceased, who was an emancipated child, or her husband, as the stepfather. The obligation imposed by the stat. 43 Eliz. on relations to support one another, extends only to blood relations: (*Reg. v. Munden*, 1 Stra. 190.) And it has been expressly held that a stepfather is not bound to support his wife's children by the first marriage: (*Cooper v. Martin*, 4 East, 76.) Then the 4 & 5 Will. 4, c. 76, s. 37, fixes the age of sixteen as that up to which time a stepfather shall be bound to support the children of his wife by a former marriage. If there is no obligation after that age to supply food, *a fortiori* there is no obligation to find medical assistance. In *Reg. v. Friend and Wife*, Russ. & Ry. 20, the neglect to supply an apprentice of tender years with sufficient food was held to be indictable on the ground that there was a breach of duty created by contract. In *Reg. v. Squire and Wife*, 1 Russ. on Crimes, 19, where the prisoner was charged with murder of an apprentice, who died from debility, and for want of proper food and nourishment, a married woman was held not to be responsible for not providing an apprentice with sufficient food and nourishment, though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withholden it from him, she would have been. That decision has been since acted on in *Reg. v. Saunders*, 7 C. & P. 277, and *Reg. v. Edwards*, 8 C. & P. 611. There is no allegation in this case that the prisoner prevented her daughter from obtaining medical assistance. [WILLIAMS, J.—The verdict must be taken as finding that the prisoner might have got a midwife if she pleased. There were two living near the spot, and one did come when sent for.] Again, there was no evidence that the prisoner had the means of providing such assistance. In *Reg. v. Chandler*, 1 Dears. C. C. 453; 6 Cox C. C. 519, an indictment for neglecting to provide an infant with sufficient food alleged that the prisoner, who was the mother of the child, had the means of doing so; it was not proved that she actually had the means of doing so, but only that she might have obtained relief by applying to the relieving officer, and it was held that this was not sufficient to support a conviction. And in *Reg. v. Hogen*, 5 Den. C. C. 277; 5 Cox C. C. 255, it was held that an indictment for abandoning a child without having provided any means for its support should state that the prisoner had the means of supporting the child.

*Carter (M. Berr with him)* for the prosecution.—The jury have found criminal neglect on the part of the prisoner, and it is submitted that there was a duty on the part of the prisoner to sustain the conviction. There is a natural duty recognised by law in parents to support their children (2 Steph. Black. 296-7; 43 Eliz. c. 2, s. 7; 4 & 5 Will. 4, c. 76, s. 56); and there is no time pointed out when that duty is to cease. If parents have not the means of providing proper food and nourishment for their infant children, who are incapable of taking care of themselves, it is their duty to apply for parochial assistance, and therefore when a married woman, who having a child under such circumstances, wilfully neglected for several days going to the union for the purpose of getting support for it, she knowing that such neglect was likely to cause the child's death, she was held to be guilty of man-

C. CAS. R.]

REG. v. JOHN CORSS SMITH.

[C. CAS. R.]

slaughter: (*Reg. v. Mabbett*, 5 Cox. C. C. 339.) [ERLE, C. J.—The proposition I am reported to have laid down in that case contemplates death, which I apprehend was a tolerably safe proposition.] In *Reg. v. Middleship*, 5 Cox C. C. 275, upon an indictment against the prisoner for the manslaughter of her newborn child, which had dropped from her whilst on the privity and had been smothered in the soil, it was hinted that if the jury were of opinion that after it had been born the mother had the power of procuring such assistance as might have saved the child's life, and she neglected to procure it, she was guilty of manslaughter. The following cases were also quoted: *Reg. v. Marriott*, 8 C. & P. 425; *Reg. v. Chessman*, 7 C. & P. 455; *Reg. v. Ferguson*, 1 Lew. C. C. 181; *Reg. v. Walters*, 1 Russ. on Crimes, 488; *Reg. v. Huggins*, 2 Stra. 882; *Reg. v. Simpson*, 1 Lew. C. C. 172.

ERLE, C. J.—We are to consider whether, on the facts in this case, there has been an omission of duty on the part of the prisoner, making the prisoner liable to the felony of manslaughter. It is extremely important that the boundaries of crime should be defined as far as they reasonably can be, and it is obvious that there is very much indefiniteness in the use of the terms neglect and want of ordinary care. Taking the facts to be that the prisoner did not ask for the aid of a midwife at a time when her daughter was suffering the pains of childbirth, and in the course of which a difficulty occurred, which terminated in her death, was that a breach of duty for which she is responsible, in a criminal court, for not asking a midwife to come and attend her daughter? If she had used ordinary care, she might have known where a midwife was to be found, and who would have come; but there is no evidence that she had any means at her command to pay for such professional aid. It cannot be a ground of indictment that she failed to ask for aid which might, perhaps, have been given, without her incurring any expense. In a great many cases childbirth occurs without the necessity of any professional aid at all. It is enough to say that this case does not fall within any of the authorities or the principle of them. In the case of persons imprisoned, and who are under the care of those who have the custody of them, there is a duty cast by law on the part of those who have such custody to provide them with all necessaries, and so in respect of the relation of parent and child, and some other cases. So also where the relation by contract of master and apprentice exists, the same duty may arise. But in this case the relation is that of a parent and daughter beyond the age by which a duty is cast by the statute to maintain and support her, the daughter being entirely emancipated. In my judgment therefore the question must be answered in the negative, as I cannot find any authority or principle according to which the prisoner has been guilty of a breach of duty, making her criminally responsible.

WIGHTMAN, J.—I am of the same opinion. I put my judgment on the ground that the circumstances stated do not show any legal duty to do that for the omission of which the prisoner was charged.

WILLIAMS, J.—I am of the same opinion. No doubt, morally speaking, the prisoner has been guilty of a shocking crime, but not of a legal one.

WILDE, B. and MELLOR, J. concurred.

*Conviction quashed.*

*Saturday, Jan. 18.*

(Before ERLE, C. J., BLACKBURN and KEATING, JJ., WILDE, B. and MELLOR, J.)

REG. v. JOHN CORSS SMITH.

*Statute—Repeal—Saving clause—Offence committed before expiration of repealed statute—Bankrupt.* The 12 & 13 Vict. c. 106, s. 251, enacted, among other things, that a bankrupt not duly surrendering him-

self to the court should be deemed guilty of felony, and be liable to transportation or imprisonment.

The 24 & 25 Vict. c. 134, s. 230, repealed the above enactment, "but such repeal shall not affect any proceeding pending or any penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing, done or existing prior to or at the commencement of this Act, under or by virtue of any of the Acts or parts of Acts repealed."

The offence of not surrendering to the Bankruptcy Court pursuant to the 12 & 13 Vict. c. 106, was complete on the 26th Sept. 1861. The bankrupt commissioner issued his warrant for the apprehension of the prisoner, and the information on which it was founded was given, and also the magistrate's warrant for the prisoner's apprehension was issued, before the repeal of the 12 & 13 Vict. c. 106. The indictment framed on that statute was not found until after its repeal:

*Held, that the warrants and information made this a proceeding pending within the saving part of the repeal clause, sect. 230 of the 24 & 25 Vict. c. 134.*

Case reserved for the opinion of this Court by the Recorder of London:—

At a session of the Central Criminal Court, held on Monday, the 16th Dec. 1861, John Corss Smith was tried before me on an indictment preferred and found against him on the 25th Nov. last, which charged that he, being adjudged a bankrupt, feloniously did not surrender himself to the Court of Bankruptcy on the day limited for his surrender—that is to say, on the 26th Sept. 1861—with intent to defraud his creditors.

The bankruptcy and non-surrender were proved. It was also proved that a warrant of the commissioner for the prisoner's apprehension on this charge, and the information on which it was founded, were signed and dated before the coming into operation of the new Bankruptcy Act, and that the magistrate's warrant for the like purpose was also issued a week before that period—namely, on the 4th Oct. 1861.

Metcalfe, on behalf of the prisoner, contended that the indictment must fail, inasmuch as the stat. 12 & 13 Vict. c. 106, s. 251, upon which it was founded, had been repealed from and after the 11th Oct. 1861, by 24 & 25 Vict. c. 134, and that sect. 230 of the latter Act was not sufficiently large in its terms to preserve the offence of felony. He contended, as to sect. 230, that the indictment was not a "proceeding pending" on the 11th Oct. 1861; that the word "penalty," used in that section, must be construed "pecuniary penalty;" but that, even if a larger construction should be put upon it, so as to include penal servitude or judicial punishment of any kind, yet that the penalty alone was preserved, and not the offence of felony. He referred to *Reg. v. Swan*, 4 Cox Crim. Cas. 108; and *Reg. v. Nairn*, 4 Cox Crim. Cas. 115, in support of his argument, and contended that, though penalties might be preserved and proceedings kept alive, the offences were not mentioned, and that the offences must be preserved in the clearest and most express terms before a conviction could take place.

Parry, Serjt., for the prosecution, contended that the indictment was a proceeding pending within the meaning of the 230th section of the last Act, the warrant of the commissioner for the prisoner's apprehension and the warrant of the magistrate for the like purpose having issued at least a week before the coming into operation of the new Act, and the information on which the warrants were granted, and the direction of the commissioner to prosecute, being both before the new Act; that the offence of the prisoner was complete on the 26th Sept., and that he had then incurred the "penalty" of penal servitude; and that if the new Act preserved the penalty, it must of necessity preserve the offence of felony.

The prisoner was found guilty by the jury, but enter-



taining great doubts whether the prisoner was liable to be convicted of felony, I respited judgment and discharged the prisoner on recognisance, with sureties, and reserved for the consideration of the justices of either bench, and before the Exchequer, the question

Whether, under the circumstances, the prisoner was liable to be convicted of felony.

RUSSELL GURNEY.

*Metcalfe* for the prisoner.—This conviction cannot be sustained. The indictment was found on the 25th Nov., and on the 11th Dec. the prisoner was convicted for his non-surrender to the Court of Bankruptcy. The statute under which he was indicted, the 12 & 13 Vict. c. 106, s. 251, was repealed, and also certain preceding Acts, from and after the 11th Oct. The words used, however, in the exceptional clause were not sufficiently large to preserve the charge of felony for which the prisoner was tried. The word "penalty" must be construed as a pecuniary infliction, and has no application to the crime of felony. Mr. Serjt. Parry, at the Central Criminal Court, contended that the offence came within the exception comprised in the 230th section of the Bankruptcy Act, inasmuch as the warrant for the prisoner's apprehension was issued at least a week before that Act came into operation. But if that statute preserved any penalty it must be that for felony, which clearly could not have been contemplated by the law. The prisoner was found guilty, but judgment was arrested on the point whether, under the circumstances stated, the prisoner had been convicted of an offence which had been kept alive by the statute which repealed all the old Acts, with certain exceptions specified in sect. 230. With regard to Acts repealed, they are to be taken as having no existence. The offence for which the prisoner could be tried, if any, was a mere statutable one. There was no offence committed unless the repealing statute had preserved that offence *pro tanto*. The words of sect. 230 of 24 & 25 Vict. c. 134, are: "all other Acts, or parts of Acts, which are inconsistent with this Act, are repealed;" and then it is provided that "such repeal shall not affect any proceeding pending, or any right that has arisen, or may arise, or any penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of this Act, under or by virtue of any of the Acts, or parts of Acts, repealed." Those words do not keep alive an offence committed before the passing of the Act, for the purpose of indicting a man for it. That for which the bankrupt was indicted, namely, non-surrender to the Court of Bankruptcy, was a statutable offence. No argument could be drawn from the common law, and the statute being swept away the offence fell with it. Mr. Serjt. Parry contended below, that inasmuch as the warrant for the apprehension of the prisoner was granted before the passing of the Act, as well as the commissioner's order to prosecute, that the offence was kept alive, and made a "proceeding pending." The latter words no doubt would keep alive the warrant of the commissioner for the purpose of protecting the officer in its execution, but not for any proceeding in a criminal court. It was not a "proceeding pending" connected with the indictment; it was a warrant for an apprehension prior to the commencement of a prosecution, but it was not a "proceeding pending" within the meaning of the section. Although the warrant of commitment might have saved a prosecution under the Game and other Acts, to get over the period of limitation for the commencement of a prosecution, yet there is no case to show, in the words of the section, that a warrant for a commitment is a "proceeding pending." The real question raised in the court below was whether the words "penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done, or exist-

ing prior to or at the commencement of this Act" saved the offence. It would be contended that the word "penalty" was to be used in a larger sense. No doubt the word "*pena*," from which "penalty" was derived, showed that, as generally used, it had that signification; but its legal meaning is limited to the extracting from a man a pecuniary fine for something he has done, and not imprisoning, transporting, or hanging him for any offence.

WILDE, B.—What is "the extreme penalty of the law?"

*Metcalfe*.—No doubt that is death.

BLACKBURN, J.—In the marginal note of a previous section the word is "punishment," and not "penalty." The latter word is in the body.

*Metcalfe*.—In the previous Bankruptcy Acts the very same word "penalty" has been held by the judges to have only a pecuniary signification, and that it did not apply to a criminal offence. The learned counsel then referred to *Reg. v. Swan*, 4 Cox's C. C. 108, where Coleridge, J., and Rolfe, B. had expressed an opinion to that effect; and to *Reg. v. Nairn*, 4 Cox's C. C. 115, where Patteson and Talford, JJ., had held that an indictment could not be maintained where similar words were used, in the 12 & 13 Vict. c. 106, s. 1, 4, with a slight difference in wording, including all matters necessary for keeping alive any proceedings in bankruptcy. In the judgment of the four judges mentioned it was held that the word "penalty" did not apply to offences; the words "recovery and application" would not have been used if it had been intended to be so applied. The last statute said, "any penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done." Did that mean any offence for which a man might be imprisoned or sent to penal servitude? Why did the clause use the words "may be incurred"? Clearly in contemplation of such an act as that of taking larger fees by the commissioner than he was authorised to receive, which would render him liable to punishment by a fine; but it did not apply to an offence punishable by imprisonment or penal servitude. The commissioner's warrant was for the purpose of arresting the bankrupt and taking him before a magistrate; then the magistrate's warrant was for the purpose of committing him to prison for the offence. If it was "penalty incurred," it must be under the old Act; but if it was a "penalty to be incurred," it came under the new Act. The words in the former statute, "any right that has arisen or may arise," were just of the same effect. There was nothing that could be incurred subsequent to the passing of the new Act. The new Criminal Acts, passed the same day as the new Bankruptcy Act, were drawn by gentlemen conversant with criminal law; but the other was not. The 24 & 25 Vict. c. 95, s. 3, the repealing clause, kept alive by most express words offences and penalties (committed before the commencement of the Act) which were to be dealt with and recovered in the same manner as if the said Acts and parts of Acts had not been repealed. The words "penalty" and "offence" were both used; and it was provided that they were to be dealt with and inquired into, determined and punished, in the same way as though the Act was not passed. It kept alive every portion of the former penalties and offences *eo nomine*. It was very odd, if there really was an intention in the new Bankruptcy Act to keep alive the offence, that the same words, or some equivalent to them, were not used. There the word "penalty" was used in contradistinction to the word "offence." In the court below attention was drawn to the fact that both the Acts provided that persons guilty of perjury before the Bankruptcy Court should be subject to the "pains and penalties" of perjury. The offence was punished by the common law with fine, and by the statute with imprisonment.

C. CAS. R.]

REG. v. JOHN CORSS SMITH.

[C. CAS. R.]

ERLE, C.J.—I well remember when every prisoner convicted of perjury was sentenced to be fined 1s. and then to be transported also for seven years. For the common law offence the prisoner was fined 1s., and for the statutable offence he was punished with transportation in addition.

*Metcalfe*.—In Sir Robert Peel's Act, the same provisions were inserted as were introduced into the Criminal Acts in express terms, because the Legislature thought them necessary to keep alive the offence. Rolfe, B. said that upon the principle now contended for by the other side, a man might be hanged for an offence whilst there was a statute in force declaring that he should not be tried for it. It was not right to speculate upon what was intended to be done by the Legislature. They had no right to take judicial notice of a marginal note in a book, although the handwriting was recognised by the court. Their Lordships must be guided by the words of the Legislature and nothing else. Its intention even may have been frustrated by what took place in Parliament. The judgment of Lord Tenterden in *Suttees v. Ellison*, 9 B. & C. 750, was not unimportant. There it was held that when an Act repealed the previous statutes, they were to look at the existing statute as though it had been the first Act ever passed on the subject of bankruptcy. The indictment in *Reg. v. Swan* was founded upon a section of the 5 & 6 Vict. c. 122, which made the non-surrender to bankruptcy an offence punishable with transportation for life, or for not less than seven years; but that upon which the present indictment was founded reduced the same offence to a misdemeanor punishable with a maximum imprisonment of three years. The case drawn up for the consideration of the court stated that the prisoner had been guilty of "felony," and the question is whether he has been rightly so convicted of that offence. Under what law has he been convicted of felony? Supposing the words "proceeding pending" kept alive an offence; what was it? Not felony, but misdemeanor. There were other authorities bearing upon the same point, and amongst them that of *Reg. v. Mackenzie*, Russ. & Ry. 429, and *Reg. v. Austin*, 1 Car. & Kir. 621; the latter was upon a charge of night poaching, and the question was, whether the offence had been committed within twelve months from the date of the prosecution. The Lord Chief Baron there said that the warrant must be held to show the commencement of the prosecution. In the present case, however, the warrant of apprehension may have been for fifty other purposes besides that of prosecuting. The prisoner was not apprehended and taken before a magistrate prior to the new Act passing. It would not be said to be the same "proceeding pending" which was afterwards brought before the Central Criminal Court.

WILDE, B.—The statute alludes to taking criminal proceedings against a man.

*Metcalfe*.—But the "proceedings" must be the same as those "pending," whereas the indictment upon which the prisoner was tried was quite new matter, having nothing to do with the previous "proceedings pending."

Parry, Serjt. rose to reply, but

ERLE, C.J. intimated that they need not trouble the learned gentleman, to whom, however, the court always listened with the best attention. His Lordship was of opinion that the conviction of the prisoner was legally right. By the 12 & 13 Vict. c. 106, s. 251, he had been guilty of felony in not surrendering to his bankruptcy. Under the powers conferred by that statute the commissioner had issued a warrant for the prisoner's prosecution for that crime, in respect of which an information had also been laid before a magistrate, in pursuance of which, and prior to the present Act coming into operation, the magistrate issued his warrant for the prisoner's apprehension. Before the

indictment was framed the 12 & 13 Vict. was repealed by the 24 & 25 Vict. After the latter statute was passed, the indictment was preferred under which the prisoner was convicted. Sect. 230 of that statute was what the court had to construe upon the present occasion. By it the 12 & 13 Vict. was repealed, as far as concerned certain offences. Mr. Metcalfe's argument was perfectly just, and his Lordship went with it to the fullest extent, except as to his view of what was the effect of the saving clause. The statute was repealed, and with it the offence would have gone, and, of course, all proceedings in respect of it with it, had not the saving clause prevented the effect of that repeal. The excepting section was in these words: "This repeal shall not affect any proceeding pending, or any penalty incurred in respect of any act, matter, or thing done prior to or at the commencement of this Act." Now, was there a "proceeding pending," and was there a "thing done" before the commencement of this Act? I answer both questions in the affirmative. First, was there a "proceeding pending" in respect of a "thing done" before the commencement of this Act? The "thing done" by the bankrupt was feloniously abstaining from surrendering to his bankruptcy; that was the "thing done." Secondly, was there a "proceeding pending" in respect of it at the time? There were the matters I mentioned—the issue of the warrant of the commissioner, the information laid before the magistrate, and the warrant of the magistrate for the prisoner's apprehension. To my mind these are all steps taken towards one thing, which comes to its completion by indictment, conviction and punishment of the prisoner. The crime has been committed, proceedings are taken for the purpose of bringing the criminal to justice, and such acts as I have mentioned are all of them steps which were brought to a consummation by indictment and conviction. It seems to me, then, to be within the meaning of this statute. The warrant of the commissioner, the information before the magistrate, and the warrant of the magistrate, were all parts of a "proceeding pending," and the last part of that line of a "proceeding pending" was the indictment founded thereon. That section of the statute, therefore, I think does apply to the case. I should also take it in conjunction—because it is all in the same sentence—with the words "penalty incurred, or that may be incurred, in respect of any transaction, act, matter, or thing done, or existing prior to or at the commencement of this Act," as being excepted by that repeal. I think it extends to all the penal consequences by law due to an offence, and not to a pecuniary penalty only. How stands the matter with respect to a "proceeding pending?" In my opinion the words of a statute are to be construed in a great degree by reference to the statute itself. It is useful, in giving a meaning to the words, to consider what was the state of the law at the time when a new statute passed, what is apparent from the statute itself, what has been the purpose of the law that comes in question, and then, bearing those points in mind, to construe the words about which the doubt arises. The state of the law was this: the 12 & 13 Vict. created several offences; and the effect of the new statute was to abolish them, and substitute a new set of proceedings, to take effect after the time that the Act should come into operation. What would be the purpose if the repeal instead of being absolute was qualified? I take it it would be qualified, certainly in respect of all rights which may arise. Why is it not then to be intended to apply to all liabilities that may have been incurred before the repeal should come into operation? According to the contest of Mr. Metcalfe all inchoate proceedings—any proceeding in respect of a felony, or by way of indictment—were rendered null, and iniquity

was given for all offences which previously were punishable. I cannot find any rational ground upon which I can come to the conclusion that the Legislature intended to give such impunity, or to stop proceedings that were begun for the prosecution of an offence, before the guilt of the party was incurred into, and before, if found guilty, retribution was suffered for that offence. The repeal is not to affect any "proceeding pending." In an ordinary action for malicious prosecution, the information before a magistrate, the warrant to apprehend the party, and the indictment, are all steps in the proceedings for the prosecution. It is the constant experience of those conversant with such proceedings that the action may lie in respect of a warrant, it may lie in respect of an information, and it may lie in respect of an indictment founded thereon; that it may lie in respect of either of them, and that all the others may have been taken with reasonable and probable cause, and the last step without it. It is constantly in the course of experience that they are all taken as a series of proceedings constituting the prosecution of the criminal upon the charge—all necessary steps to be taken in prosecution before the indictment. So much as to the branch of the argument that the indictment is not a "proceeding pending" at the time of the repeal. Then as to the other branch of the argument, respecting the penalty incurred and about to be inflicted upon the prisoner in respect of a felony committed before the repeal, whether that is a "penalty incurred" in respect of a "thing done" prior to the repeal coming into operation. To my mind those words are capable of meaning not merely a pecuniary, but any penalty or punishment. "The last penalty of the law" has been adverted to as a phrase indicating the highest punishment that can be inflicted—words certainly capable of being applied to any penalty consequent on any offence. "Penalty" applies to the punishment of death, to penal servitude, to imprisonment, fine, or any infliction which may accrue upon an offence. It seems to me that the intention of the Legislature, notwithstanding the repealing part of the Act, was to leave the responsibility of the bankrupt as it was before the Act came into operation. We have been pressed very much with the fact adverted to that the same or similar words are to be found in other statutes. I say again that every statute is to be construed very much by reference to the state of the law at the time when it came into operation, and the purpose of the law must be construed in a very great degree by the words contained in the statute itself. In respect to the cases founded on the 12 & 13 Vict., the same clause there speaks of the "recovery and application" of the penalty. The recovery and application of any penalty was, it is said, there stated in the nature of words signifying rather a pecuniary penalty recovered and applied than an infliction of punishment. I say again that the words are to be construed by reference to the statute itself, and that no "proceeding pending" in respect of any "thing done," and no "penalty incurred in respect of any thing done" is to be affected by the repealing section. In sect. 221 some of the offences of which the bankrupt may be guilty under the statute are provided for, and the words of that section are, "From and after the commencement of this Act, any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute"—felony, misdemeanor, or penalty, as the matter may be. The Legislature, at the time when they were drawing this Act, said, virtually, "For the future the bankrupt shall be liable in respect of any acts or things following;" and

with respect to the old law, "the repeal shall not affect any proceedings pending, or any penalty incurred in respect of any act or thing done before the repeal of the old Act. For the future they are to be proceeded against under this section. But for acts before the repeal came into operation, and the penalties incurred in respect of them, they shall be inflicted according to the provisions of the former statute." I observe that in the cases which have been before decided upon other statutes, such as the game laws, and treason by coining, the issuing of the writ for the apprehension of the parties has been considered as a continuation of the proceedings, the warrant beginning and the indictment terminating the "proceedings pending;" so that it seems to me that I should not lay much stress on those decisions founded on other statutes, because I think that the ground of construction of each statute ought to be state of the law at the time it was brought into the Legislature and the purpose of the Legislature in bringing in the statute, and then the construction to be put on the words, if very usual words, or if capable of a variety of meanings, that the one ought to be chosen which most consists with the purpose of the Legislature, and with the whole statute, taking it in connection with the state of the law at the time; and taking this statute in connection with the state of the law at the time it was passed, and the purpose of the Legislature, I am clearly of opinion that there can be no rational reason assigned why all the criminals under the last statute should have an immunity, and that absolutely all proceedings should be rendered null, and that a man committing an offence under this Act shall not be reached by a penal indictment. No rational purpose can be suggested for giving to the words the meaning which Mr. Metcalfe has dwelt upon, as taken by themselves, without any reference to the rational purpose of the Legislature. Without that rational purpose they are incapable of the meaning which he has given to them; but, in my humble judgment, having reference to the rational purpose of the Legislature, and the state of the law at the time of the enactment, they are capable of the meaning I have given to them, and for that reason I am of opinion that the conviction must be sustained.

BLACKBURN, J.—I am of the same opinion. The 230th section enacts, "that the Acts and parts of Acts set forth in schedule G. to the extent to which they are therein expressed to be repealed, and all other Acts or parts of Acts which are inconsistent with that Act are repealed, but such repeal shall not affect any proceeding pending, or any right that has arisen or may arise, or any penalty incurred or that may be incurred in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of that Act under or by virtue of any of the Acts or part of Acts repealed. Under that section the parts of the 13 & 14 Vict. c. 106, which created the felony of which the prisoner was found guilty, is repealed. I perfectly agree with the decision in *Reg. v. Nairn*, that if that provision had been simply repealed, the felony would no longer be in existence; but the section reserves power to proceed in respect of existing crimes, which would be otherwise done away with. The first question is, was this a proceeding pending? Now, I think it was the intention of the Legislature, by this saving clause, to prevent criminals going free. The word "penalties" used by the draftsman is large enough to extend to all kinds of punishments, whether pecuniary or affecting life or limb, or any other. In *Reg. v. Nairn* the decision turned on the effect of the words in the saving clause of the repeal section of 12 & 13 Vict. c. 106, and that clause was held only to apply to summary proceedings under which a penalty could be awarded. The context there showed that the Legislature was speaking of "penalties" of the same kind, and not of penalties in the nature of

Q. B.]

REG. v. VESTRY OF ST. LUKE'S, CHELSEA.

[Q. B.]

imprisonment or penal servitude. In the present Act there is nothing in the context or Act to show that the test was intended to be, whether the penalty was of a pecuniary nature or not, but the words of the section will apply to every kind of penalty. For the reasons given by the Lord Chief Justice, it seems to me that the Legislature by this enactment never supposed that criminals who had committed offences were to be set free, but that in future a different code was to prevail.

KEATING, J.—I am of the same opinion. The question is not whether more apt words might not have been used for keeping alive the provisions in the old Act relating to offences, but whether the words used in the new Act are sufficient for that purpose; and, for the reasons already given, I am of opinion that they are sufficient.

WILDE, B.—I am of the same opinion. I have been very clearly of opinion all through the discussion that the prisoner was rightly convicted, and that under the words "proceeding pending" the Legislature might fairly be deemed to include such a case as the present. I should expect to find very strong words if it had been intended to let free all persons who had previously offended against the provisions of the former Act. In *Willace's case*, 1 East, P. C. 186, where the question was, whether the prosecution had been commenced within time, the judges unanimously held, that the information and proceeding before the magistrate were the commencement of the prosecution within the meaning of the statute; and so in *Reg. v. Brooks*, 1 Den. C. C. 217, the information and warrant were held the commencement of a prosecution for night-poaching, under 9 Geo. 4, c. 69. These cases are authorities for saying that the information and warrant are parts of a proceeding pending in the present case. The second point is equally plain. The term "penalty" is broad enough to include criminal punishment. The 12 & 13 Vict. c. 106, s. 254, in dealing with the offence of perjury, uses the words "shall be liable to the penalties of wilful and corrupt perjury."

MELLOR, J.—I am of the same opinion. The section relied on, when taken in connection with the other sections of the Act, clearly was not intended to affect existing liabilities.

*Conviction affirmed.*

### COURT OF QUEEN'S BENCH.

Reported by JOHN THOMPSON, T. W. SAUNDERS, and  
C. J. B. HINCHLEY, Esqrs., Barristers-at-Law.

Wednesday, Jan. 22.

REG. v. VESTRY OF ST. LUKE'S, CHELSEA.

*Metropolis Local Management Act, sect. 69—Mandamus—Discretion of vestry—Priority of sewerage works in particular places.*

*A Mandamus reciting the Metropolis Local Management Act ordered a metropolitan vestry to make a sewer for the use of a partly finished street in the parish. The vestry in their return said there were other parts of the parish in course of being drained which in their discretion they thought more important, and the particular works were not necessary, and that they could not do all the works at once:*

*Held, this return was a good answer, and that the mandamus in order to be valid ought to have shown some reason why that particular part of the sewerage works was to be singled out and done at once in preference to all others:*

*Held further, that the mandamus was bad because it ordered the vestry to make a sewer, which it required the previous sanction of the Metropolitan Board of Works to make, and so the writ was conditional.*

*Mandamus.*—Victoria, &c., to the Vestry of the parish of St. Luke, Chelsea, Middlesex, greeting:—Whereas, the said parish of St. Luke, Chelsea, is a

parish mentioned in schedule A to the 18 & 19 Vict. c. 120, entitled "An Act for the better local management of the Metropolis;" and whereas, after the passing and coming into operation of the said Act of Parliament, it became and was necessary for effectually draining a certain part of the said parish, called Limerston-street, that the said vestry should make certain sewers and works, and they were duly requested to make the said sewers and works, by and on behalf of Edward Wigan and John Alfred Wigan, the owners of certain houses in the said street, whose property was greatly injured for want of such sewers and works for effectually draining the same, and to take all necessary steps in that behalf; but that the said vestry had neglected and refused to make such sewers and works as were necessary for effectually draining the said part of the parish, or to take all or any necessary steps or step in that behalf, in contempt of us, &c., to the great damage of the said Edward Wigan and John Alfred Wigan. Whereupon, they have humbly besought us that a fit and speedy remedy may be supplied in this respect. Now we, being willing that due and speedy justice be done in the premises, as it is reasonable, do command you, the said vestry of the parish of St. Luke, Chelsea, in the county of Middlesex, firmly enjoining you that, immediately after the receipt of this our writ, you cause to be made such sewers and works as may be necessary for effectually draining that part of the said parish called Limerston-street, and that you take all necessary steps in that behalf, or that you show us cause to the contrary thereof; lest by your default the same complaint shall be repeated to us, and how you shall have executed this our writ make known to us at Westminster, on Friday, the 2nd of Nov. next, then returning to us this writ, and this you are not to omit.—Witness, &c.

*Return.*—That the said sewers and works in the said writ mentioned and commanded to be made, are not nor were necessary for effectually draining the said parish of St. Luke, Chelsea, in the said writ mentioned, within the meaning of the said Act of Parliament in the said writ mentioned. That Limerston-street is a street formed after the passing and within the limits of a certain Act of Parliament passed in the ninth year of the reign of Queen Victoria, for better paving, lighting, cleansing, regulating and improving the said parish of St. Luke, Chelsea, exclusive of the district of Hants-town, in the county of Middlesex, and that the said street was never sufficiently paved, flagged, stoned, gravelled, levelled, drained and sewered to the satisfaction of the commissioners for putting the last-mentioned Act into execution, and has never been sufficiently paved, flagged, stoned, gravelled, levelled, drained and sewered to the satisfaction of the said vestry, since the coming into operation of the said Act for the better local management of the metropolis in the said writ mentioned, and that it was and is the duty and obligation of the respective owners of the houses and tenements adjoining or abutting on the said street on each side thereof, subject to the directions contained in the last-mentioned Act, and in the Act for the better local management of the metropolis in the said writ mentioned, and in the bye-laws made and published by the Metropolitan Board of Works under and pursuant thereto, at their own respective charges and expenses, to well and sufficiently pave, flag-stone, gravel, level, drain and sewer so much of the said street to the centre thereof as was and is opposite to and co-extensive with their respective houses or tenements adjoining or abutting on such street. That Limerston-street is a road or way set out by and at the expense of private parties, for the use and accommodation of certain private property near thereto, partly built and partly unbuilt upon; that the soil of the said road or way is private property; that the said road or way is not a highway repairable by the inhabitants of

Q. B.]

REG. v. VESTRY OF ST. LUKE'S, CHELSEA.

[Q. B.]

the said parish, and has never been paved or made in a proper or substantial manner. That a large portion of the land abutting on the said road or way is uninclosed building land, upon which no houses have been erected or begun to be erected. That the said road or way is not a street within the meaning of the said Act of Parliament for the better local management of the metropolis in the said writ mentioned. That there is in a certain part of the said parish of St. Luke, Chelsea, to wit, in King's-road, near to the said road or way called Limerston-street, a public sewer vested in and cleansed and maintained by the said vestry, conveniently situated and well adapted as an outlet for the drainage of the said road or way, and of the houses and land abutting thereon. That the vestry are ready and willing, subject to the previous approval of the said Metropolitan Board of Works, to permit the respective owners of the said road or way and the said houses and land, at their own costs and charges, to drain the same into the said public sewer in the King's-road aforesaid. That the said vestry were not nor are now by law liable or bound under or by virtue of the said Act of Parliament for the better local management of the metropolis in the said writ mentioned, or otherwise, to cause to be made the said sewers and works in the said writ mentioned and thereby commanded to be made. That the said vestry have, from the time of the passing of the said Act for the better local management of the metropolis in the said writ mentioned, exercised a reasonable discretion and judgment in causing to be made such sewers and works as were in their judgment from time to time necessary for effectually draining the said parish, and had, in exercise of such reasonable judgment and discretion, and with the previous approval of the said Metropolitan Board of Works in manner directed by the said Act for the better local management of the metropolis, caused to be made divers sewers and works in and for the drainage of the parish, which sewers and works the said vestry in the exercise of such reasonable discretion and judgment as aforesaid had deemed expedient and proper to cause to be made before and at the time of the issuing of the said writ of *mandamus*, or at any time since, in execution of and for the purposes of the said Act for the better local management of the metropolis in the said writ mentioned. That the sums required for causing to be made and completed the several sewers and works necessary for effectually draining the whole of the said parish in the writ mentioned would amount to a very large sum, to wit, to a sum exceeding 12,000*l.*, and that the moneys in their possession or control before and at the time of the issuing of the said writ of *mandamus*, or at any time since, were and are wholly inadequate and insufficient to defray the cost of making and completing such sewers and works. That the said vestry could not, otherwise than by making and levying rates wholly exorbitant and unreasonable in amount, and vexatious and oppressive to the ratepayers of the said parish, raise sums which would be sufficient to defray the cost of making and completing the said sewers and works, and also to meet the costs, charges and expenses to which sewers rates leviable within the said parish in the said writ mentioned are now liable by law; that is to say, the costs and charges of and incident to the cleansing, maintaining and managing the existing sewers in the said parish vested in the said vestry, the payment of the interest and portions of the principal of the mortgage-debts of the late Metropolitan Commissioners of Sewers, contracted under the Metropolitan Sewers Act 1848, and the Acts for continuing and amending the same, and charged under the said Acts upon the said parish, amounting to 82*6**l.* 10*s.* 5*d.*, and the payments of the amounts required by precepts of the said Metropolitan Board of Works, and payable by the said vestry for and towards expenses of the said board in the execution of the

said Act of Parliament in the said writ mentioned, and for raising moneys for the Metropolis Main Drainage rate, under and pursuant to the Act 22 Vict. c. 104, for altering and amending the Metropolis Local Management Act 1855, and extending the powers of the Metropolitan Board of Works for the purification of the Thames and the main drainage of the metropolis; and for those reasons and causes, the said vestry had not caused to be made the said sewers and works in the said writ mentioned, or taken all necessary steps in that behalf mentioned.

Pleas:—1. To the whole return, that the sewers and works in the said writ mentioned and thereby commanded to be made were and are necessary for effectually draining the said parish of St. Luke, Chelsea, in the said writ mentioned, within the meaning of the said Act of Parliament in the said writ mentioned. Issue thereon. 2. To the whole return except the statement above traversed in the first plea, that the part of the return herein pleaded to is bad in substance. Joinder in demurrer. 3. To the whole return except the statement traversed in the first plea, that the vestry have not made any order that the said street called Limerston-street should be sewered pursuant to the local Act in the said return referred to, and that divers of the owners of the houses and tenements adjoining or abutting on the said street on each side thereof, have refused at their own expense or charge respectively to sewer any part of the said street, of which the said vestry had notice long before the issuing of the said writ of *mandamus*, and the owners of the said houses and tenements adjoining to or abutting on the said street, willing to sewer such part of the said street as is opposite to and co-extensive with their respective houses or tenements adjoining or abutting on the said street, could not make the sewers and works mentioned in the *mandamus*; of all which the said vestry had notice long before the issuing of the said writ and before the request in the said writ mentioned. Demurrer to this plea, and joinder therein.

The 69th section of the Act, 18 & 19 Vict. c. 120, enacts, "the vestry of every parish mentioned in schedule A to this Act, and the board of works for every district mentioned in schedule B to this Act, shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them, or such of them as shall not be discontinued, closed up or destroyed under the powers herein contained; and shall cause to be made, repaired and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district, and shall cause all banks, wharves, docks, or defences abutting on or adjoining on any river, stream, canal, pond, or watercourse in such parish or district, to be raised, strengthened, or altered or repaired, where it may be necessary so to do, for effectually draining or protecting from floods or inundation such parish or district; and it shall be lawful for any such vestry or district board to carry any such sewers and works through, across, &c.; provided always, that no new sewer shall be made without the previous approval of the Metropolitan Board of Works," &c. By sect. 137 the Metropolitan Board of Works may declare sewers to be main sewers, and take under their jurisdiction certain sewerage matters. By sect. 138 the Metropolitan Board shall also, from time to time, make orders for controlling vestries, &c., in the construction of sewers, &c.

The *Attorney-General* (Atlierton) and *Keane* for the prosecutors.—The main question here is, whether the vestry can return to a *mandamus* calling upon them to make certain sewers, that they have exercised their discretion in the matter, and have decided that other drains and sewers are more important and must

Q. B.]

REG. V. VESTRY OF ST. LUKE'S, CHELSEA.

[Q. B.]

be disposed of first. The vestry do not allege that they have applied for the approval of the Metropolitan Board of Works; nor, on the other hand, do they deny their obligation to make the sewers in question. They only say in substance, that they have done such works as were necessary, and that it would be very expensive to do the particular work now commanded. Their duty, however, is to do this work when commanded. [CROMPTON, J.—Why must this particular part of the work be done immediately? They can't do everything at once. You show no reason why they are to do this particular work at once, or that they have had a reasonable time to do it, and have failed.] The duty on the vestry is imperative to take steps to do the work. [COCKBURN, C. J.—That's your difficulty. They are only bound to do it when due regard has been given to other things which may claim precedence. Now, you call on them to do absolutely what they are only bound to do in a contingency.]

Sir F. Kelly, Q.C. and Welsby for the defendants.—It is in the discretion of the vestry, subject to the superintending control of the Metropolitan Board, to do one part of the work before another. It is therefore not compulsory on them to make any particular drain communicating with a particular house. There may be many unfinished streets in so large a parish as this, and isolated houses, and it would be most unjust to call on the vestry to execute the drainage works connected with these before they have time and money to do other works of a more pressing nature. The work to be done and made incumbent on the vestry is of enormous magnitude, and may require half a century to complete it; and it cannot be that any individual owner can at any moment put his finger on a particular part of the work and say, "you must do this immediately." The duty is general, to do the works from time to time, leaving it discretionary in the vestry to determine the order of precedence in which the works are to be done. This particular drain is not shown to be for the good of the parish; it is only for the good of the particular houses. [COCKBURN, J.—Does the return not in substance mean "we will never do the drainage in this particular street at any future time?" If so, that will be a difficulty to be got over.] It is enough for the present to say that it is not necessary now to do the drainage in the particular district. The *mandamus* does not even say that a reasonable time has elapsed for the doing of the work. The vestry cannot by law construct a new sewer without the approval of the Metropolitan Board of Works, and the *mandamus* does not say that the approval has been obtained, or that the vestry had been requested to apply for such approval. Moreover, a *mandamus* does not lie to compel the doing of that which is contingent and uncertain. The *mandamus* must show an absolute and positive obligation to do this work, and that is not done.

The Attorney-General in reply.—It is enough to show the necessity of doing this work. The duty of the vestry is to drain the whole parish, and if so its duty must be to drain every part. If there is any particular reason why this part should not be drained, it is matter within the knowledge of the defendants, and ought to be returned by them. It is enough for the prosecutors to assume that this is part of the whole parish, and the whole parish is to be drained. [CROMPTON, J.—I rather think it lies on you to show there is a present and immediate obligation on the vestry to make this drain.]

COCKBURN, C. J.—I am of opinion that this writ of *mandamus* calling upon the vestry of St. Luke's, Chelsea, to drain a certain street called Limerston-street, is defective. In order to constitute a writ which will be sufficient, there ought to appear on the face of it a present duty on the part of the defendants to do the work in question, and that this duty has not been performed. Now, the only duty shown is a general duty to drain, &c.

the whole of the parish, and it does not appear that in this particular instance there is any present duty to do the particular work. By the Metropolitan Local Management Act I agree that there is imposed on the vestry a general duty to drain the parish, and this involves all the parts of the parish; but I think also, that in the discharge of that duty a reasonable time for its discharge is necessarily implied; and I think, when we consider the magnitude and extent of the works thereby imposed, and the nature of the funds which are to defray the expense, there must be vested in the body on which that duty is cast some discretion to select the extent and order of their operations, in reference to the means at their disposal, and with reference to the greater or less degree of necessity for selecting one district in preference to another. It cannot be expected that the vestry are to levy the whole sum necessary to complete the works at once. The work must be done with reference to what is reasonable and proper under the circumstances. Therefore some discretion must be vested in the vestry or local board to select one part of the works, to begin with, in preference to another. It may well be that in reference to this locality the vestry may have thought the works in other parts of the parish were of more pressing necessity, and that this locality might wait for a time. Taking all those circumstances into consideration, I do not think it is enough to say that there is a large part of the parish undrained; it must be shown that there was a present duty on the vestry to do this work, and that a reasonable time for its discharge had elapsed. Now, the present duty is not at all shown in this *mandamus*. Another objection raised is, that this is a conditional duty, the condition being that the approval of the Metropolitan Board of Works was to be first obtained. I do not think such a conditional *mandamus* as this has ever been issued before. In the event of a peremptory *mandamus* issuing, what would be the return? It would be that the vestry had applied to the Metropolitan Board for their approval, and that they had or had not obtained it, and if they had not obtained it, then they could not do this work. I see a difficulty in such a course, though perhaps such a difficulty might be got over by issuing two writs of *mandamus* applicable respectively to the cases of their obtaining and their not obtaining this approval. I do not, therefore, rely on this objection at present. It is enough to say that the other objection is fatal.

CROMPTON, J.—I think it is now very well established that on a return to the writ of *mandamus* the title may be questioned, and the title here does not warrant the mandatory part of the writ. The question is, if the recital warrants the conclusion that this particular part of the works is to be done immediately? I think it does not. The writ does not follow the words of the statute, which apply generally to the whole parish, but it selects a particular part of the parish, and says certain works in this part are necessary, and must be done immediately. That won't do; you must show that this particular part of the parish is to be drained in priority to the other parts. Now, it is plain from the statute that there must of necessity be some discretion left to the body which is to do all these works as to the order and time of doing them. Then what is there to show either that there are funds or other circumstances making it necessary that this part of the works shall be done at once? This is not made out. I adhere to what I have said before, that though the mandatory part of the *mandamus* may be very general, still a title must be shown. Now, the real duty here under the statute is to do what ought to be done first, having reference to all the circumstances, and in the exercise of the discretion of the board upon those circumstances. Now all discretion is sought to be excluded by this writ,













